CHAPTER 885

WITNESSES AND ORAL TESTIMONY

SUBCHAPTER I

GENERAL PROVISIONS

885.01 Subpoenas, who may issue. The subpoena need not be sealed, and may be signed and issued as follows:

(1) By any judge or clerk of a court or court commissioner or municipal judge, within the territory in which the officer or the court of which he or she is the officer has jurisdiction, to require the attendance of witnesses and their production of lawful instruments of evidence in any action, matter or proceeding pending or to be examined into before any court, magistrate, officer, arbitrator, board, committee or other person authorized to take testimony in the state.

(2) By the attorney general or any district attorney or person acting in his or her stead, to require the attendance of witnesses, in behalf of the state, in any court or before any magistrate and from any part of the state.

(3) By the chairperson of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof.

(4) By any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or by any member of a board, commission, authority or committee which is authorized to take testimony, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection.

(5) By the department of children and families or a county child support agency under s. 59.53 (5) in the administration of ss. 49.145, 49.19, 49.22, 49.46, 49.47, and 49.471 and programs carrying out the purposes of 7 USC 2011 to 2029.

History: 1971 c. 164; 1973 c. 272, 305, 336; 1977 c. 29 s. 1650m (4); 1977 c. 305; 1979 c. 34; 1989 a. 56; 1993 a. 486; 1997 a. 191; 2007 a. 20.

Cross–reference: See s. 805.07 concerning issuance of subpoenas by attorneys of record.

A taxpayer subpoenaed by the department of revenue has limited discovery rights. State v. Beno, 99 Wis. 2d 77, 298 N.W.2d 405 (Ct. App. 1980).

A school board may issue a subpoena to compel the attendance of a witness at an expulsion hearing. Racine Unified School District v. Thompson, 107 Wis. 2d 657, 321 N.W.2d 334 (Ct. App. 1982).

A John Doe judge has exclusive authority to subpoena witnesses in a John Doe proceeding based upon the language of s. 968.26. Hipp v. Circuit Court for Milwaukee County, 2008 WI 67, 310 Wis. 2d 342, 750 N.W.2d 873, 07–0230.

A subpoenaed witness must attend a continued or postponed hearing and remain in attendance until excused. 68 Atty. Gen. 251.

885.02 Form of subpoena. (1) The subpoena may be in the following form:

SUBPOENA

STATE OF WISCONSIN

.... County

THE STATE OF WISCONSIN, To ....:

You are hereby required to appear before .... (designating the court, officer or person and place of appearance), on the .... day of ...., at .... o'clock in the .... noon of that day, to give evidence in a certain cause then and there to be tried between ...., plaintiff, and ...., defendant, on the part of the .... (or to give evidence in the matter [state sufficient to identify the matter or proceeding in which the evidence is to be given] then and there to be heard, on the part of ....). Failure to appear may result in punishment for contempt which may include monetary penalties, imprisonment and other sanctions.

Given under my hand this .... day of ...., ... (year)

....(Give official title)

(2) For a subpoena requiring the production of materials, the following or its equivalent may be added to the foregoing form (immediately before the attestation clause): and you are further required to bring with you the following papers and documents (describing them as accurately as possible).

History: 1977 c. 305; 1979 c. 110; 1985 a. 332; 1987 a. 155; 1997 a. 250.

885.03 Service of subpoena. Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.

History: 1993 a. 486.

Section 972.11 (1) points in two different directions. The rules of civil procedure are applicable generally to criminal proceedings and the application of the rules of

civil procedure mandates reasonable diligence for substituted service of a subpoena. On the other hand, this chapter is to apply in all criminal proceedings and this section sets forth three manners for service of a subpoena that do not include the reasonable diligence mandate. Because s. 972.11 (1) explicitly references it, this chapter is the more specific textual provision. Thus, service of a witness subpoena in a criminal proceeding is controlled by this section, which provides only that "any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode." State v. Wilson, 2017 WI 63, 376 Wis. 2d 92, 896 N.W.2d 682, 15–0671.

885.04 Municipal judge; subpoena served in state. A subpoena to require attendance before a municipal judge may be served anywhere in the state if authorized by the municipal judge and shall require the attendance of any witness so served. A subpoena to require the attendance of the defendant, whether the defendant is within or without the state, may be served by mailing it to the defendant at the address on file with the court.

History: 1977 c. 305; 2019 a. 70; s. 35.17 correction.

Former s. 885.04, 2017 stats., does not authorize a municipal court to subpoena persons outside of the state; thus the court in this case could not order an out of state defendant to appear in person. There is no inherent authority in the court authorizing such an order. City of Sun Prairie v. Davis, 226 Wis. 2d 738, 595 N.W.2d 635 (1999), 97–1651.

885.05 Witness and interpreter fees. The fees of witnesses and interpreters are prescribed in s. 814.67.

History: 1981 c. 317.

885.06 Witness' fees, prepayment. (1) Except when subpoenaed on behalf of the state, of a municipality in a forfeiture action, or of an indigent respondent in a paternity proceeding, no person is required to attend as a witness in any civil action, matter or proceeding unless witness fees are paid or tendered, in cash or by check, share draft or other draft, to the person for one day's attendance and for travel.

(2) No witness on behalf of the state in any civil action, matter or proceeding, on behalf of either party in any criminal action or proceeding, on behalf of a municipality in a forfeiture action or on behalf of an indigent respondent in a paternity proceeding shall be entitled to any fee in advance, but shall be obliged to attend upon the service of a subpoena as therein lawfully required.

History: 1983 a. 368, 447, 538; 1987 a. 201.

A "witness on behalf of the state" is one who is expected to provide relevant testimony or evidence for the state. The witness may be hostile to the state. State v. Kielisch, 123 Wis. 2d 125, 365 N.W.2d 904 (Ct. App. 1985).

885.07 State witnesses in civil actions and municipal witnesses in forfeiture actions, how paid. Every witness on behalf of the state in any civil action or proceeding may file with the clerk of the court where the same is pending the witness's affidavit of attendance and travel, and the witness's fees shall, upon the certificate of such clerk, countersigned by the attorney general, district attorney, or acting state's attorney, be paid out of the state treasury, and shall be charged to the legal expense appropriation to the attorney general. In forfeiture actions by municipalities the clerk shall tax witness fees; however witness fees for police officers of any such municipality when collected shall be paid by the clerk to the treasurer of the municipality.

History: 1993 a. 486.

885.08 State witnesses in criminal cases, how paid. The fees of witnesses on the part of the state in every criminal action or proceeding, and of every person who is committed to jail in default of security for the person's appearance as a witness, shall be paid by the county in which the action or proceeding is had. The clerk of the court upon proof of the witness's or committed person's attendance, travel or confinement shall give each such witness or person a certificate of the number of days' attendance or confinement, the number of miles traveled, and the amount of compensation due the witness or committed person, which certificate shall be receipted for by such witness or person, and the county treasurer shall pay the amount thereof on surrender of the certificate.

History: 1993 a. 486.

Cross–reference: For fees of expert witnesses, see s. 971.16 (1).

885.09 Compensation of nonresident or indigent witness. If a witness attends a court of record in behalf of the state and it appears that the witness came from outside this state or is indigent, the court may order that the witness be paid a specific reasonable sum for expenses and attendance, in lieu of fees. The clerk shall give a certificate for the sum, with a copy of the order affixed, and the certificate shall be paid as other court certificates are paid.

History: 1987 a. 403.

