CHAPTER 885

WITNESSES AND ORAL TESTIMONY

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 workforce development or a county child support agency under s. 59.53 (5) in the administration of ss. 49.145, 49.19, 49.22, 49.46 and 49.47 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.

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

See note to 71.74, citing State v. Beno, 99 W (2d) 77, 298 NW (2d) 405 (Ct. App. 1980).

See note to 120.13, citing Racine Unified School Dist. v. Thompson, 107 W (2d) 657, 321 NW (2d) 334 (Ct. App. 1982).

See note to 227.46, citing 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.

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.

History: 1977 c. 305.

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.

"Witness on behalf of state" is one who is expected to provide relevant testimony or evidence for state; witness may be hostile to state. State v. Kielisch, 123 W (2d) 125, 365 NW (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 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, in full or in part, 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.

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 7 years before making the motion to strike the pleading. "Unlawfully" means without legal excuse and this must be determined at a hearing. Gipson Lumber Co. v. Schickling, 56 W (2d) 164, 201 NW (2d) 500.

Trial court did not abuse discretion in dismissing plaintiff's complaint for failure to comply with discovery order. Furrenes v. Ford Motor Co. 79 W (2d) 260, 255 NW (2d) 511.

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 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.

Cross−reference: See s. 785.06.

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.

885.16 Transactions with deceased or insane persons. No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communica-

tion, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.

History: 1993 a. 486

Under the dead man's statute if an objection properly made is overruled, the objecting counsel can cross−examine without risk of waiving his objection; however, if an examination exceeds the scope of the direct examination by questions "beyond the scope," and the examiner elicits the very information he sought to exclude, such examination "beyond the scope" constitutes a waiver of the objection. Estate of Molay, 46 W (2d) 450, 175 NW (2d) 254.

While the benefit of the dead man's statute is waived where the opposite party opens the door, such waiver is not effected where, as in the instant case, testimony elicited from an interested survivor established only independent facts made up of physical actions of the parties and no inquiry is made into what, if anything, actually transpired between the decedent and the interested survivor with regard to these actions. Johnson v. Mielke, 49 W (2d) 60, 181 NW (2d) 503.

A widow, sued on a note as comaker with her husband, cannot exclude testimony as to transactions with her deceased husband, no evidence of agency being presented. Keller Implement Co. v. Eiting, 52 W (2d) 460, 190 NW (2d) 508.

An attorney who drew a will which directs that he be retained to probate the estate is not barred from testifying by this section. Casper v. McDowell, 58 W (2d) 82, 205 NW (2d) 753.

An interested person may testify as to overhearing a conversation the deceased had with 2 other persons (also since deceased) while the witness was in another room. Estate of Nale, 61 W (2d) 654, 213 NW (2d) 552.

The company waived the protection of the statute when it presented principal stockholder's widow as a witness. Younger v. Rosenow Paper & Supply Co. 63 W (2d) 548, 217 NW (2d) 841.

In a petition for proof of heirship by the natural son of deceased and cross−petition by deceased's niece and nephew alleging that the son had been adopted by his aunt, testimony by the cross−petitioners' mother, a sister−in−law of deceased, as to conversations with the deceased were not precluded by this section because she did not stand to gain or lose from the direct legal operation and effect of the judgment, and her interest in a judgment in favor of her children was too remote and speculative to bring her within the statute's restrictions. Estate of Komarr, 68 W (2d) 473, 228 NW (2d) 681.

Husband of niece of testatrix, who was residuary legatee in prior wills, is not disqualified from testifying as to his conversations with testatrix even though the niece was an incompetent witness under the statute. In re Estate of Christen, 72 W (2d) 8, 239 NW (2d) 528.

Protection of dead man's statute was waived where counsel objected to inadmissibility of evidence rather than to incompetency of witness. In Matter of Estate of Reist, 91 W (2d) 209, 281 NW (2d) 86 (1979).

Deposition questions about transaction with decedent did not result in total waiver of dead man statute for purposes of trial. In Matter of Estate of Vorel, 105 W (2d) 112, 312 NW (2d) 850 (Ct. App. 1981).

Current law expresses disdain for Dead Man's Statute and requires courts to construe it narrowly and restrict its application whenever possible. Havlicek/Fleisher Enterprise, Inc. v. Bridgeman, 788 F Supp. 389 (1992).

Raising the dead man's statute in federal court. Pendleton. Wis. Law. March 1990.

The Wisconsin Deadman's Statute: The Last Surviving Vestige of an Abandoned Common Law Rule. Stevens. 82 MLR 281 (1998).

885.17 Transactions with deceased agent. No party, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with an agent of the adverse party or an agent of the person from, through or under whom such adverse party derives his or her interest or title, when such agent is dead or insane, or otherwise legally incompetent as a witness unless the opposite party shall first be examined or examine some other witness in his or her behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates.

History: 1993 a. 486.

The dead man's statute is not available to benefit the automobile insurer of a corporation concerning a transaction whereby an officer−agent accepted title of his wife's automobile for the corporation, since the insurer did not derive its interest "from, through or under" the corporation by virtue of its contract to insure. Knutson v. Mueller, 68 W (2d) 199, 228 NW (2d) 342.

