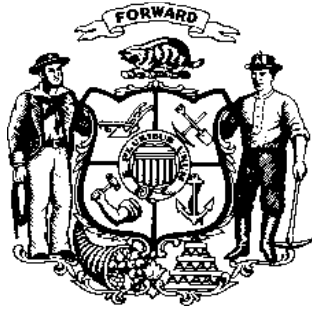




Wisconsin Judicial Council

Overview of the Wisconsin Judicial Council's Proposed Rules of Evidence Comprehensive Revision

October 1, 2026

The Evidence and Civil Procedure Committee of the Wisconsin Judicial Council has reviewed every provision in the Wisconsin Rules of Evidence, except for Wis. Stat. Ch. 905, concerning privileges. This summary indicates which rules are recommended for change and the general nature of the change, such as adoption of the current federal rule ("Restyled federal rule") or a blending of the current Wisconsin rule with elements of the federal rule. Details of all changes appear in the commentary accompanying the recommended changes. In several instances, the recommendation is to withdraw the current Wisconsin rule for reasons stated in the commentary.

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Current Members of the Evidence and Civil Procedure Committee

Member	Judicial Council designation	Organizational Affiliation
William Gleisner, III	Council Chair - Appointed to Council by Governor	William C. Gleisner Law Offices Brookfield
Thomas Shriner	Council member and Committee Chair - Appointed to Council by Dean of Marquette University Law School	Foley & Lardner – Milwaukee Marquette University Law School (Adjunct Professor)
Daniel D. Blinka	Advisor to Committee	Marquette University Law School Milwaukee (Professor)
Brandon Flugaur	Committee member	Wisconsin Department of Justice Madison (Assistant Attorney General)
Hon. Eugene Gasiorkiewicz	Committee member; former Council member designated by Judicial Conference	Racine County Circuit Court Judge
Margo Kirchner	Council Vice-Chair – Elected to Council by Members of State Bar	Wisconsin Justice Initiative - Milwaukee Shorewood Municipal Court Judge
Hon. Emily Lonergan	Council member designated by Judicial Conference	Outagamie County Circuit Court Judge
Hon. Ryan Nilsestuen	Council member designated by Judicial Conference	Dane County Circuit Court Judge
John Orton	Committee member; former Council member elected by members of State Bar	Curran Law Office Mauston

David Schwartz	Former advisor to committee	University of Wisconsin - Law School Madison (Emeritus Professor)
Hon. Kristine Snow	Former committee member; Council member designated by Judicial Conference	Dodge County Circuit Court Judge
Hon. Beverly Wickstrom	Council member designated by Judicial Conference	Eau Claire County Circuit Court Judge
Sarah Zylstra	Council member elected to Council by members of State Bar	Boardman Clark Madison

WISCONSIN RULES OF EVIDENCE COMPREHENSIVE REVISION PROCESS

I. RATIONALE

Properly updated rules of evidence will improve the quality of legal practice in this state and reduce the number of errors and appeals, increasing court efficiency and effectiveness.

II. WHY THE JUDICIAL COUNCIL?

Creation of the original Wisconsin rules of evidence (1973) was a Judicial Council project. Advising the Supreme Court on such matters is a core function of the Council under Wis. Stat. § 758.13(2)(a).

Many significant rules of evidence revisions were Council projects:

- Rules relating to hearsay and audiovisual statements of children (1985).
- Rules relating to hearsay and authentication of patient health care records (1990).
- Rules relating to communications in mediation and *in camera* hearings (1993).
- Rules relating to hearsay and records of regularly conducted activity, and self-authentication of domestic records (2005).
- Rules relating to remainder of or related writings or recorded statements (2017).
- Rules relating to evidence of character and conduct of witnesses (2017).
- Rules relating to impeachment by evidence of conviction of crime or adjudication of delinquency (2017).
- Creation of Wis. Stat. § 906.16, a new bias rule (2017).

The Judicial Council determined that the rules of evidence needed a complete review:

- Provisions were hard to find.
- Organization had broken down as new provisions were added.
- Case law needed to be codified.
- No significant update has occurred in more than fifty years

The Council designated its Evidence and Civil Procedure Committee to take on this overhaul in late 2022. The recommended changes are a result of almost four years of careful review.

III. PROCESS

Guiding Principle

Current practice should be reflected in the statutes and presented in a manner that makes it easy to find and understand – a well-intentioned, if inexperienced, lawyer or judge, as well as the general public, ought to be able to rely on the statutes as a guide to the rules of evidence.

General Approach

Each chapter of the rules of evidence (Chapters 901-911, except Chapter 905 - Privileges) was reviewed against comparable federal rules and relevant case law.

- A “plain language” drafting style was adopted to the fullest extent possible.
- Comparable federal rules were adopted unless Wisconsin case law or the current language made the change unnecessary.
- The committee elected not to review Chapter 905, as there is no comparable federal rule and no obvious need to revise the statutes on privileges.

Committee Members

The Committee members come from a broad range of practice experience. It included civil and criminal practitioners, prosecutors, plaintiff’s attorneys, defense lawyers, trial judges, and academics. It was guided throughout its work by evidence professors from the state’s two law schools, Dan Blinka from Marquette and David Schwartz (recently retired) from Wisconsin. Indeed, the original suggestion for the project came from Professor Blinka.

The committee operated by compromise – not every committee member was wholeheartedly in favor of every item, nor did every member prefer each item as it was finally approved. But the final product carries the unanimous endorsement of the Committee.

Next Steps

Having endorsed its Committee’s work, the Judicial Council now seeks input, through open comment, from interested stakeholders and legal practitioners concerning the proposed changes.

After the open comment period has closed, the Council will determine if further amendments to the proposal are necessary.

The Council intends to submit a rule petition to the Wisconsin Supreme Court later this year, proposing these updates to the rules of evidence in early 2027. It is anticipated that one or more public hearings will be held before the Court makes its determination.

SUGGESTED CHANGES TO THE RULES OF EVIDENCE PROPOSED BY THE JUDICIAL COUNCIL

Wis. Stat. Chapter 901: Evidence – General Provisions

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 101 as modified
Wis. Stat. § 901.01: Scope Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11.	§ 901.01: Scope; definitions (1) Scope. These rules apply to proceedings <u>in the courts of the state of Wisconsin</u> ~~in United States courts~~. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in <u>ss. 911.01 and 972.11</u> ~~Rule 1101~~ <u>Rule 1101</u>. (2) Definitions. In these rules: (a) “civil case” means a civil action or proceeding, <u>as defined by s. 801.01(1)</u>; (b) “criminal case” includes a criminal proceeding; (c) “public office” includes a public agency; (d) “record” includes a memorandum, report, or data compilation; (e) a “rule prescribed by the Supreme Court” means a rule adopted by the <u>Wisconsin</u> Supreme Court under statutory authority; and (f) a reference to any kind of written material or any other medium includes electronically stored information.

Judicial Council Comments:

- The proposal adopts current federal Rule 101 as modified to incorporate Wisconsin cross-references.
- No substantive changes are intended. The proposed rule clarifies that the evidence rules “apply” to – not “govern” – proceedings in the courtrooms.

The scope of the proposed rule is consistent with current Wisconsin law. The definitions in sub. (2), while new to the rule, are also consistent with Wisconsin law and clarify fundamental terms, especially the inclusion of electronically stored information in the phrase “written material.” The definitions were added in 2011 to Rule 101 as part of the general restyling of the federal evidence rules. The goal was to make them more easily understood and to make style and terminology consistent throughout the rules. These changes were intended to be stylistic only; the federal case law evinces no problems with this language. There is no intent to change any result in any ruling on evidence admissibility.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 102
Wis. Stat. § 901.02: Purpose and construction Chapters 901 to 911 shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.	§ 901.02: Purpose These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 102, which was a stylistic revision of the original federal – and Wisconsin -- rule. No substantive change is intended.