885.10 Witness for indigent respondent or defendant. Upon satisfactory proof of the financial inability of the respondent or defendant to procure the attendance of witnesses for his or her defense, the judge or supplemental court commissioner, in any paternity proceeding or criminal action or proceeding, or in any other case in which the respondent or defendant is represented by the state public defender or by assigned counsel under s. 977.08, to be tried or heard before him or her, may direct the witnesses to be subpoenaed as he or she determines is proper and necessary, upon the respondent's or defendant's oath or affidavit or that of the respondent's or defendant's attorney. Witnesses so subpoenaed shall be paid their fees in the manner that witnesses for the state therein are paid. Determination of indigency under s. 977.07 is proof of the respondent's or defendant's financial inability to procure the attendance of witnesses for his or her defense.

History: 1977 c. 305; 1983 a. 377, 447, 538; 1985 a. 135; 2001 a. 61; 2017 a. 359.

885.11 Disobedient witness. (1) DAMAGES RECOVERABLE. If any person obliged to attend as a witness shall fail to do so without any reasonable excuse, the person shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in an action.

(2) ATTENDANCE COMPELLED. Every court, in case of unexcused failure to appear before it, may issue an attachment to bring such witness before it for the contempt, and also to testify.

(3) PUNISHMENT IN COURTS. Inexcusable failure to attend any court of record is a contempt of the court, punishable by a fine not exceeding $200.

(4) SAME. Unexcused failure to attend a court not of record shall be a contempt, and the witness shall be fined all the costs of the witness's apprehension, unless the witness shall show reasonable cause for his or her failure; in which case the party procuring the witness to be apprehended shall pay said costs.

(5) STRIKING OUT PLEADING. If any party to an action or proceeding shall unlawfully refuse or neglect to appear or testify or depose therein, either within or without the state, the court may, also, strike out the party's pleading, and give judgment against the party as upon default or failure of proof.

History: 1987 a. 155; 1993 a. 486.

Cross–reference: See also s. 804.12 (4) regarding failure to appear at deposition.

Sub. (5) is broad enough to include the failure to produce documents at a discovery examination, but a party cannot delay seven years before making the motion to strike the pleading. "Unlawfully" means without legal excuse, which must be determined at a hearing. Gipson Lumber Co. v. Schickling, 56 Wis. 2d 164, 201 N.W.2d 500 (1972).

The trial court did not abuse its discretion in dismissing a plaintiff's complaint for failure to comply with a discovery order. Furrenes v. Ford Motor Co., 79 Wis. 2d 260, 255 N.W.2d 511 (1977).

885.12 Coercing witnesses before officers and boards. If any person, without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony, or to produce a book or paper which the person was lawfully directed to bring, or to subscribe the person's deposition when correctly reduced to writing, any judge of a court of record or a circuit court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for the person, and unless the person shall purge the contempt and go and testify or do such other act as required by law, may commit the person to close confinement in the county jail

until the person shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.

History: 1973 c. 272; 1993 a. 486; 2001 a. 61.
Cross–reference: See s. 785.06.

885.14 Disclosure of information and sources by news person. (1) DEFINITION. In this section, "news person" means any of the following:

(a) Any business or organization that, by means of print, broadcast, photographic, mechanical, electronic, or other medium, disseminates on a regular and consistent basis news or information to the public, including a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company; and a parent, subsidiary, division, or affiliate of any of these businesses or organizations.

(b) Any person who is or has been engaged in gathering, receiving, preparing, or disseminating news or information to the public for an entity described in par. (a), including any person supervising or assisting the person in gathering, receiving, preparing, or disseminating such news or information.

(2) SUBPOENAS ISSUED TO NEWS PERSON. (a) *Prohibition.* Except as provided in par. (b), no person having the power to issue a subpoena may issue a subpoena compelling a news person to testify about or produce or disclose any of the following that is obtained or prepared by the news person in the news person's capacity in gathering, receiving, or preparing news or information for potential dissemination to the public:

1. The identity of a confidential source of any news or information.

2. Any information that would tend to identify the confidential source of any news or information.

3. Any news or information obtained or prepared in confidence by the news person.

4. Any news, information, or identity of any source of any news or information that is not described in subd. 1., 2., or 3.

(b) *Procedure before courts.* Subject to par. (c), a circuit court may issue a subpoena to compel a news person to testify about or disclose or produce any news, information, or identity of any source as specified in par. (a) 4. if the court finds, after notice to and an opportunity to be heard by the news person that the person requesting the subpoena established, based on information obtained from a person other than the news person, one of the following by clear and convincing evidence:

1. In a criminal prosecution or investigation that there are reasonable grounds to believe that a crime has occurred.

2. In a civil action or proceeding that the complaint states a claim upon which relief may be granted.

(c) A circuit court may issue a subpoena under par. (b) only if all of the following conditions are met:

1. The news, information, or identity of the source is highly relevant to the investigation, prosecution, action, or proceeding.

2. The news, information, or identity of the source is necessary to the maintenance of a party's claim, defense, or to the proof of an issue material to the investigation, prosecution, action, or proceeding.

3. The news, information, or identity of the source is not obtainable from any alternative source for the investigation, prosecution, action, or proceeding.

4. There is an overriding public interest in the disclosure of the news, information, or identity of the source.

(3) SUBPOENAS ISSUED TO PERSONS OTHER THAN NEWS PERSONS. No person having the power to issue a subpoena may issue a subpoena to compel a person other than a news person to testify about or produce or disclose, information, records, or communications relating to a business transaction between that person and the news person if the purpose of the subpoena is to discover any of the items listed in sub. (2) (a) 1. to 3.

(4) DISTRIBUTION. A disclosure to another person or dissemination to the public of news, information, or the identity of a source as described in sub. (2) (a) 1. to 4. by a news person does not constitute a waiver of the protection from compelled disclosure under sub. (2) or (3).

(5) INADMISSIBILITY. Any news, information, records, communications, or the identity of a source of any news or information obtained in violation of this section are inadmissible for any purpose in any judicial, legislative, or administrative action, proceeding, or hearing.

History: 2009 a. 400.

885.15 Immunity. (1) No person may be excused from attending, testifying or producing books, papers, and documents before any court in a prosecution under s. 134.05 on the ground or for the reason that the testimony or evidence required of him or her may tend to incriminate him or her, or to subject him or her to a penalty or forfeiture. No person who testifies or produces evidence in obedience to the command of the court in the prosecution may be liable to any suit or prosecution, civil or criminal, for or on account of testifying or producing evidence; provided, that no person may be exempted from prosecution and punishment for perjury committed in so testifying.

(2) The immunity provided under sub. (1) is subject to the restrictions under s. 972.085.

History: 1989 a. 122.

885.205 Privileged communications. No dean of men, dean of women or dean of students at any institution of higher education in this state, or any school psychologist at any school in this state, shall be allowed to disclose communications made to such dean or psychologist or advice given by such dean or psychologist in the course of counseling a student, or in the course of investigating the conduct of a student enrolled at such university or school, except:

(1) This prohibition may be waived by the student.

(2) This prohibition does not include communications which such dean needs to divulge for the dean's own protection, or the protection of those with whom the dean deals, or which were made to the dean for the express purpose of being communicated to another, or of being made public.

(3) This prohibition does not extend to a criminal case when such dean has been regularly subpoenaed to testify.

History: 1993 a. 486.

885.23 Genetic tests in civil actions. Whenever it is relevant in a civil action to determine the parentage or identity of any child, person or corpse, the court, by order, shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.84. The results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of the parties refuses to submit to the tests that fact shall be disclosed upon trial.

History: 1979 c. 352; 1995 a. 100; 2005 a. 443 s. 265.