Employes of a party, including corporate employes, are not within the disqualification imposed by this section. Hunzinger Construction Co. v. Granite Resources Corp. 196 W (2d) 327, 538 NW (2d) 804 (Ct. App. 1995).

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. 767.48. 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.

Under s. 885.23, 1977 stats., human leukocyte antigen test of blood tissue was inadmissible as evidence that plaintiff was child's father. J.B. v. A.F. 92 W (2d) 696, 285 NW (2d) 880 (Ct. App. 1979).

See note to 904.01, citing State v. Hartman, 145 W (2d) 1, 426 NW (2d) 320 (1988).

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).

(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 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) 1. 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.

2. The fact that the analysis shows that the person had an alcohol concentration of more than 0.0 but less than 0.1 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 0.1 is relevant evidence on the issue of intoxication or an alcohol concentration of 0.1 or more but is not to be given any prima facie effect.

(bd) 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 0.1 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 0.1 or more.

(cd) In cases involving persons who have 2 or more prior convictions, suspensions or revocations, as counted under s. 343.307 (1), 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.

(1m) In any action under s. 23.33 (4c) (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., 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 0.1 is prima facie evidence that the person had an alcohol concentration in the range specified in s. 23.33 (4c) (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 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 specified alcohol concentration or had an alcohol concentration in the range specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c).

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.

A blood sample taken under 346.71 (2) and forwarded to the department of transportation is admissible in evidence. Luedtke v. Shedivy, 51 W (2d) 110, 186 NW (2d) 220.

See note to Art. I, sec. 8, citing State v. Driver, 59 W (2d) 35, 207 NW (2d) 850.

See note to 345.421, citing State v. Ehlen, 119 W (2d) 451, 351 NW (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 W (2d) 252, 551 NW (2d) 859 (Ct. App. 1996).

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, station wagon 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.

History: 1991 a. 233; 1997 a. 27.

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, employe 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, employe 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, employe 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 which attaches under (2) or 77.61 (12), Stats. 1969, is merely coextensive with a defendant's 5th amendment rights against self−incrimination, and since the 5th amendment privilege does not attach to the records of a corporation, defendants' claim of immunity has no merit. State v. Alioto, 64 W (2d) 354, 219 NW (2d) 585.

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.

See note to 893.12, citing Abraham v. Milwaukee Mutual Insurance Co. 115 W (2d) 678, 341 NW (2d) 414 (Ct. App. 1983).

See note to 893.12, citing Riley v. Doe, 152 W (2d) 766, 449 NW (2d) 83 (Ct. App. 1989).

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 employes 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 for persons with language difficulties or hearing or speaking impairments. (1) (a) If a court has notice that a person fits any of the following criteria, the court shall make the determinations specified under par. (b):

1. The person is charged with a crime.

2. The person is a child or parent subject to ch. 48 or 938.

3. The person is subject to ch. 51 or 55.

4. The person is a witness in an action or proceeding under subd. 1., 2. or 3.

(b) If a court has notice that a person who fits any of the criteria under par. (a) 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.

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

(3) (a) In this subsection:

1. "Agency" includes any official, employe 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 under sub. (1) or (2) shall be paid as follows:

1. In the supreme court or the court of appeals, the director of state courts shall pay the expense.

2. In circuit court, the director of state courts shall pay the expense.

2m. To assist the state public defender in representing an indigent in preparing for court proceedings, the state public defender shall pay the expense.

3. In municipal court, the municipality shall pay the expense.

(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 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).

(b) The department of health and family 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 W (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.

The cost of providing an interpreter under this section is shared; the public defender paying out−of−court costs and the director of state courts paying in−court costs. State v. Tai V. Le, 184 W (2d) 860, 517 NW (2d) 144 (1994).

A court has notice of language difficulty under sub. (1) (b) 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 W (2d) 721, 549 NW (2d) 769 (Ct. App. 1996).

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 W (2d) 3, 556 NW (2d) 687 (1996).

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

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 W (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 drunk driver. State v. Haefer, 110 W (2d) 381, 328 NW (2d) 894 (Ct. App. 1982).

Legal applications of videotape. Benowitz, 1974 WBB No. 3.

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 W (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.

(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 and other testimony presented by videotape shall be reported.

History: Sup. Ct. Order, 67 W (2d) 585, xii (1975); 1975 c. 218; 1987 a. 403.

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 W (2d) 585, xii (1975); Sup. Ct. Order, 141 W (2d) xxv. (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. The original videotape shall not be affected by any editing process. In its order for editing the court may: (a) order the official to keep the original videotape intact and make an edited copy of the videotape which deletes all references to objections and objectionable material; (b) order the person showing the original videotape at trial to suppress the objectionable audio portions of the videotape; or (c) order the person showing the original videotape at trial to suppress the objectionable audio and video portions of the videotape. If the court uses alternative (b), it shall, in jury trials, instruct the jury to disregard the video portions of the presentation when the audio portion is suppressed. If the court uses alternative (c), 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 W (2d) vii, xiii (1975); 1975 c. 218; Sup. Ct. Order, 141 W (2d) xxxvi.

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 W (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 W (2d) 585, vii (1975); Sup. Ct. Order, 141 W (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 W (2d) xiii (1975); 1975 c. 218; Sup. Ct. Order, 101 W (2d) xi (1981); Sup. Ct. Order, 141 W (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]