The current Wisconsin rule references the “promotion of growth and development” of evidence law while the proposed rule – the current federal rule -- speaks only to its “development.” The federal rule used the same phrase until it was restyled in 2011. The change of phrase, predictably, has had no effect on the case law -- as intended.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 103
Wis. Stat. § 901.03: Rulings on evidence (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and (a) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (b) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. (2) RECORD OF OFFER AND RULING. The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The judge may direct the making of an offer in question and answer form. (3) HEARING OF JURY. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.	§ 901.03: Rulings on evidence (1) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and: (a) if the ruling admits evidence, a party, on the record: 1. timely objects or moves to strike; and 2. states the specific ground, unless it was apparent from the context; or (b) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. (2) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal. (3) Court’s Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(4) PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.	(4) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means. (5) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.
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Judicial Council Comments:

- The proposed rule adopts current federal Rule 103, which is consistent with Wisconsin law.
- Proposed § 901.03(2), which governs “definitive” rulings, is consistent with Wisconsin case law.
- The last three subsections present only stylistic changes; no substantive changes are proposed.

The proposed rule is the restyled federal rule (2011) and is consistent with the current Wisconsin rule and case law on preserving the record through timely and specific objections, motions to strike, and offers of proof. This includes motions in limine. *State v. Mercado*, 2021 WI 2, ¶34, n.13, 395 Wis. 2d 296, 953 N.W.2d 337 (repeated failures to make a timely, specific objection waived any error).

Sub. (2), relating to “definitive” rulings, is a new rule but one that is consistent with the current Wisconsin practice under § 901.03 and the case law. It applies whether an objection or offer of proof was made before or at trial. Essentially, when a judge makes a definitive ruling on evidence, opposing counsel need not raise the issue again at trial only for purposes of preserving the record. *State v. Mercado*, 2021 WI 2, ¶34, n.13 (“Mercado is correct that he properly preserved his challenge to L.G.’s video-recording for purposes of appeal by objecting during his pre-trial hearing.”).

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 104 as modified
Wis. Stat. § 901.04: Preliminary questions (1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05. (2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. (3) HEARING OUT OF THE PRESENCE OF A JURY. Hearings on any of the following shall be conducted out of the presence of the jury: (a) Admissibility of confessions. (b) In actions under s. 940.22, admissibility of evidence of the patient's or client's personal or medical history. (c) In actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302 (2), if the court determines that the offense was sexually motivated, as defined in s. 980.01 (5), admissibility of the prior sexual conduct or reputation of a complaining witness.	§ 901.04: Preliminary questions (1) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible, <u>subject to sub. (2) and ss. 971.31 (11) and 972.11 (2).</u> In so deciding, the court is not bound by evidence rules, except those on privilege <u>and as provided in s. 901.05.</u> (2) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later. (3) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (a) the hearing involves the admissibility of a confession; (b) a defendant in a criminal case is a witness and so requests;~~or~~ (c) justice so requires; (d) <u>in actions under s. 940.22, the hearing involves admissibility of the patient's or client's personal or medical history;</u> (e) <u>in actions under s. 940.225, 948.02, 948.025, 948.051, 948.085, or 948.095, or under s. 940.302 (2), if the court determines that the offense was sexually motivated, as defined in s. 980.01 (5), the hearing involves the admissibility of the prior</u>

(cm) Admissibility of evidence specified in s. 972.11 (2) (d). (d) Any preliminary matter if the interests of justice so requires. (4) TESTIMONY BY ACCUSED. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case. (5) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.	<u>sexual conduct or reputation of a complaining witness; or,</u> <u>(f) the hearing involves the admissibility of evidence specified in § 972.11(2)(d).</u> (4) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case. (5) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.
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Judicial Council Comments:

- The proposed rule adopts the federal rule as modified to incorporate cross-references to other Wisconsin statutes as they appear in current Wis. Stat. § 901.04.
- No substantive change is intended.

The proposed rule adopts the current styling of federal Rule 104, as modified to reflect references to other Wisconsin rules that currently appear in § 901.04. The wording of § 901.4(3)(e) has been altered to clarify that the issue involves only the jury's presence. No substantive changes are anticipated or intended.

**Retain Wis. Stat. § 901.05;
Transfer to ch. 904 and renumber as § 904.20**

Wis. Stat. § 901.05: Admissibility of certain test results

(1) In this section, "HIV" means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

(2) Except as provided in sub. (3), the results of an HIV test, as defined in s. 252.01 (2m), are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding, as evidence of a person's character or a trait of his or her character for the purpose of proving that he or she acted in conformity with that character on a particular occasion unless the evidence is admissible under s. 904.04 (1) or 904.05 (2) and unless the following procedures are used:

(a) The court may determine the admissibility of evidence under this section only upon a pretrial motion.

(b) Evidence which is admissible under this section must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(3) The results of a test or tests under s. 938.296 (4) or (5) or 968.38 (4) or (5) and the fact that a person has been ordered to submit to such a test or tests under s. 938.296

(4) or (5) or 968.38 (4) or (5) are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding.

Judicial Council Comments:

- There is no corresponding federal rule; no change is proposed.

The Judicial Council recommends that current § 901.05 be retained but transferred to ch. 904 where it better fits with other relevancy rules. It should be renumbered as § 904.20. This chapter should reflect that current § 901.05 was "transferred to § 904.20."

**Retain Wis. Stat. § 901.053;
Transfer to ch. 904 and renumber as § 904.21**

Wis. Stat. 901.053: Admissibility of evidence relating to use of protective headgear while operating certain motor vehicles

Evidence of use or nonuse of protective headgear by a person, other than a person required to wear protective headgear under s. 23.33 (3g), 23.335 (8) (a) or (b), or 347.485 (1), who operates or is a passenger on a utility terrain vehicle, as defined in s. 23.33 (1) (ng), a motorcycle, as defined in s. 340.01 (32), an all-terrain vehicle, as defined in s. 340.01 (2g), or a snowmobile, as defined in s. 340.01 (58a), on or off a highway, is not admissible in any civil action for personal injury or property damage. This section does not apply to the introduction of such evidence in a civil action against the manufacturer or producer of the protective headgear arising out of any alleged deficiency or defect in the design or manufacture of the protective headgear or, with respect to such use of protective headgear, in a civil action on the sole issue of whether the protective headgear contributed to the personal injury or property damage incurred by another person.

Judicial Council Comments:

- There is no corresponding federal rule.
- No substantive change is recommended..

The Judicial Council recommends that current § 901.053 be retained but transferred to ch. 904 where it better fits with other relevancy rules. It should be renumbered as § 904.21. This chapter should reflect that § 901.053 was “transferred to § 904.21.”

Retain Wis. Stat. § 901.055; Transfer to ch. 904 and renumber as § 904.22
Wis. Stat. § 901.055: Admissibility of results of dust testing for the presence of lead The results of a test for the presence of lead in dust are not admissible during the course of a civil or criminal action or proceeding or an administrative proceeding unless the test was conducted by a person certified for this purpose by the department of health services.

Judicial Council Comments:

- There is no corresponding federal rule;
- No substantive change is proposed.

The Judicial Council recommends that current § 901.055 be retained but transferred to ch. 904 where it better fits with other relevancy rules. It should be renumbered as § 904.22. This chapter should reflect that § 901.055 was “transferred to § 904.22.”

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 105 as modified
Wis. Stat. § 901.06: Limited admissibility When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.	<u>§ 901.06</u> Limiting evidence that is not admissible against other parties or for other purposes <u>Subject to s. 904.01 and s. 904.03,</u> if the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Judicial Council Comment:

- The proposed rule adopts the current federal rule which appears as Rule 105 (not 106). The proposed rule follows the convention of the last 50 years by retaining the state rule number, § 901.06.
- The only deviation from the substance of the federal rule are the references to § 904.01 and § 904.03, which are underscored above.