Section 767.80 (1) does not permit a man alleging he is the father to bring a paternity action for the sole purpose of establishing paternity of a stillborn so that he may bring a wrongful death action. The proper vehicle for determining parentage is a motion by the father under this section for a determination of parentage within the pending wrongful death action. Shannon E.T. v. Alicia M.V.M., 2007 WI 29, 299 Wis. 2d 601, 728 N.W.2d 636, 05–0077.

885.235 Chemical tests for intoxication. (1) In this section:

(a) "Alcohol concentration" means the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath.

(b) "Controlled substance" has the meaning specified in s. 961.01 (4).

(bd) "Controlled substance analog" has the meaning given in s. 961.01 (4m).

(c) "Drug" has the meaning specified in s. 450.01 (10).

(d) "Restricted controlled substance" means any of the following:

1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.

1m. The heroin metabolite 6–monoacetylmorphine.

2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in subd. 1.

3. Cocaine or any of its metabolites.

4. Methamphetamine.

5. Delta–9–tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

(1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all–terrain vehicle or utility terrain vehicle or while handling a firearm, evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect:

(a) The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.08 is relevant evidence on the issue of being under the combined influence of alcohol and a controlled substance, a controlled substance analog or any other drug, but, except as provided in par. (d) or sub. (1m), is not to be given any prima facie effect.

(b) Except with respect to the operation of a commercial motor vehicle as provided in par. (d), the fact that the analysis shows that the person had an alcohol concentration of more than 0.04 but less than 0.08 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.08 or more but is not to be given any prima facie effect.

(c) The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

(d) The fact that the analysis shows that the person had an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more.

(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle, on duty time, while operating a motorboat, except a sailboat operating under sail alone, while operating a snowmobile, while operating an all–terrain vehicle or utility terrain vehicle, or while handling a firearm, if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

(1m) In any action under s. 23.33 (4c) (a) 3., 23.335 (12) (a) 3., 30.681 (1) (bn), 346.63 (2m) or (7), or 350.101 (1) (c), evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 23.335 (12) (a) 3., 30.681 (1) (bn), 346.63 (2m), or 350.101 (1) (c) or an alcohol concentration above 0.0 under s. 346.63 (7) if the sample was taken within 3 hours after the event to be proved. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but not more than 0.08 is prima facie evidence that the person had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 23.335 (12) (a) 3., 30.681 (1) (bn), 346.63 (2m), or 350.101 (1) (c) or an alcohol concentration above 0.0 under s. 346.63 (7).

(2) The concentration of alcohol in the blood shall be taken prima facie to be three–fourths of the concentration of alcohol in the urine.

(3) If the sample of breath, blood or urine was not taken within 3 hours after the event to be proved, evidence of the amount of alcohol in the person's blood or breath as shown by the chemical analysis is admissible only if expert testimony establishes its probative value and may be given prima facie effect only if the effect is established by expert testimony.

(4) The provisions of this section relating to the admissibility of chemical tests for alcohol concentration or intoxication or for determining whether a person had a detectable amount of a restricted controlled substance in his or her blood shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether or not a person was under the influence of an intoxicant, had a detectable amount of a restricted controlled substance in his or her blood, had a specified alcohol concentration, or had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 23.335 (12) (a) 3., 30.681 (1) (bn), 346.63 (2m), or 350.101 (1) (c).

(5) Notwithstanding sub. (4), in any action or proceeding for a violation of s. 23.33 (4c) (a) 2m. or (b) 2m., 23.335 (12) (a) 2m. or (b) 2m., 30.681 (1) (b) 1m. or (2) (b) 1m., 346.63 (1) (am) or (2) (a) 3., 350.101 (1) (bm) or (2) (bm), 940.09 (1) (am) or (cm) or (1g) (am) or (cm), 940.25 (1) (am) or (cm), or 941.20 (1) (bm), the only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta–9–tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

History: 1971 c. 40; 1973 c. 102; 1981 c. 20, 184; 1983 a. 74, 459; 1985 a. 146 s. 8; 1985 a. 331, 337; 1987 a. 3, 399; 1989 a. 105; 1991 a. 277; 1995 a. 436, 448; 1997 a. 35, 198; 2003 a. 30, 97; 2005 a. 8; 2011 a. 208; 2015 a. 170, 332; 2019 a. 68.

A blood sample taken under s. 346.71 (2) and forwarded to the Department of Transportation is admissible in evidence. Luedtke v. Shedivy, 51 Wis. 2d 110, 186 N.W.2d 220 (1971).

Administration of a blood or breath test does not violate a defendant's privilege against self–incrimination. State v. Driver, 59 Wis. 2d 35, 207 N.W.2d 850 (1973).

When blood alcohol content is tested under statutory procedures, results of the test are mandatorily admissible. The physical sample tested is not evidence intended, required, or even susceptible of being produced by the state under s. 971.23 (4) and (5). State v. Ehlen, 119 Wis. 2d 451, 351 N.W.2d 503 (1984).

Failure to timely notify a person of the right to an alternative blood test for intoxication does not affect the presumption of validity for a properly given blood test and is not grounds for suppressing the test results. County of Dane v. Granum, 203 Wis. 2d 252, 551 N.W.2d 859 (Ct. App. 1996), 95–3470.

885.237 Presumptions as to operation and registration of motor vehicle. (1) The fact that a motor vehicle is located on a highway, as defined in s. 340.01 (22), is prima facie evidence, for purposes of ch. 341, that the motor vehicle has been operated on a highway by the owner.

(2) Notwithstanding s. 341.04, the fact that an automobile or motor truck having a registered weight of 8,000 pounds or less is located on a highway, as defined in s. 340.01 (22), and is not displaying valid registration plates, a temporary operation plate or

other evidence of registration as provided under s. 341.18 (1) is prima facie evidence, for purposes of ch. 341, that the vehicle is an unregistered or improperly registered vehicle. This subsection does not apply to violations of ordinances enacted under s. 341.65, but this subsection does apply to violations of ordinances enacted under s. 341.65, 2003 stats.

History: 1991 a. 233; 1997 a. 27; 1999 a. 80; 2005 a. 185.

885.24 Actions for public moneys, immunity. (1) No witness or party in an action brought upon the bond of a public officer, or in an action by the state or any municipality to recover public money received by or deposited with the defendant, or in any action, proceeding or examination, instituted by or in behalf of the state or any municipality, involving the official conduct of any officer thereof, may be excused from testifying on the ground that his or her testimony may expose him or her to prosecution for any crime or forfeiture. No person may be prosecuted or subjected to any penalty or forfeiture for or on account of testifying or producing evidence, documentary or otherwise, in the action, proceeding or examination, except a prosecution for perjury committed in giving the testimony.

(2) The immunity provided under sub. (1) is subject to the restrictions under s. 972.085.

History: 1989 a. 122.

885.25 State actions vs. corporations or limited liability companies. (1) No corporation or limited liability company shall be excused from producing books, papers, tariffs, contracts, agreements, records, files or documents, in its possession, or under its control, in obedience to the subpoena of any court or officer authorized to issue subpoenas, in any civil action which is now or hereafter may be pending, brought by the state against it to recover license fees, taxes, penalties or forfeitures, or to enforce forfeitures, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of it, may subject it to a penalty or forfeiture, or be excused from making a true answer under oath, by and through its properly authorized officer or agent, when required by law to make such answer to any pleading in any such civil action upon any such ground or for such reason.

(2) No officer, clerk, agent, employee or servant of any corporation or limited liability company in any such action may be excused from attending or testifying or from producing books, papers, tariffs, contracts, agreements, records, files or documents, in his or her possession or under his or her control, in obedience to the subpoena of any court in which any such civil action is pending or before any officer or court empowered or authorized to take deposition or testimony in any such action, in obedience to the subpoena of the officer or court, or of any officer or court empowered to issue a subpoena in that behalf, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him or her, may tend to incriminate him or her or subject him or her to a penalty or a forfeiture, but no such officer, clerk, agent, employee or servant shall be prosecuted, or subjected to any penalty or forfeiture, for or on account of testifying or producing evidence, documentary or otherwise, before the court or officer, or any court or officer empowered to issue subpoena in that behalf, or in any such case or proceeding except a prosecution for perjury or false swearing in giving the testimony.

(2m) The immunity provided under sub. (2) is subject to the restrictions under s. 972.085.

(3) In case of the failure or neglect of any corporation or limited liability company, or of any such officer, clerk, agent, employee or servant, to produce any such book, paper, tariff, contract, agreement, record, file or document, secondary evidence of the contents of any or either of the same may be given, and such secondary evidence shall be of the same force and effect as the original.

History: 1989 a. 122; 1993 a. 112.

Since the immunity that attaches under sub. (2) or s. 77.61 (12), is merely coextensive with a defendant's rights against self–incrimination, which does not attach to the records of a corporation, a defendant's claim of immunity for delivering corporate records has no merit. State v. Alioto, 64 Wis. 2d 354, 219 N.W.2d 585 (1974).

885.285 Settlement and advance payment of claim for damages. (1) No admission of liability shall be inferred from the following:

(a) A settlement with or any payment made to an injured person, or to another on behalf of any injured person, or any person entitled to recover damages on account of injury or death of such person; or

(b) A settlement with or any payment made to a person or on the person's behalf to another for injury to or destruction of property.

(2) Any settlement or payment under sub. (1) is not admissible in any legal action unless pleaded as a defense.

(3) Any settlement or advance payment under sub. (1) shall be credited against any final settlement or judgment between the parties. Upon motion to the court in the absence of the jury and on submission of proper proof prior to entry of judgment on a verdict, the court shall apply the provisions of s. 895.045 and then shall reduce the amount of the damages so determined by the amount of the payments made. Any rights of contribution between joint tort–feasors shall be determined on the amount of the verdict prior to reduction because of a settlement or advance payment.

(4) The period fixed for the limitation for the commencement of actions shall be as provided by s. 893.12.

History: 1975 c. 327, 421; 1979 c. 323.

A property payment under sub. (1) extends the limitation under s. 893.12, but only if made within the three–year limit of s. 893.54 (1). Abraham v. Milwaukee Mutual Insurance Co., 115 Wis. 2d 678, 341 N.W.2d 414 (Ct. App. 1983).

To be a payment under this section that will toll or extend the statute of limitations, a payment must be related to fault or liability. Gurney v. Heritage Mutual Insurance Co., 188 Wis. 2d 68, 523 N.W.2d 193 (Ct. App. 1994).

The waiver by the defendant medical provider in a medical malpractice action of the copayment portion of the amount due for the plaintiff's medical treatment did not constitute a payment under this section or s. 893.12. Young v. Aurora Medical Center, 2004 WI App 71, 272 Wis. 2d 300, 679 N.W.2d 549, 03–0224.

885.365 Recorded telephone conversation. (1) Evidence obtained as the result of the use of voice recording equipment for recording of telephone conversations, by way of interception of a communication or in any other manner, shall be totally inadmissible in the courts of this state in civil actions, except as provided in ss. 968.28 to 968.37.

(2) Subsection (1) shall not apply where:

(a) Such recording is made in a manner other than by interception and the person whose conversation is being recorded is informed at that time that the conversation is being recorded and that any evidence thereby obtained may be used in a court of law; or such recording is made through a recorder connector provided by the telecommunications utility as defined in s. 196.01 (10) or a telecommunications carrier as defined in s. 196.01 (8m) in accordance with its tariffs and which automatically produces a distinctive recorder tone that is repeated at intervals of approximately 15 seconds;

(b) The recording is made by a telecommunications utility as defined in s. 196.01 (10), a telecommunications carrier as defined in s. 196.01 (8m) or its officers or employees for the purpose of or incident to the construction, maintenance, conduct or operation of the services and facilities of such public utilities, or to the normal use by such public utilities of the services and facilities furnished to the public by such public utility; or

(c) The recording is made by a fire department or law enforcement agency to determine violations of, and in the enforcement of, s. 941.13.

History: 1971 c. 40 s. 93; 1977 c. 173 s. 168; 1985 a. 297; 1987 a. 399; 1993 a. 496.

885.37 Interpreters in municipal courts and administrative agency contested cases. (1) If a municipal court has notice that a person who is a juvenile or parent subject to ch. 938, or who is a witness in a proceeding under ch. 938, has a language difficulty because of the inability to speak or understand

English, has a hearing impairment, is unable to speak or has a speech defect, the court shall make a factual determination of whether the language difficulty or the hearing or speaking impairment is sufficient to prevent the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English. If the court determines that an interpreter is necessary, the court shall advise the person that he or she has a right to a qualified interpreter and that, if the person cannot afford one, an interpreter will be provided for him or her at the public's expense. Any waiver of the right to an interpreter is effective only if made voluntarily in person, in open court and on the record.

NOTE: Sub. (1) is shown as renumbered from sub. (1) (b) by the legislative reference bureau under s. 13.92 (1) (bm) 2.

(2) A municipal court may authorize the use of an interpreter in actions or proceedings in addition to those specified in sub. (1).

NOTE: The cross–reference to sub. (1) was changed from sub. (1) (b) by the legislative reference bureau under s. 13.92 (1) (bm) 2. to reflect the renumbering under s. 13.92 (1) (bm) 2. of sub. (1) (b).

(3) (a) In this subsection:

1. "Agency" includes any official, employee or person acting on behalf of an agency.

2. "Contested case" means a proceeding before an agency in which, after a hearing required by law, substantial interests of any party to the proceeding are determined or adversely affected by a decision or order in the proceeding and in which the assertion by one party of any such substantial interest is denied or controverted by another party to the proceeding.

(b) In any administrative contested case proceeding before a state, county or municipal agency, if the agency conducting the proceeding has notice that a party to the proceeding has a language difficulty because of the inability to speak or understand English, has a hearing impairment, is unable to speak or has a speech defect, the agency shall make a factual determination of whether the language difficulty or hearing or speaking impairment is sufficient to prevent the party from communicating with others, reasonably understanding the English testimony or reasonably being understood in English. If the agency determines that an interpreter is necessary, the agency shall advise the party that he or she has a right to a qualified interpreter. After considering the party's ability to pay and the other needs of the party, the agency may provide for an interpreter for the party at the public's expense. Any waiver of the right to an interpreter is effective only if made at the administrative contested case proceeding.

(3m) Any agency may authorize the use of an interpreter in a contested case proceeding for a person who is not a party but who has a substantial interest in the proceeding.

(4) (a) The necessary expense of furnishing an interpreter for an indigent person in a municipal court shall be paid by the municipality.

(b) The necessary expense of furnishing an interpreter for an indigent party under sub. (3) shall be paid by the unit of government for which the proceeding is held.

(c) The court or agency shall determine indigency under this section.

(5) (a) If a municipal court under sub. (1) or (2) or an agency under sub. (3) decides to appoint an interpreter, the court or agency shall follow the applicable procedure under par. (b) or (c).