The cross-references to § 904.01 and § 904.03 are not substantive changes. Those rules apply regardless and the cross-references are a helpful courtesy to the trial court and counsel.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 106 as § 901.07
Wis. Stat. § 901.07: Remainder of or related writings or statements When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.	§ 901.07 Remainder of or Related Statements If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Judicial Council Comment:

- The proposed rule adopts current federal Rule 106, which regulates the “rule of completeness,” that is, the admissibility of other statements or parts of statements when necessary to avoid confusion or unfairness.
- The proposed rule encompasses “statements” that are oral or written, which is consistent with current state case law.
- The federal rule effectively – and helpfully -- waives any hearsay problems that might otherwise impede the use of a prior statement.
- Although the number for the current federal rule is Rule 106, the Wisconsin rule would continue to bear the number Wis. Stat. § 901.07.

Current federal Rule 106 is an enormous improvement over both the former federal rule and the current Wisconsin rule. It applies to both oral and written/recorded statements, thus eliminating the need for courts to examine both the common law (for oral statements) and the evidence rules (for written statements). See *State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642, 651 (1998) (held that the current rule applies to both oral and written statements). Rule 106 also solves the nettlesome hearsay issue by eliminating hearsay as an objection to any statement deemed necessary to ensure “fairness.” The ability to draw on emerging federal case law will be an enormous advantage to Wisconsin practice.

**Retain Wis. Stat. § 901.08 as modified;
Transfer to ch. 904 and renumber as § 904.23**

Wis. Stat. § 901.08: Admissibility of sexual conduct

(1) In this section:

(a) "Sexual conduct" means any conduct or behavior relating to sexual activities, including prior experience of sexual intercourse or sexual contact, use of contraceptives, and sexual life-style.

(b) "Sexual misconduct" includes a violation of s. 940.22 (2), 940.225 (1), (2), or (3), 940.32, 942.08, 942.09, 948.02, 948.025, 948.05 (1) or (1m), 948.055 (1), 948.06, 948.07, 948.075, 948.08, 948.081, 948.09, 948.095, 948.10, or 948.11 (2) and includes sexual harassment, as defined in s. 111.32 (13).

(c) "Victim" means a person against whom sexual misconduct allegedly has been committed.

(2) In a civil action involving damages for an injury resulting from sexual misconduct, any evidence concerning a victim's sexual conduct, opinions of the victim's sexual conduct, and reputation as to the victim's sexual conduct, offered to prove that the victim engaged in other sexual conduct or to prove the victim's sexual predisposition may not be admitted into evidence during the course of any hearing or trial, nor may any reference to such sexual conduct be made in the presence of the jury, except the following:

(a) Evidence of the specific, consensual sexual conduct between the alleged offender and the victim.

(b) Evidence of specific instances of sexual conduct by the alleged victim after an in camera showing by the party requesting the admission that the sexual conduct was the actual cause of the victim's injury for which damages are requested in the action.

(3) In criminal actions, "sexual conduct" evidence is governed by Wis. Stat. § 972.11(2).

Judicial Council Comment:

- The Judicial Council is not proposing any change to current Wis. Stat. § 901.08, except for a cross-reference to the criminal rape shield rule.
- The corresponding criminal "rape shield" statute is found in ch. 972. This provision governs only civil cases.
- The current federal rape shield rule, Rule 412, governs both civil and criminal cases.

The Judicial Council recommends that current § 901.08 be retained but transferred to ch. 904 where it better fits with other relevancy rules. It should be renumbered as § 904.24. This chapter should reflect that § 901.08 was "transferred to § 904.23."

No change to § 901.08 is proposed because it was created by the legislature and seems to have generated no confusion or concern in the case law.

Retain Wis. Stat. § 901.09

§ 901.09 Submission of writings; languages other than English.

(1) The court may require that a writing in a language other than English offered in evidence be accompanied by a written translation of the writing into English with an attached affidavit by the translator stating his or her qualifications to perform the translation and certifying that the translation is true and correct.

(2) A party may object to all or parts of a translation offered under sub. [\(1\)](#) or to the qualifications of the translator. The court may order a party objecting to all or part of a translation to submit an alternate translation of those parts of the original translation to which the party objects, accompanied by a translator's affidavit as described in sub. [\(1\)](#). If an objection is made to the qualifications of the translator and the court finds that the translator is not qualified the court may reject the offered translation on that ground alone without requiring an alternative translation by the objecting party.

(3) The court may require a party offering into evidence a translation under sub. [\(1\)](#) or an alternative translation ordered by the court under sub. [\(2\)](#) to bear the cost of the translation.

Judicial Council Comments:

- No change is proposed.

There is no corresponding federal rule. Nor is there any reason to change the present rule.

Adopts federal Rule 107 as Wis. Stat. § 901.10 as modified
§ 901.10 Illustrative Aids (a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time. (b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless: (1) all parties consent; or (2) the court, for good cause, orders otherwise. (c) Record. When practicable, an illustrative aid used at trial must be entered into the record. (d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by <u>§ 910.06</u>.

Judicial Council Comments:

- This is a new federal rule that will be commonly used in trials.
- The proposed rule is current Fed. R. Evid. 107, which took effect on December 1, 2024. It introduces the neologism “illustrative aids” which differs, we are told, from the term “demonstrative evidence” that has been used in varying, inconsistent, sometimes unhelpful ways for decades. The intent behind Rule 107 is to keep up with current trial practice while also safeguarding against abuses.
- Essentially, Rule 107 allows the use of illustrative aids – which are not evidence -- during trial when helpful in the presentation or understanding of evidence as well as argument, subject to a balancing test drawn from Rule 403. Regardless, illustrative aids are not to be used by the jury during deliberations unless the parties agree or the court finds “good cause.”
- Federal case law will be useful in construing the contours of Rule 107. The Wisconsin rules should adjust as well to the use of “illustrative aids” and the flexible regulations imposed by the rule. The Wisconsin rule will have to carry the number “901.10” to accommodate existing rules.
- In light of Rule 107’s novelty, recency, and currency among federal courts, we are appending the 2024 note prepared by the federal Advisory Committee on evidence rules:

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. “Demonstrative evidence” is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens.

Usually, the jury is permitted to take this substantive evidence to the jury room during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as “illustrative aids,” have also been described as “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations”—that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument. Cf. Fed. R. Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should prohibit the use of—or order the modification of—the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to

use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations.

If the court does allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact. This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

Wis. Stat. Chapter 902: Evidence – Judicial Notice

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 201
Wis. Stat. § 902.01: Judicial notice of adjudicative facts (1) SCOPE. This section governs only judicial notice of adjudicative facts. (2) KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is any of the following: (a) A fact generally known within the territorial jurisdiction of the trial court. (b) A fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (3) WHEN DISCRETIONARY. A judge or court may take judicial notice, whether requested or not. (4) WHEN MANDATORY. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information. (5) OPPORTUNITY TO BE HEARD. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.	§ 902.01: Judicial notice of adjudicative facts (1) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact. (2) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it: (a) is generally known within the trial court's territorial jurisdiction; or (b) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. (3) Taking Notice. The court: (a) may take judicial notice on its own; or (b) must take judicial notice if a party requests it and the court is supplied with the necessary information. (4) Timing. The court may take judicial notice at any stage of the proceeding. (5) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(6) TIME OF TAKING NOTICE. Judicial notice may be taken at any stage of the proceeding. (7) INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed.	(6) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.
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Judicial Council Comment:

- The proposed rule adopts federal Rule 201; no substantive change is intended.
- Proposed § 902.01(1) clarifies that the rule only applies to adjudicative facts, not legislative facts.
- The time for taking judicial notice (“at any stage”) appears in subs. (4) of the proposed rule; it appears in subs. (6) of the current rule.

It is recommended that the current Wisconsin rule be replaced with federal Rule 201. Substantively, the rules are the same. Proposed § 902.01 clarifies that in criminal cases the jury is given the option of accepting the judicially noticed facts; in civil cases, the jury must accept the noticed fact. Many cases precludes taking notice of facts against a criminal defendant on constitutional grounds as well.