NOTE: The cross–reference to sub. (1) was changed from sub. (1) (b) by the legislative reference bureau under s. 13.92 (1) (bm) 2. to reflect the renumbering under s. 13.92 (1) (bm) 2. of sub. (1) (b).

(b) The department of health services shall maintain a list of qualified interpreters for use with persons who have hearing impairments. The department shall distribute the list, upon request and without cost, to courts and agencies who must appoint interpreters. If an interpreter needs to be appointed for a person who has a hearing impairment, the court or agency shall appoint a qualified interpreter from the list. If no listed interpreter is available or able to interpret, the court or agency shall appoint as interpreter another person who is able to accurately communicate with and convey information to and receive information from the hearing–impaired person.

(c) If an interpreter needs to be appointed for a person with an impairment or difficulty not covered under par. (b), the court or agency may appoint any person the court or agency decides is qualified.

History: Sup. Ct. Order, 67 Wis. 2d 585, 760 (1975); 1975 c. 106, 199; Stats. 1975 s. 885.37; 1985 a. 266; 1987 a. 27; 1995 a. 27 ss. 7207 to 7209, 9126 (19); 1995 a. 77; 2001 a. 16; 2007 a. 20 s. 9121 (6) (a); s. 13.92 (1) (bm) 2.

A court has notice of a language difficulty when it becomes aware that a defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony, or to be understood in English and does not hinge on a request from counsel for an interpreter. State v. Yang, 201 Wis. 2d 725, 549 N.W.2d 769 (Ct. App. 1996), 95–0583.

The hearing on the accommodation should precede the substantive hearing. Strook v. Kedinger, 2009 WI App 31, 316 Wis. 2d 548, 766 N.W.2d 219, 07–2898.

885.38 Interpreters in circuit and appellate courts.

(1) In this section:

(a) "Court proceeding" means any proceeding before a court of record.

(b) "Limited English proficiency" means any of the following:

1. The inability, because of the use of a language other than English, to adequately understand or communicate effectively in English in a court proceeding.

2. The inability, due to a speech impairment, hearing loss, deafness, deaf–blindness, or other disability, to adequately hear, understand, or communicate effectively in English in a court proceeding.

(c) "Qualified interpreter" means a person who is able to do all of the following:

1. Readily communicate with a person who has limited English proficiency.

2. Orally transfer the meaning of statements to and from English and the language spoken by a person who has limited English proficiency in the context of a court proceeding.

3. Readily and accurately interpret for a person who has limited English proficiency, without omissions or additions, in a manner that conserves the meaning, tone, and style of the original statement, including dialect, slang, and specialized vocabulary.

(2) The supreme court shall establish the procedures and policies for the recruitment, training, and certification of persons to act as qualified interpreters in a court proceeding and for the fees imposed for the training and certification, and for the coordination, discipline, retention, and training of those interpreters. Any fees collected under this subsection shall be credited to the appropriation under s. 20.680 (2) (gc).

(3) (a) If the court determines that the person has limited English proficiency and that an interpreter is necessary, the court shall advise the person that he or she has the right to a qualified interpreter at the public's expense if the person is one of the following:

1. A party in interest.

2. A witness, while testifying in a court proceeding.

3. An alleged victim, as defined in s. 950.02 (4).

4. A parent or legal guardian of a minor party in interest or the legal guardian of a party in interest.

5. Another person affected by the proceedings, if the court determines that the appointment is necessary and appropriate.

(b) The court may appoint more than one qualified interpreter in a court proceeding when necessary.

(c) If a person with limited English proficiency, as defined in sub. (1) (b) 2., is part of a jury panel in a court proceeding, the court shall appoint a qualified interpreter for that person.

(d) If a person with limited English proficiency requests the assistance of the clerk of circuit courts regarding a legal proceeding, the clerk may provide the assistance of a qualified interpreter to respond to the person's inquiry.

(e) A qualified interpreter appointed under this subsection may, with the approval of the court, provide interpreter services

outside the court room that are related to the court proceedings, including during court–ordered psychiatric or medical exams or mediation.

(f) A court may authorize the use of a qualified interpreter in actions or proceedings in addition to those specified in par. (a).

(4) (a) The court may accept the waiver of the right to a qualified interpreter by a person with limited English proficiency at any point in the court proceeding if the court advises the person of the nature and effect of the waiver and determines on the record that the waiver has been made knowingly, intelligently, and voluntarily.

(b) At any point in the court proceeding, for good cause, the person with limited English proficiency may retract his or her waiver and request that a qualified interpreter be appointed.

(5) Every qualified interpreter, before commencing his or her duties in a court proceeding, shall take a sworn oath that he or she will make a true and impartial interpretation. The supreme court may approve a uniform oath for qualified interpreters.

(6) Any party to a court proceeding may object to the use of any qualified interpreter for good cause. The court may remove a qualified interpreter for good cause.

(7) The delay resulting from the need to locate and appoint a qualified interpreter may constitute good cause for the court to toll the time limitations in the court proceeding.

(8) (a) Except as provided in par. (b), the necessary expenses of providing qualified interpreters to persons with limited English proficiency under this section shall be paid as follows:

1. The county in which the circuit court is located shall pay the expenses in all proceedings before a circuit court and when the clerk of circuit court uses a qualified interpreter under sub. (3) (d). The county shall be reimbursed in the manner determined by the director of state courts under s. 758.19 for expenses paid under this subdivision.

2. The court of appeals shall pay the expenses in all proceedings before the court of appeals.

3. The supreme court shall pay the expenses in all proceedings before the supreme court.

(b) The state public defender shall pay the expenses for interpreters assisting the state public defender in representing an indigent person in preparing for court proceedings.

History: 2001 a. 16; 2003 a. 33; 2007 a. 20; 2015 a. 55.

A court has notice of a language difficulty when it becomes aware that a defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony, or to be understood in English and does not hinge on a request from counsel for an interpreter. State v. Yang, 201 Wis. 2d 725, 549 N.W.2d 769 (Ct. App. 1996), 95–0583.

When an accused requires an interpreter and witnesses are to testify in a foreign language, the better practice may be to have 2 interpreters, one for the accused and one for the court. State v. Santiago, 206 Wis. 2d 3, 556 N.W.2d 687 (1996), 94–1200.

Fair trials require comprehension of the spoken word by parties, witnesses, and fact–finders. A witness's comprehension affects the analysis of whether a trial court cut off cross–examination prematurely. State v. Yang, 2006 WI App 48, 290 Wis. 2d 235, 712 N.W.2d 400, 05–0817.

The legislature intended for the courts to provide necessary interpreters for both the hearing impaired and for those of limited English proficiency regardless of their ability to pay. Courts may not tax the parties for these costs. OAG 9–08.

Injustice in any Language: the Need for Improved Standards Governing Courtroom Interpretation in Wisconsin. Pantoga. 82 MLR 601 (1999).

Se Habla Everything: The Right to an Impartial, Qualified Interpreter. Araiza. Wis. Law. Sept. 1997.

New Interpreter Code of Ethics. Lamelas. Wis. Law. Mar. 2003.

SUBCHAPTER II

VIDEOTAPE PROCEDURE

885.40 Applicability. Sections 885.40 to 885.47 apply to all trial courts of record in this state in the receipt and utilization of testimony and other evidence recorded on videotape and to the review of cases on appeal where the record on appeal contains testimony or other evidence recorded on videotape. These sections are not intended to preclude or limit the presentation of evidence by other technical procedures.

History: Sup. Ct. Order, 67 Wis. 2d vii (1975).

Judicial Council Committee's Note, 1975: The contents of these rules are not meant to exclude present practice whereby movies and photographs are introduced into evidence in appropriate situations. [Re Order effective Jan. 1, 1976]

Sections 885.40 to 885.47 did not apply to police videotape of a drunk driver. State v. Haefer, 110 Wis. 2d 381, 328 N.W.2d 894 (Ct. App. 1982).

Legal Applications of Videotape. Benowitz. WBB June 1974.

885.41 Definitions. (1) VIDEOTAPING. Videotaping is a visual or simultaneous audiovisual electronic recording.

(2) OPERATOR. Operator means a person trained to operate video equipment and may be an official qualified under s. 804.03.

History: Sup. Ct. Order, 67 Wis. 2d vii (1975); 1987 a. 403.

Judicial Council Committee's Note, 1975: The definition of videotaping recognizes that videotaping can be used for visual purposes with no audio recording present. The definition of operator recognizes that an operator of videotape equipment could be the same individual before whom depositions can presently be taken as authorized by s. 804.03. [Re Order effective Jan. 1, 1976]

885.42 When available. (1) DEPOSITIONS. Any deposition may be recorded by audiovisual videotape without a stenographic transcript. Any party to the action may arrange at the party's expense to have a simultaneous stenographic record made. Except as provided by ss. 885.40 to 885.47, ch. 804 governing the practice and procedure in depositions and discovery shall apply.

(2) OTHER EVIDENCE. Such other evidence as is appropriate may be recorded by videotape and be presented at a trial. The court may direct a party or the court reporter to prepare a transcript of an audio or audiovisual recording presented under this subsection in accordance with SCR 71.01 (2) (e).

(3) ENTIRE TRIAL TESTIMONY AND EVIDENCE. All trial proceedings, including evidence in its entirety, may be presented at a trial by videotape upon the approval of all parties and the trial judge. In determining whether to approve a videotape trial, the trial judge, after consultation with counsel, shall consider the cost involved, the nature of the action, and the nature and amount of testimony. The trial judge shall fix a date prior to the date of trial when all recorded testimony must be filed with the clerk of court.

(4) TRIAL RECORD. At trial, videotape depositions shall be reported unless accompanied with a certified transcript submitted in accordance with SCR 71.01 (2) (d).

History: Sup. Ct. Order, 67 Wis. 2d 585, xii (1975); 1975 c. 218; 1987 a. 403; Sup. Ct. Order No. 10–06, 2010 WI 128, 329 Wis. 2d xxvii.

Judicial Council Committee's Note, 1975: Sub. (1). The definition of depositions is meant to include adverse examinations prior to trial.

Sub. (2). This subsection anticipates that certain other evidence, such as the scene of an accident or the lifestyle of an accident victim, may be presented at trial by means of videotape. This provision would also allow the majority of a trial to be conducted by means of videotape.

Sub. (3). This subsection would authorize an entire videotape trial in Wisconsin. Such a trial could only occur upon the approval of all parties and the presiding judge. Appropriate safeguards are included to ensure that this provision would be used only when clearly appropriate. Procedure for a videotape trial is subject to agreement among the parties and the court.

Sub. (4). This subsection establishes that matters presented by videotape at trial are made a part of the trial record in anticipation of a possible appeal. [Re Order effective Jan. 1, 1976]

885.43 Notice of videotape deposition. Every notice for the taking of a videotape deposition and subpoena for attendance at such deposition shall state that the deposition is to be visually recorded and preserved pursuant to the provisions of ss. 885.44 and 885.46.

History: Sup. Ct. Order, 67 Wis. 2d 585, xii (1975); Sup. Ct. Order, 141 Wis. 2d xxxv (1987).

Judicial Council Committee's Note, 1975: This provision recognizes that there should be adequate notice that a deposition by videotape is to be taken. The section requires that the notice make reference to the provisions on filing and preserving of videotape depositions. [Re Order effective Jan. 1, 1976]

Judicial Council Note, 1988. Videotape depositions are no longer required to be filed in court. [Re Order effective Jan. 1, 1988]

885.44 Videotape deposition procedure. (1) OFFICIAL. Videotape depositions may be taken by persons authorized by s. 804.03.

(2) REQUIRED INFORMATION. The deposition shall begin by the operator stating on camera:

(a) The operator's name and business address;

(b) The name and business address of the operator's employer;

(c) The date, time and place of the deposition;

(d) The caption of the case;

(e) The name of the witness; and

(f) The party on whose behalf the deposition is being taken. Counsel shall identify themselves on camera. The person before whom the deposition is taken shall then identify himself or herself and swear or affirm the witness on camera. At the conclusion of the deposition the operator shall state on camera that the deposition is concluded. When the length of the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced on camera by the operator.

(3) CAMERA. More than one camera may be used, either in sequence or simultaneously.

(4) TIMING OF DEPOSITION. The deposition shall be timed by a date–time generator which shall show continually each hour, minute and second of each tape of the deposition.

(5) OBJECTIONS. Objections may be made as provided in s. 804.05 (4) (b).

(6) SUBMISSION TO WITNESS. After a videotape deposition is taken, submission of the videotape to the witness for examination is deemed waived unless such submission is requested by the witness.

(7) CERTIFICATION OF ORIGINAL VIDEOTAPE DEPOSITION. The official before whom the videotape deposition is taken shall cause a written certification to be attached to the original videotape. The certification shall state that the witness was fully sworn or affirmed by the official and that the videotape is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

(8) CERTIFICATION OF EDITED VIDEOTAPE DEPOSITION. The official who edits an original videotape deposition shall attach a written certification to the edited copy of the videotape deposition. The certification shall state that the editing complies with the rulings of the court and that the original videotape deposition has not been affected by the editing process.

(9) MOTIONS ON OBJECTIONS. Motions for ruling upon objections shall be made with the court within 30 days of recording of the videotape deposition or within a reasonable time stipulated by the parties.

(11) RULING ON OBJECTIONS. In ruling on objections the court may view the entire videotape or pertinent parts thereof, listen to an audiotape of the videotape sound track, or direct the objecting party to file a partial transcript. The court shall make written rulings on objections and an order for editing. Copies of the court's rulings and order for editing shall be sent to the parties and the objecting witness.

(12) EDITING ALTERNATIVES. (a) The original videotape shall not be affected by any editing process. In its order for editing the court may do any of the following:

1. Order the official to keep the original videotape intact and make an edited copy of the videotape that deletes all references to objections and objectionable material.

2. Order the person showing the original videotape at trial to suppress the objectionable audio portions of the videotape.

3. Order the person showing the original videotape at trial to suppress the objectionable audio and video portions of the videotape.

(b) If the court enters an order under par. (a) 2., it shall, in jury trials, instruct the jury to disregard the video portions of the presentation when the audio portion is suppressed.

(c) If the court enters an order under par. (a) 3., it shall, in jury trials, instruct the jury to disregard any deletions apparent in the playing of the videotape.

(13) COPYING AND TRANSCRIBING. (a) Upon the request of any party or other person authorized by the court, the official shall provide, at the cost of the party or person, a copy of a deposition in the form of a videotape, a written transcript, or an audio recording.

(b) When an official makes a copy of the videotape deposition in the form of a videotape or audio recording, the official shall attach a written certification to the copy. The certification shall state that the copy is a true record of the videotape testimony of the witness.

(c) When an official makes a copy of the videotape deposition in the form of a written transcript, the official shall attach a written certification and serve the transcript pursuant to s. 804.05 (7).