Currently, the reporters are awash in cases involving judicial notice from internet sources. Rule 201 neither facilitates nor hinders this development. Using the same rule language will enable Wisconsin courts to draw more easily from the deep well of federal case law.

Current Wisconsin Rule	Proposed Rule Adopts Fed. R. Civ. Pro. 44.1 as modified
Wis. Stat. § 902.02: Uniform judicial notice of foreign law act (1) COURTS TAKE NOTICE. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. (2) INFORMATION OF THE COURT. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information. (3) DETERMINED BY COURT; RULING REVIEWABLE. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable. (4) EVIDENCE OF FOREIGN LAW. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise. (5) FOREIGN COUNTRY. The law of a jurisdiction other than those referred to in sub. (1) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice. (6) INTERPRETATION. This section shall be so interpreted as to make uniform the law of those states which enact it. (7) SHORT TITLE. This section may be cited as the Uniform Judicial Notice of Foreign Law Act.	§ 902.02. Determining Foreign Law A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Wisconsin Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Judicial Council Comment:

- It is recommended that § 902.02 be withdrawn and replaced by the language in Fed. R. Civ. Pro. 44.1, as modified.

Wis. Stat. § 902.02 was recently addressed by the supreme court in *Hennessy v. Wells Fargo Bank*, 2022 WI 2, 400 Wis. 2d 50, 968 N.W.2d 684. Although the court upheld its application on the record before it, the various opinions strongly suggest that the rule should be changed.

Essentially, § 902.02 treats foreign law as an issue of fact that is proved like any other “fact.” Expert witnesses on a foreign law (e.g., Mexican) may testify to their competing and conflicting views of what the foreign law is. Ultimately, the trier of fact determines the foreign law as a factual matter, subject to the same limited review on appeal as is accorded questions of fact.

Most jurisdictions, including the federal courts, approach foreign law as a question of law that is decided by the judge. In making this determination, the judge is not bound by the rules of evidence and appellate courts will review the finding *de novo*, like any other question of law. This approach is found in Fed. R. Civ. Pro. 44.1, which was adopted in 1966:

Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the [Federal Rules of Evidence](#). The court's determination must be treated as a ruling on a question of law.

In short, Wisconsin is currently on an island with respect to the judicial notice of foreign law. The “Uniform Judicial Notice of Foreign Law Act” was abandoned decades ago. See Sarah Alsaden, *Proof of Foreign Law A Guide for Judges* (Federal Judicial Center, 2022), 17 (apparently only two other states treat questions of foreign law as a question of fact).

The Judicial Council strongly favors repealing this rule and adopting language consistent with Fed. R. Civ. Pro. 44.1. The proposed rule substitutes “Wisconsin” for “Federal” in the current federal provision. It is also recommended that this rule continue to be placed among the rules of evidence rather than the rules of civil procedure.

Current Wisconsin Law	Proposed Rule Retain § 902.03 as modified
Wis. Stat. § 902.03: County and municipal ordinances; administrative rules of state and federal agencies (1) The courts of this state, including the court of appeals and the supreme court, shall take judicial notice of: (a) County and municipal ordinances in those counties in which the particular court has jurisdiction; and (b) All rules of state agencies which have been published in the Wisconsin administrative code or register and all orders of such agencies. (2) The courts of this state, including the court of appeals and the supreme court, may take judicial notice, if requested by a party and supplied with the necessary information, of all rules and orders of federal agencies.	§ 902.03: County and municipal ordinances; administrative rules of state and federal agencies (1) The courts of this state, including the court of appeals and the supreme court, shall take judicial notice of: (a) County and municipal ordinances <u>in Wisconsin</u>; and ~~those counties in which the particular court has jurisdiction; and~~ (b) All rules of state agencies which have been published in the Wisconsin administrative code or register and all orders of such agencies. (2) The courts of this state, including the court of appeals and the supreme court, may take judicial notice, if requested by a party and supplied with the necessary information, of all rules and orders of federal agencies.

Judicial Council Comment:

- There is no corresponding federal rule.
- The recommendation is that the current rule remain unchanged but that the “county restriction” that applies to county and municipal ordinances be withdrawn.
§ 902.03(1)(a). This restriction is unnecessary as explained in the comments below.

The subcommittee recommends that § 902.03 remain unchanged but that the “county restriction” in subs. (1)(a) be deleted. That restriction is rooted in the problem of identifying authoritative ordinances in the pre-internet age. Such ordinances are now readily available on the internet. The proverbial “county line” does not make it easier or harder to find county law. Occasionally, there may be authentication issues regarding variations or superseded provisions, but these can be sorted through by court and counsel in a particular case. There is no need for the blanket ban.

Wis. Stat. Chapter 903: Evidence - Presumptions

Retain Wis. Stat. § 903.01

Wis. Stat. § 903.01: Presumptions in general

Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Judicial Council Comments:

- No changes are recommended to Wis. Stat. § 903.01.
- It differs from Fed. R. Evid. 301.
- The current Wisconsin rule is a default provision; the supreme court and the legislature are free to create presumptions that follow the federal path, for example.

It is recommended that § 903.01 remain unchanged. Both the Wisconsin rule, § 903.01, and federal Rule 301 are default provisions that govern the strength of presumptions unless otherwise provided by a case, statute (e.g., the UCC), or rule. The two rules, however, approach presumptions differently. The Wisconsin rule embraces the “Morgan theory” of presumptions: the proponent has the burden of production and persuasion to establish the basic facts of a presumption. Once that burden is met, the *opponent* assumes the burden of persuading the trier of fact “that the nonexistence of the presumed fact is more probable than its existence,” that is, the opponent has the burden of negating the presumed fact. See *Odd S.-G. v. Carolyn S.-G.*, 194 Wis. 2d 365, 533 N.W.2d 794, 797 (1995). The federal rule is a softer, weaker presumption (the “Thayer theory” of presumptions). Although it also imposes the burden of proving the existence of the basic facts on the proponent, it requires that the opponent only produce evidence sufficient to rebut the presumption (a “bursting bubble” presumption). Federal Rule 301 does not shift any burdens of persuasion.

Again, these rules are simply defaults. Many Wisconsin statutes, such as the UCC provisions, explicitly opt to follow the Thayer/federal pathway. Put differently, § 903.01 only applies when a rule, statute, or case does not otherwise address the strength of the presumption. The Wisconsin case law reflects no need to change the default.

Federal Rule of Evidence 302

Current Wisconsin Rule	Proposed Rule None
None	

Judicial Council Comment:

- There is no need to adopt federal Rule 302; it is included only in the interest of completeness:

Fed. R. Evid. 302. Applying state law to presumptions in civil cases

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

Withdraw Wis. Stat. § 903.03

Wis. Stat. § 903.03: Presumptions in criminal cases

(1) SCOPE. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) SUBMISSION TO JURY. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) INSTRUCTING THE JURY. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Judicial Council Comment:

- This rule should be withdrawn.
- There is no corresponding Federal Rule of Evidence largely because the subject is one that is superseded by case law construing constitutional rights.

The Judicial Council recommends that the Wisconsin Supreme Court withdraw this rule. The subject is one extensively addressed in case law construing the constitution. In 1974 the Judicial Council Committee's note observed that the "presumption" described by this rule amounted to only a permissive inference because of constitutional constraints. 59 Wis. 2d R58 and R60. See also the heroic note at Wis JI – Criminal 225 (instructions on presumed facts), which was originally published in 1987, republished in 2000, and apparently left untouched since then.¹ The point: this rule no longer serves any purpose and, worse, may mislead unwary counsel into thinking that it controls issues that are governed by case law construing constitutional rights.

¹ The Comment to Wis JI – Criminal 225 observes: "Wis JI – Criminal 225 was originally published in 1987. The list of statutes beginning on page 3 was amended in February 1989 and January 1990. The instruction was republished without substantive change in 2000."