(14) OBJECTIONS AT TRIAL. Objections made at trial which have not been waived or previously raised and ruled upon shall be made before the videotape deposition is presented. The trial judge shall rule on such objections prior to the presentation of the videotape. If an objection is sustained, that portion of the videotape containing the objectionable testimony shall be deleted in the manner provided in sub. (12).

History: Sup. Ct. Order, 67 Wis. 2d vii, xiii (1975); 1975 c. 218; Sup. Ct. Order, 141 Wis. 2d xxxv (1987); 1999 a. 85.

Judicial Council Committee's Note, 1975: Subs. (2) through (5) set out the mechanical procedures for the taking of a videotape deposition. These procedures are included to ensure uniformity throughout Wisconsin. In addition, they ensure proper identification of the contents of a videotape deposition and protect against tampering. Sub. (5) is not intended to affect the provisions in other statutes on objections but is included as part of videotape deposition procedure to facilitate possible editing. It is based on a similar Ohio rule.

Sub. (6) contemplates that, as with regular depositions, the large majority of witnesses at a videotape deposition do not desire to review the deposition upon its completion.

Subs. (7) and (8) set out the procedure for certification of a videotape deposition. Certification by the official taking the deposition must also be made of a copy or audio recording of a videotape deposition and of an edited version of a deposition.

Sub. (9) allows for an expansion of time for motions on videotape objections if the parties stipulate to the additional time.

Sub. (11) requires that any editing of a videotape deposition required by a court ruling favorably on an objection can only be done by a court order. It also requires that the parties and the objecting witness receive copies of both the court's ruling on objections and order for editing.

Sub. (12) sets out the alternatives that the court may use in ordering editing of a videotape deposition. It is included to facilitate the most expeditious and least expensive method of editing.

Sub. (13). Access to videotape recordings after filing is by court order and subject to terms prescribed by the court in order to protect the integrity of such recordings.

Sub. (14). Objections to a videotape deposition not previously resolved that are made at trial must be made prior to the actual showing of the videotape at the trial. This procedure assures timely raising of objections. [Re Order effective Jan. 1, 1976]

Judicial Council Note, 1988: Videotape depositions, like other discovery documents, are no longer required to be filed in court. See s. 804.01 (6), Stats. [Re Order effective Jan. 1, 1988]

885.45 Videotape costs; depositions and trials.

(1) The expense of videotape as a material shall be borne by the proponent.

(2) The reasonable expense of recording testimony on videotape shall be costs in the action.

(3) The expense of playing the videotape recording at trial shall be borne by the proponent of the testimony. If the proponent is entitled to costs, the expense under this subsection shall be costs in the action, not to exceed for each witness or expert witness the maximum allowable cost for witness fees under ss. 814.04 (2) and 814.67 (1) (b) and (c).

(4) The expense of an audio reproduction of the videotape recording sound track used by the court in ruling on objections shall be costs in the action.

(5) The expense of playing the videotape recording for the purpose of ruling upon objections shall be borne by one or more parties as apportioned by the court in an equitable manner. If the party bearing the expense is entitled to costs, the expense under this subsection shall be costs in the action in an amount determined by the court.

(6) The expense of producing the edited version of the videotape recording shall be costs in the action, provided that the expense of the videotape, as a material, shall be borne by the proponent of the testimony.

(7) The expense of a copy of the videotape recording and the expense of an audiotape recording of the videotape sound track shall be borne by the party requesting the copy.

History: Sup. Ct. Order, 67 Wis. 2d vii (1975); 1983 a. 256.

Judicial Council Committee's Note, 1975: This provision sets out the application of costs in the use of videotape procedure. Costs are allocated in an equitable manner between the proponent and the court or are considered costs in the action. [Re Order effective Jan. 1, 1976]

885.46 Videotape custody and preservation. The official shall maintain secure and proper storage of the original videotape recording and any edited videotape recording until:

(1) The final disposition of the cause where no trial is had;

(2) The expiration of the appeal period following trial, provided no appeal is taken;

(3) The final determination of the cause if an appeal is taken.

History: Sup. Ct. Order, 67 Wis. 2d 585, vii (1975); Sup. Ct. Order, 141 Wis. 2d xxxv (1987).

Judicial Council Committee's Note, 1975: Sub. (1). One of the advantages of videotape is its possible reuse in other legal proceedings but the proponent of any videotape testimony retains the responsibility for submitting a recording of sufficient quality.

Sub. (2). Release of videotape recordings may be done only by order of the court. Such release may only occur after completion of the proceeding for which the videotape has been used. [Re Order effective Jan. 1, 1976]

885.47 Videotape playback equipment. (1) PLAYBACK EQUIPMENT. Each court may establish rules providing for the availability of playback or reproducing equipment. Such rules shall provide for an adequately trained operator. Minimum playback equipment shall be a videotape player of a commonly available type and one monitor having at least a 14 inch diagonal screen. Color equipment is not required. If a party uses videotape which is not compatible with the available playback equipment, the party shall furnish playback equipment or convert the videotape to a format compatible with the available playback equipment at the party's expense, which shall not be chargeable as costs.

History: Sup. Ct. Order, 67 Wis. 2d xiii (1975); 1975 c. 218; Sup. Ct. Order, 101 Wis. 2d xi (1981); Sup. Ct. Order, 141 Wis. 2d xxxv (1987).

Judicial Council Committee's Note, 1975: Sub. (2) [(1)]. Each court in Wisconsin is encouraged to establish rules for making available videotape playback or reproducing equipment. Such availability could be secured through purchase, leasing, rental, or borrowing from another court. Each court establishing such rules must provide for a trained videotape operator. [Re Order effective Jan. 1, 1976]

SUBCHAPTER III

USE OF VIDEOCONFERENCING IN THE CIRCUIT COURTS

885.50 Statement of intent. (1) It is the intent of the Supreme Court that videoconferencing technology be available for use in the circuit courts of Wisconsin to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve the fairness, dignity, solemnity, and decorum of court proceedings. Further, it is the intent of the Supreme Court that circuit court judges be vested with the discretion to determine the manner and extent of the use of videoconferencing technology, except as specifically set forth in this subchapter.

(2) In declaring this intent, the Supreme Court finds that careful use of this evolving technology can make proceedings in the circuit courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings. The Supreme Court further finds that an open–ended approach to the incorporation of this technology into the court system under the supervision and control of judges, subject to the limitations and guidance set forth in this subchapter, will most rapidly realize the benefits of videoconferencing for all concerned.

(3) In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology, or use in situations in which the technical and operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

Comment, 2008: Section 885.50 is intended to recognize and summarize the larger debate concerning the use of videoconferencing technology in the courts, and to provide a clear statement of the Supreme Court's intent concerning such use, which should be helpful guidance to litigants, counsel and circuit and appellate courts in interpreting and applying these rules.

This subchapter is not intended to give circuit court judges the authority to compel county boards to acquire, maintain or replace videoconferencing equipment. Rather, it is intended to provide courts with authority and guidance in the use of whatever videoconferencing equipment might be made available to them.

Bridging the Distance: Videoconferencing in Wisconsin Circuit Courts. Leineweber. Wis. Law. July 2008.

885.52 Definitions. In this subchapter:

(1) "Circuit court" includes proceedings before circuit court judges and commissioners, and all references to circuit court judges include circuit court commissioners.

(2) "Participants" includes litigants, counsel, witnesses while on the stand, judges, and essential court staff, but excludes other interested persons and the public at large.

(3) "Videoconferencing" means an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

885.54 Technical and operational standards. (1) Videoconferencing technology used in circuit court proceedings shall meet the following technical and operational standards:

(a) Participants shall be able to see, hear, and communicate with each other.