Wis. Stat. Chapter 904: Evidence - Relevancy and It's Limits

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 401 as modified
Wis. Stat. § 904.01: Definition of “relevant evidence” “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.	§ 904.01: <u>Definition of</u> relevant evidence Evidence is relevant if: (1) it has any tendency to make a fact more <u>probable</u> or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action.

Judicial Council Comments:

- The proposal adopts the wording of federal Rule 401, which in turn is substantively identical to the current Wisconsin rule as well as the former federal rule (which Wisconsin also followed). In short, the proposed rule works no change in the law.
- The proposed Wisconsin rule adds the noun “probable” such that it reads “more probable or less probable” rather than “more or less probable,” as appears in federal Rule 401.
- Like the current Wisconsin rule, the title to the proposed rule frames it as a “definition” rather than a “test,” unlike the current federal rule (“Test for Relevant Evidence”).

The proposed rule is a modest restyling of current § 904.01 with no substantive change intended. If evidence has “any tendency” to make a consequential fact more or less likely (“probable”), it is relevant. Relevant evidence is admissible unless otherwise excluded. Irrelevant evidence is inadmissible.

Unlike current federal Rule 401, which is framed as a “test” for relevancy, the proposed Wisconsin rule retains the title “definition of relevant evidence.” The proposed rule also defines relevant evidence as having “any tendency to make a fact more probable or less probable,” unlike federal Rule 401 which uses the breezier phrase “more or less probable.” The point is to emphasize that the heart of relevance looks to whether evidence increases or decreases the probabilities of consequential facts. The question is one entrusted to the trial judge’s discretion.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 402 as modified
§ Wis. Stat 904.02: Relevant evidence generally admissible; irrelevant evidence inadmissible All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.	§904.02: General admissibility of relevant evidence Relevant evidence is admissible unless any of the following provides otherwise: • ~~the United States Constitution~~ <u>the constitutions of the United States or the state of Wisconsin;</u> • ~~a federal statute;~~ • <u>a statute;</u> • these rules; or • other rules <u>adopted by the supreme court</u> ~~prescribed by the Supreme Court.~~ Irrelevant evidence is not admissible.

Judicial Council Comments:

- Substantively, the proposed rule is identical to current Wis. Stat. § 904.02. The proposed rule takes the form of restyled federal Rule 402.

The proposed rule essentially adopts the wording of restyled federal Rule 402 along with the existing references to Wisconsin law. In the fourth bullet point the verb “adopted” has been substituted for “prescribed” as used in Rule 402, a change that accommodates Wisconsin usage and is consistent with current § 904.01. See Wis. Stat. § 751.12. Also, the proposed rule uses the conjunction “or” instead of “and” in the first bullet point.

Other rules, such as Wis. Stat. § 346.73 (traffic accident reports) or the rape shield rules (civil and criminal), also exclude relevant evidence. Cross-references are impractical, yet such exclusions are at the heart of § 904.02.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 403
Wis. Stat. § 904.03: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.	§ 904.03: Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Judicial Council Comment:

- The proposed rule adopts federal Rule 403, which was restyled in 2011 with no substantive changes intended. Federal case law since 2011 supports this assertion.
- This version jettisons the original rule's forlorn distinction between evidentiary "dangers" and evidentiary "considerations" in balancing probative value against other interests.
- The proposed rule does not substantively change Wisconsin law.
- The new title better reflects the rule's content.

The proposed rule is current federal Rule 403. Presently, Wisconsin uses the original version of federal Rule 403, which distinguishes among 3 "dangers" and 3 "considerations" when balancing those factors against the probative value of the proffered evidence. The original thought seemed to be that the "dangers" were to be accorded greater weight than the "considerations" when balancing probative value against competing concerns. The distinction between "dangers" and "considerations," however, never amounted to much in the case law, which homogenized all 6 dangers/considerations. In any event, the distinctions were "obliterated" during the 2011 federal "restyling." 22A Wright & Graham, Federal Practice and Procedure: Evidence § 5211.1, p. 139.

Proposed Rule 403 denominates all six countervailing concerns as "dangers" while clarifying that even a single "danger" may justify the exclusion of otherwise probative evidence. The change reflects the case law, federal and state. The tilt of Rule 403 remains as before: evidence may be "excluded" only when its probative value is substantially outweighed by the "dangers." The trial judge does the balancing subject to § 901.04(1). The modified language has had no discernable impact on the federal case law since it became effective in 2011.

Both versions (old and new) of Rule 403 speak of "exclud[ing]" evidence. Recognizing that trial judges must have broad discretion, federal and state case law has wisely interpreted "exclusion" broadly and creatively to include not only the exclusion of testimony or exhibits, but also the broad authority to limit the number of witnesses (expert or lay) as well as to reshape (edit? bowdlerize?) the content of testimony as needs be. See also Wis. Stat. § 901.02 (rules to be interpreted to promote "fairness"; "truth") and § 906.11 (a judge's power to control the mode

and order of interrogation). Wisconsin case law approves such discretion. Federal case law has followed suit, before and since 2011.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 404, as modified; incorporate Wis. Stat. § 904.04(2)(b)
Wis. Stat. § 904.04: Character evidence not admissible to prove conduct; exceptions; other crimes (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: (a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same; (b) Character of victim. Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (c) Character of witness. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09. (2) OTHER CRIMES, WRONGS, OR ACTS. (a) General admissibility. Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence	§ 904.04: Character evidence; other crimes, wrongs, or acts (1) Character Evidence. (a) <i>Prohibited Uses.</i> Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. (b) <i>Exceptions for a Defendant or Victim in a Criminal Case.</i> The following exceptions apply in a criminal case: 1. a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; 2. subject to the limitations in ~~Rule 412 s. 972.11(2)~~, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, <u>the prosecutor may offer evidence to rebut it; and</u> ~~offer evidence of the defendant's same trait; and~~ 3. in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. (c) <i>Exceptions for a Witness.</i> Evidence of a witness's character may be admitted under ~~Rules 607, 608, and 609~~ <u>§§ 906.07, 906.08 and 906.09.</u> (2) Other Crimes, Wrongs, or Acts. (a) <i>Prohibited Uses.</i> Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) Greater latitude.

1. In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

(b) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(c) Sex Crimes and Domestic Abuse Cases.

1. In a criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

(d) Notice in a Criminal Case. In a criminal case, the prosecutor must:

1. provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
2. articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
3. do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Judicial Council Comments:

Overview of the proposed rule

The proposed revision of § 904.04 essentially restates current Wisconsin law. It draws on restyled federal Rule 404 and current Wis. Stat. § 904.04, both of which are based on the common law of character evidence, which Justice Jackson appropriately maligned as a “grotesque structure.” *Michelson v. US*, 335 U.S. 469, 69 S. Ct. 213, 223-24 (1948) (Jackson, J.). Grotesque it may be, yet the structure’s footings run deep in both federal and Wisconsin law.

Proposed § 904.04(1) retains the general ban against evidence of a person’s character to prove his or her conduct on a particular occasion (the “forbidden propensity inference”). The prohibition applies in both civil and criminal actions, to parties and nonparties. Nonetheless, the rule’s elastic exceptions and plentiful pathways for evasion have made it the most litigated issue in evidence law.

In criminal cases, the rule recognizes a welter of exceptions for both defendants and victims. A criminal defendant may offer evidence of his own character (“I’m good”) which in turn allows a prosecutor to rebut it. So too the defendant can attack a victim’s character (“he or she is bad”), subject to the rape shield protections. Here too the prosecutor may rebut the proof. In homicide cases, prosecutors may offer evidence of a victim’s “peaceful” character but only to rebut a first-aggressor inference. The permissible methods of proving character traits under these exceptions are governed by § 904.05.

A second set of exceptions apply to witnesses in both civil and criminal cases. These exceptions are found in Wis. Stat. §§ 906.07, 906.08, and 906.09, which involve evidence of a witness’s truthful or untruthful character.

A third set of rules apply to “other act” evidence. The rule (present and proposed) literally doubles down on the prohibited character/propensity ban by explicitly reiterating that other act evidence cannot be used to prove character/propensity. The proposed rule then tracks existing Wisconsin law by listing illustrative “permitted purposes,” such as other acts used to prove motive, opportunity, plan, etc. It is also intended that the three-step test set forth in *Sullivan v. State*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) should continue to govern the admissibility of other act evidence.

An additional set of exceptions consists of two provision. The first permits the use of “similar” acts in enumerated sexual assault and domestic violence cases. Such similar acts are declared “admissible.” A second provision applies to enumerated prior convictions, whether committed in Wisconsin or “another jurisdiction, which may be used as character/propensity evidence. The two sets currently appears under the unhelpful title “greater latitude” [sic]; the proposed rule would substitute the more descriptive and helpful title, “Sex Crimes and Domestic Abuse Cases.” The rule has been helpfully explicated by case law. No substantive change is intended.

Finally, the proposed rule adopts the notice provision found in federal Rule 404(b)(3). In our experience, many judges are currently insisting on pretrial notice through their scheduling order, so this works no sea change. Given the complexity of issues under § 904.04, the trial judge is better served by mandatory pretrial notice, which provides some assurance that a prosecutor has thought through the proof problems. Nonetheless, the judge can excuse pretrial notice for “good cause.”

Differences from current Wis rule

- The revised language in § 904.04(1)(b) makes explicit that those exceptions only apply in criminal cases. Long ago the wording of the current rule had to be clarified by case law to reach the same (obvious) outcome.
- The title of Wis. Stat. § 904.04(2)(b) is changed from “Greater latitude” to “Sex Crimes and Abuse Cases.” The term “greater latitude” does not appear in the rule’s text and is itself undefined. See Wis. Stat. § 990.001(6) (titles “are not part of the statute”). It also invites confusion with a long line of Wisconsin cases that pertain to child victims. The proposed title better alerts the reader to its provisions.
- The notice provision is new.

Differences from current federal rule

- The proposed rule does not include the broad “quid pro quo” provision found in Fed. R. Evid. 404(a)(2)(B)(ii). Upon a defense attack on a victim’s character trait, this provision permits federal prosecutors to launch a similar attack against the defendant. The federal quid pro quo is poor policy (the art of the “counterpunch”?) that does not advance truth-finding. Nor is it necessary. Frankly, Wisconsin prosecutors have had no problem spilling the defendant’s prior misconduct before the jury through the many spill ways of other act evidence, particularly in sexual assault and domestic violence cases. Indeed, use of those rules provides far broader bases for admissibility (extrinsic evidence) than does the federal quid pro quo provision.
- The inclusion of the current Wisconsin other act provisions, particularly those that govern similar act evidence in sexual assault and domestic violence cases, obviate the need for current federal Rules 413-415.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 405 as modified
Wis. Stat. § 904.05: Methods of proving character (1) REPUTATION OR OPINION. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. (2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.	§ 904.05: Methods of proving character (1) Character to Prove Propensity. ~~By Reputation or Opinion.~~ When evidence of a person's character or character trait is admissible <u>as provided by § 904.04(1)(b)</u>, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct. <u>Extrinsic evidence of the specific instance is not permitted.</u> (2) When Character is an Essential Element. ~~By Specific Instances of Conduct.~~ When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may ~~also~~ be proved by relevant specific instances of the person's conduct <u>as well as by reputation and opinion testimony as to their character or character trait. Extrinsic evidence is admissible to prove specific instances of the person's conduct.</u>

Judicial Council Comments:

- The proposed rule adopts the substance of federal Rule 405.
- The subsection titles are new and will prove helpful to courts.
- The proposed rule is consistent with current Wisconsin law.

Neither the current Wisconsin rule nor the federal rule on “methods” of proving character is particularly helpful. The 2011 federal restylers foreswore substantive evidentiary changes generally, so the changes made were very minor. Rule 405 is difficult because it turns on whether there is a very large elephant in the room: Is character admissible, and, if so, for what purpose? The answers to these questions affect the kinds of proof that may be used. In general, there are only three means of proving a person's character: (1) a (character) witness's opinion of the subject person (“she's honest”), (2) the subject's reputation among others in the pertinent community (gossip) (“everyone at work trusted her”), and (3) specific instances of conduct. The subtitles to proposed § 904.05 reflect how evidence is being used and the form it may take. The proposed rule contemplates no substantive change to current law, state or federal.

The use of a person's character trait to prove propensity is (very) narrowly limited by § 904.04. When it may be used to prove propensity, the limitations described in subsec. (1) govern the parties' proof. The proponent may call character witnesses to testify to their opinions of the subject person or her reputation in the community as to a trait. On cross-examination the opponent may inquire into specific instances of contrary behavior. Extrinsic evidence, however, is not admissible to prove a specific instance.

In those rare cases in which character is an “essential element” of a charge, claim, or defense, the parties are free to use all three forms of character proof. Character “at issue” is a question of substantive law, especially tort (e.g., slander or libel). Modern criminal law largely eschews character as an element of a charge or defense (e.g., a victim’s “chaste” character under the old “rape” laws).

Note: the term “extrinsic evidence” is a term of art used widely in the case law and commentary. Extrinsic evidence means simply that a different witness may be called to prove up some fact; counsel need not “take the answer” of the witness under examination. “Extrinsic evidence” can be defined if needs be in comments to the revised rules. The term is preferred to more convoluted language about calling other witnesses, what can be asked on direct examination, and the like.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 406 as modified; Retain § 904.06(2)
Wis. Stat. § 904.06: Habit; routine practice (1) ADMISSIBILITY. Except as provided in s. 972.11 (2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.	§ 904.06: Habit; routine practice (1) ADMISSIBILITY. <u>Except as provided in s. 972.11 (2) and s. 901.08,</u> evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness. <u>(2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.</u>

Judicial Council Comments:

- The proposed rule adopts current federal Rule 406 in subsec. (1).
- Modifications include necessary references to Wisconsin's rape shield statutes.
- The proposed rule also includes current § 904.06(2) on the "method of proof."

The proposed rule is largely based on current federal Rule 406, which governs the admissibility of proof by habit and routine practice. It is consistent with current Wisconsin law; no substantive change is proposed. The cross-reference to § 972.11(2), the criminal rape shield statute, should be retained along with an added reference to the civil rape shield statute, § 901.08, which is currently lacking.

The proposed rule also retains current § 904.06(2) as to "method of proof," which allows habit or routine practice to be proven by opinion testimony or through specific instances. The current rule has been used without difficulty since 1974 when the Wisconsin rules were adopted. This "method of proof" language originally appeared in the proposed federal Rule 406 in the mid-1970s but was eliminated during Congressional review because some critics vigorously opposed the use of opinion testimony to prove habit while others thought the method of proof should be left to trial judges. (The Congressional review occurred after Wisconsin adopted the proposed federal rules.) Wisconsin case law reflects no problems using opinion testimony. The same is true in federal courts today, despite the absence of this provision. See 23 Wright & Gold, Federal Practice & Procedure: Evidence § 5271, p. 5.

It is for the trial judge to decide whether conduct constitutes a habit or a "routine practice" in the first instance pursuant to § 901.04(1). For example, is using a directional to change lanes while driving a "habit"? Wearing a wristwatch? It is for the judge to determine whether such conduct constitutes a habit. The very different issue of whether there is sufficient evidence to support a finding of any such habit is one of conditional relevancy decided by the judge under § 901.04(2).

Current Wisconsin Rules	Proposed Rule Retain § 904.07 as modified
Wis. Stat. § 904.07: Subsequent remedial measures When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11. See also Wis. Stat. § 895.047(4): Product liability SUBSEQUENT REMEDIAL MEASURES. In an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This subsection does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold.	§ 904.07: Subsequent remedial measures When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of s. 101.11. <u>Product liability claims are subject to s. 895.047(4).</u>

Judicial Council Comments:

- No substantive changes are proposed to the current Wisconsin rules.
- Added is a cross-reference to a corresponding rule on remedial measures found nestled among the product liability statutes.