(b) Participants shall be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding.

(c) Video and sound quality shall be adequate to allow participants to observe the demeanor and non–verbal communications of other participants and to clearly hear what is taking place in the courtroom to the same extent as if they were present in the courtroom.

(d) Parties and counsel at remote locations shall be able, upon request, to have the courtroom cameras scan the courtroom so that remote participants may observe other persons present and activities taking place in the courtroom during the proceedings.

(e) In matters set out in par. (g), counsel for a defendant or respondent shall have the option to be physically present with the client at the remote location, and the facilities at the remote location shall be able to accommodate counsel's participation in the proceeding from such location. Parties and counsel at remote locations shall be able to mute the microphone system at that location so that there can be private, confidential communication between them.

(f) If applicable, there shall be a means by which documents can be transmitted between the courtroom and the remote location.

(g) In criminal matters, and in proceedings under chs. 48, 51, 55, 938, and 980, if not in each other's physical presence, a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.

(h) The proceeding at the location from which the judge is presiding shall be visible and audible to the jury and the public, including crime victims, to the same extent as the proceeding would be if not conducted by videoconferencing.

(2) The moving party, including the circuit court, shall certify that the technical and operational standards at the court and the remote location are in compliance with the requirements of sub. (1).

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli; Sup. Ct. Order No. 08–21, 2008 WI 111, filed 7–30–08.

Comment, 2008: Section 885.54 is intended to establish stringent technical and operational standards for the use of videoconferencing technology over objection, and in considering approval by the circuit court of waivers or stipulations under s. 885.62. Mobile cart–based systems will not meet these standards in many or even most situations, but may still be used pursuant to a waiver or stipulation approved by the court. The effect will be to encourage the installation of multiple camera systems, while still allowing the use of cart–based systems when participants are in agreement to do so, which is likely to be much of the time.

885.56 Criteria for exercise of court's discretion. **(1)** In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the circuit court may consider one or more of the following criteria:

(a) Whether any undue surprise or prejudice would result.

(b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.

(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.

(d) Whether the procedure would allow for full and effective cross–examination, especially when the cross–examination would involve documents or other exhibits.

(e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.

(f) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

(g) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(h) Whether the participation of an individual from a remote location presents the person at the remote location in a diminished or distorted sense such that it negatively reflects upon the individual at the remote location to persons present in the courtroom.

(i) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding so as to undermine the integrity, fairness, and effectiveness of the proceeding.

(j) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom.

(k) Waivers and stipulations of the parties offered pursuant to s. 885.62.

(L) Any other factors that the court may in each individual case determine to be relevant.

(2) The denial of the use of videoconferencing technology is not appealable.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

Comment, 2008: Section 885.56 is intended to give the circuit court broad discretion to permit the use of videoconferencing technology when the technical and operation standards of s. 885.54 are met, while providing clear guidance in the exercise of that discretion. Under this section, the circuit court may permit the use of videoconferencing technology in almost any situation, even over objection, except as provided under s. 885.60. On the other hand, the court may deny the use of videoconferencing technology in any circumstance, regardless of the guidelines. This is consistent with the intent of this legislation to vest circuit courts with broad discretion to advance the use of videoconferencing technology in court proceedings under the standards and guidelines set out, but to reserve to courts the prerogative to deny its use without explanation. A circuit court's denial of the use of videoconferencing is not appealable as an interlocutory order, but to the extent the denial involves issues related to a party's ability to present its case and broader issues related to the presentation of evidence, the denial can be appealed as part of the appeal of the final judgment.

885.58 Use in civil cases and special proceedings. **(1)** Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any civil case or special proceeding permit the use of videoconferencing technology in any pre–trial, trial, or post–trial hearing.

(2) (a) A proponent of a witness via videoconferencing technology at any evidentiary hearing or trial shall file a notice of intention to present testimony by videoconference technology 30 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconferencing technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

(b) The court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

Comment, 2008: Regarding section 885.58, civil cases and special proceedings in general pose few problems of constitutional dimension concerning the use of videoconferencing technology and offer litigants the potential of significant savings in trial expenses. For these reasons, this technology will likely gain rapid acceptance resulting in expanding use. Where objections are raised, the rule provides that the circuit court will resolve the issue pursuant to the standards and decisional guidance set out in ss. 885.54 and 885.56.

885.60 Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980. **(1)** Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any pre–trial, trial or fact–finding, or post–trial proceeding.

(2) (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings.

(b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact–finding hearing shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

(c) If an objection is made by the plaintiff or petitioner in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

(d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli; 2011 a. 32.

Comment, 2008: It is the intent of s. 885.60 to scrupulously protect the rights of criminal defendants and respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such litigants the right to be physically present in court at all critical stages of their proceedings. This section also protects such litigants' rights to adequate representation by counsel by eliminating the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court.

"Critical stages of the proceedings" is not defined under this section, but incorporates existing law as well as new law as it is adopted or decided. This section is not intended to create new rights in litigants to be physically present which they do not otherwise possess; it is intended merely to preserve such rights, and to avoid abrogating by virtue of the adoption of this subchapter any such rights.

This section is also intended to preserve constitutional and other rights to confront and effectively cross–examine witnesses. It provides the right to prevent the use of videoconferencing technology to present such adverse witnesses, but rather require that such witnesses be physically produced in the courtroom. In requiring a defendant's objection to the use of videoconferencing to be sustained, this section also preserves the defendant's speedy trial rights intact.

Objections by the State or petitioner to the use of videoconferencing technology to present defense witnesses are resolved by the court in the same manner as provided in civil cases and special proceedings under ss. 885.54 and 885.56.

885.62 Waivers and stipulations. Parties to circuit court proceedings may waive the technical and operational standards provided in this subchapter, or may stipulate to any different or modified procedure, as may be approved by the court.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

Comment, 2008: The intent of s. 885.62 is to permit litigants to take advantage of videoconferencing technology in any matter before the court regardless of whether the provisions of this subchapter would otherwise permit such use, as long as the parties are in agreement to do so and the circuit court approves. This should help to encourage innovation and experimentation in the use of videoconferencing technology, and thereby promote the most rapid realization of its benefits, while preserving to the litigants and ultimately to the courts the ability to prevent abuses and loss of the fairness, dignity, solemnity and decorum of court proceedings.

885.64 Applicability. (1) The provisions of this subchapter shall govern the procedure, practice, and use of videoconferencing in the circuit courts of this state.

(2) All circuit court proceedings, with the exception of proceedings pursuant to s. 972.11 (2m), that are conducted by videoconference, interactive video and audio transmission, audiovisual means, live audiovisual means, closed–circuit audiovisual, or other interactive electronic communication with a video component, shall be conducted in accordance with the provisions of this subchapter.

(3) The use of non–video telephone communications otherwise permitted by specific statutes and rules shall not be affected by this subchapter, and shall remain available as provided in those specific statutes and rules.

History: Sup. Ct. Order No. 07–12, 2008 WI 37, 305 Wis. 2d xli.

Comment, 2008: The intent of s. 885.64 is to make it clear that all electronic communications with a video component are to be conducted under the provisions of this subchapter, regardless of the various names and terms by which such means of communication are referenced in other statutes and rules, and also to make clear that the provisions of this subchapter are to take precedence over other statutes and rules which address the use of such means of communication. Finally, sub. (3) is intended to make clear that existing authority for the use of non–video telephone communications in court proceedings remains unaffected by the new provisions of this subchapter concerning videoconferencing.