No substantive change is proposed to § 904.07. Nothing in the case law signals a need to reconsider the rule. Product liability claims are governed by Wis. Stat. § 895.047(4). See *Murphy v. Columbus McKinnon*, 2022 WI 109 , 405 Wis. 2d 157, 982 N.W.2d 898 (defective design claim).

To address the interrelationship of § 904.07 and § 894.047(4), it is proposed to add a cross-reference to § 894.047(4) in § 904.07. Also discussed was whether to add the word “also” on the assumption that both rules may apply in a products case. Ultimately it was agreed that this is an open issue, one that the courts have yet to decide, and that the proposed cross-reference was both accurate and sufficient until the courts clarify the relationship. No other revisions to § 904.07 were proposed.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 408 as modified
Wis. Stat. § 904.08: Compromise and offers to compromise Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.	§ 904.08: Compromise offers and negotiations (1) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (a) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (b) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority. (2) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, <u>proving accord and satisfaction, novation, or release</u>, or proving an effort to obstruct a criminal investigation or prosecution.

Judicial Council Comments:

- The proposed rule adopts federal Rule 408 but adds necessary language from the current Wisconsin rule.
- The proposed rule expands protection for statements made during efforts to compromise. Not only does it forbid the use of such statements to prove or disprove the validity or amount of a disputed claim, it also precludes their use to impeach witnesses as prior inconsistent statements or through contradiction.
- The proposed rule broadly includes any “conduct or statement made during compromise negotiations” but excepts their use in criminal cases “when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.”

- To conform with the current Wisconsin rule, the proposal excepts statements that relate to “accord and satisfaction, novation, or release.”

The proposed rule is based on federal Rule 408 but is substantively the same as the current Wisconsin rule. The proposal expands protections for statements and conduct during efforts to compromise by precluding their use not only as proof of a claim’s validity or its amount, but also to impeach as a prior inconsistent statement or by contradiction. The current Wisconsin version contains no such limitation. State case law does not suggest that abuse of the impeachment exemption has been a particular problem but for that same reason the federal language would work no significant change to state law. The remaining avenues of impeachment, especially bias, are sufficient. Impeachment by contradiction and prior inconsistent statements are more likely to be contrived and a trap for the unwary during settlement talks. Candid, frank discussions are encouraged by the rule. The federal advisory committee’s concern was that “broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements.” A textbook example of the proper, skillful use of the impeachment exception for bias appears in *Allsop Venture Partners v. Murphy Desmond*, 2023 WI 43, ¶¶24-30, 407 Wis. 2d 387, 991 N.W.2d 320.

In 2006 federal Rule 408(a)(2) was amended to address the use of “conduct or a statement during compromise negotiations” in a later criminal prosecution. Although statements and conduct of compromise are generally prohibited, the rule excepts “negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.” See Advisory Committee Note (2006), Rule 408 (“Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.”). Rule 403 also applies to exclude statements in an appropriate case.

Finally, the Council recommends retaining the exceptions for proving accord and satisfaction, novation, or release, as set forth in the current Wisconsin rule.

Proposed Rule
Retain current Wis. Stat. § 904.085

§ 904.085 Communications in mediation

(1) PURPOSE. The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled.

(2) DEFINITIONS. In this section:

(a) "Mediation" means mediation under s. 93.50 (3), conciliation under s. 111.54, mediation under s. 111.11, 111.70 (4) (cg) or (cm) 3. or 111.87, mediation under s. 115.797, negotiation under s. 289.33 (9), mediation under ch. 655 or s. 767.405, or any similar statutory, contractual or court-referred process facilitating the voluntary resolution of disputes.

"Mediation" does not include binding arbitration or appraisal.

(b) "Mediator" means the neutral facilitator in mediation, its agents and employees.

(c) "Party" means a participant in mediation, personally or by an attorney, guardian, guardian ad litem or other representative, regardless of whether such person is a party to an action or proceeding whose resolution is attempted through mediation.

(3) INADMISSIBILITY.

(a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.

(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.

(4) EXCEPTIONS.

(a) Subsection (3) does not apply to any written agreement, stipulation or settlement made between 2 or more parties during or pursuant to mediation.

(b) Subsection (3) does not apply if the parties stipulate that the mediator may investigate the parties under s. 767.405 (14) (c).

(c) Subsection (3) (a) does not prohibit the admission of evidence otherwise discovered, although the evidence was presented in the course of mediation.

(d) A mediator reporting child or unborn child abuse under s. 48.981, reporting a threat of violence in or targeted at a school under s. 175.32, or reporting nonidentifying information for statistical, research, or educational purposes does not violate this section.

(e) In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.

Judicial Council Comments.

- No change is proposed. There is no corresponding federal rule.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 409
Wis. Stat. § 904.09: Payment of medical and similar expenses Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.	§ 904.09: Offers to pay medical and similar expenses Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Judicial Council Comment:

- The proposed rule is federal Rule 409.

Current federal Rule 409 is substantively identical to the current Wisconsin rule.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 410 as modified
Wis. Stat. § 904.10: Offer to plead guilty; no contest; withdrawn plea of guilty Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.	§ 904.10: Pleas, plea discussions, and related statements (1) Prohibited Uses. In a civil or criminal case, <u>or in a civil forfeiture action,</u> evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (a) a guilty plea, <u>including an Alford plea,</u> that was later withdrawn; (b) a no contest plea ~~no contest plea~~; (c) a statement made during a proceeding on either of those pleas ~~under Federal Rule of Criminal Procedure 11 or a comparable state procedure~~; or (d) a statement made during plea discussions with an attorney for the prosecuting authority <u>in connection with any of the foregoing pleas[.]</u> ~~if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.~~ (2) Exceptions. The court may admit a statement described in <u>s. 904.10(1)(c) or (d):</u> (a) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (b) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Judicial Council Comments:

- The proposed rule largely adopts the language of current federal Rule 410 with adjustments for Wisconsin practice.
- The proposal makes no substantive changes in current Wisconsin law.

It is recommended that federal Rule 410 replace the virtually unreadable current Wisconsin rule. The proposed rule is modified to accommodate Wisconsin law where it differs from federal authority.

Subsection (1) clarifies that the rule will continue to apply in civil forfeiture actions, as in the past. Although technically such actions fall under the broader umbrella of “civil” cases, the language is taken from the current Wisconsin rule and will avoid any ambiguities.

Subsection (1)(a) substitutes “no contest plea” for the federal term “nolo contendere plea” which accords with the current rule and Wisconsin usage. Withdrawn Alford pleas also fall under the aegis of this rule.

Subsection (1)(c) eliminates unnecessary verbiage.

Subsection (1)(d) is consistent with the current Wisconsin rule and practice which does not restrict such statements to instances where the plea talks failed or a guilty plea was withdrawn. There is no apparent reason to adopt the excess verbiage, as indicated by the strike throughs.

Subsection (2) would be new to Wisconsin law but consistent with current practice. Subsection (2)(a) is no more than a rule of completeness which only applies when a party has already introduced some statement relating to the “same plea or plea discussions.” Subsection (2)(b) is hardly objectionable.

A final note. The current Wisconsin rule contains cryptic language that insulates both the person who made the plea or offer to plead as well as “one liable for the person’s conduct.” This language is not included in the proposed rule. Such issues are better handled under § 904.03 as well as the law governing statements by party opponents, particularly statements by conspirators, aiders and abettors, and employees and agents.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 411
Wis. Stat. § 904.11: Liability insurance Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.	§ 904.11: Liability insurance Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 411.
- The proposed rule is substantively identical to the current Wisconsin rule, which in turn was based on the former federal evidence rule.

The current federal and Wisconsin rules are substantively identical. The restyled federal rule, however, is somewhat more succinct.

**Proposed Rule
Retain Wis. Stat. § 904.12
as modified**

§ 904.12: Statement of injured; admissibility; copies

(1) In actions for damages caused by personal injury, no statement made or writing signed by the injured person within 72 hours of the time the injury happened or accident occurred, shall be received in evidence unless such evidence would be admissible as a present sense impression, excited utterance or a statement of then existing mental, emotional or physical condition as described in s. 908.03 (1), (2) or (3).

(2) Every person who takes a written or recorded statement from any injured person or person sustaining damage with respect to any accident or with respect to any injury to person or property, shall, at the time of taking such statement, furnish to the person making such statement, a true, correct and complete copy thereof. Any person taking or having possession of any written or recorded statement or a copy of said statement, by any injured person, or by any person claiming damage to property with respect to any accident or with respect to any injury to person or property, shall, at the request of the person who made such statement or the person's personal representative, furnish the person who made such statement or the person's personal representative, a true, honest and complete copy thereof within 20 days after written demand. No written or recorded statement by any injured person or any person sustaining damage to property shall be admissible in evidence or otherwise used or referred to in any way or manner whatsoever in any civil action relating to the subject matter thereof, if it is made to appear that a person having possession of such statement refused, upon the request of the person who made the statement or the person's personal representatives, to furnish such true, correct and complete copy thereof as herein required.

(3) This section does not apply to any statement taken by any officer having the power to make arrests.

Judicial Council Comment:

- No changes are proposed to this rule except for the addition of “recorded” statements in sub. (2).

There is no corresponding federal rule. The statute long antedates the Wisconsin Rules of Evidence (1974). It is directed at “curing the evils resulting from the practice of obtaining statements from an injured person” *Schueler v. City of Madison*, 49 Wis. 2d 695, 707, 183 N.W.2d 116 (1971).

It is recommended, however, that the rule be revised to explicitly include “recorded” as well as “written” statements. The change is necessitated by technological changes that make the recording of oral interviews simple and inexpensive.

Proposed Rule Retain Current Wis. Stat. § 904.13

§ 904.13: Information concerning crime victims

(1) In this section:

- (a) "Crime" has the meaning described in s. 950.02 (1m).
- (b) "Family member" has the meaning described in s. 950.02 (3).
- (c) "Victim" has the meaning described in s. 950.02 (4).

(2) In any action or proceeding under ch. 938 or chs. 967 to 979, evidence of the address of an alleged crime victim or any family member of an alleged crime victim or evidence of the name and address of any place of employment of an alleged crime victim or any family member of an alleged crime victim is relevant only if it meets the criteria under s. 904.01. District attorneys shall make appropriate objections if they believe that evidence of this information, which is being elicited by any party, is not relevant in the action or proceeding.

Judicial Council Comment:

- No change is proposed.

There is no corresponding federal rule. No change is recommended.

Proposed Rule
Retain Current Wis. Stat. § 904.14

§ 904.14: Inadmissibility of statement by health care provider of apology or condolence

(1) In this section:

(a) "Health care provider" has the meaning given in s. 146.81 (1) and includes an ambulatory surgery center, an adult family home as defined in s. 50.01 (1), and a residential care apartment complex, as defined in s. 50.01 (6d), that is certified or registered by the department of health services.

(b) "Relative" has the meaning given in s. 106.50 (1m) (q).

(2) A statement, a gesture, or the conduct of a health care provider, or a health care provider's employee or agent, that satisfies all of the following is not admissible into evidence in any civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration regarding the health care provider as evidence of liability or as an admission against interest:

(a) The statement, gesture, or conduct is made or occurs before the commencement of the civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration.

(b) The statement, gesture, or conduct expresses apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or his or her relative or representative.

Judicial Council Comment:

- No change is proposed.

There is no corresponding rule. No change is recommended.

Proposed Rule Retain Current Wis. Stat. § 904.15

§ 904.15: Communication in farmer assistance programs

(1) Except as provided under sub. (2), no oral or written communication made in the course of providing or receiving advice or counseling under s. 93.51 or in providing or receiving assistance under s. 93.41 or 93.52 is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.

(2)

(a) Subsection (1) does not apply to information relating to possible criminal conduct.

(b) Subsection (1) does not apply if the person receiving advice or counseling under s. 93.51 or assistance under s. 93.41 or 93.52 consents to admission or discovery of the communication.

(c) A court may admit evidence otherwise barred by this section if necessary to prevent a manifest injustice.

Judicial Council Comments:

- No change is proposed.

There is no corresponding federal rule. No changes are suggested.

Proposed Rule
Retain Current Wis. Stat. § 904.16

§ 904.16: Health care reports

(1) In this section:

(a) "Health care provider" has the meaning given in s. 146.38 (1) (b).

(b) "Regulatory agency" means the department of safety and professional services or the division within the department of health services that conducts quality assurance activities related to health care providers.

(2) Except as provided in sub. (3), the following may not be used as evidence in a civil or criminal action brought against a health care provider:

(a) Reports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency.

(b) Statements of, or records of interviews with, employees of a health care provider related to the regulation of the health care provider obtained by a regulatory agency.

(3) This section does not prohibit the use of the reports, statements, and records described in sub. (2) in any administrative proceeding conducted by a regulatory agency. This section does not apply to reports protected under s. 146.997.

Judicial Council Comment:

- No change is proposed.

There is no corresponding rule. No change is proposed.

Note on Fed. R. Evid. 412, 413, 414, and 415

The Judicial Council considered current federal Rules 412, 413, 414, and 415 which address the following:

- Rule 412: Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
- Rule 413: Similar crimes in sexual-assault cases.
- Rule 414: Similar crimes in child molestation cases.
- Rule 415: Similar acts in civil cases involving sexual assault or child molestation.

Their adoption is not recommended. Rule 412, which protects sexual assault victims, is controlled by § 901.08 in civil cases and § 972.11 in criminal cases. Rules 413-415 are neither necessary nor sound public policy. Evidence of "similar" conduct in such cases is directly addressed in the "greater latitude" provision of current § 904.04(2) as well as other act doctrine generally. In short, the subject has been appropriately addressed in both the Wisconsin rules and the case law.

Note on evidence rules not found in Ch. 904

The Judicial Council has noted that there are many other statutes and administrative rules which, in essence, are rules of evidence, but which are not currently found in the Wisconsin Rules of Evidence, Wis. Stat. Chapters 901 – 911. Some of these statutes and administrative rules exclude specific kinds of evidence:

- **§ 102.40:** Excluding Workers compensation reports furnished pursuant to 102.37 and 102.38 in any action or proceeding arising out of the incident reported.
- **§ 343.303:** Excluding preliminary breath screening tests are excluded.
- **§ 346.73:** Excluding accident reports as evidence at civil or criminal trial
- **§ 968.30(9)(a):** Excluding the results of unlawfully intercepted wiretaps (and any information derived therefrom). *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 630, 749 N.W.2d 611, 625
- **§ 971.23:** Excluding evidence or witnesses not properly disclosed in a criminal case.
- **§ 972.11(2)(b):** Rape shield statute which limits evidence relating to a victim's past sexual history.
- **NR 64.10:** Excluding reports of ATV or UTV accidents as evidence in any civil or criminal trial.

Other statutes specifically admit evidence which might otherwise be excluded:

- **§ 885.235:** Admitting chemical tests for intoxication
- **§ 343.305(5):** Admitting chemical tests of blood or urine to determine intoxication
- **§ 767.87:** Admitting evidence relating to the establishment of paternity
- **§ 889.18:** Admitting certified copies when originals would be admissible.
- **§ 893.55(7):** Admitting evidence of collateral sources in medical malpractice cases.

The Council considered, and rejected, the possibility of moving such statutes into Chapter 904. The Council also considered, and rejected, listing these statutes in a new single statute under Chapter 904. Instead, as an aid to the Courts and counsel, the Judicial Council recommends including this list in any comments to Chapter 904 where helpful.

Wis. Stat. Chapter 905 was NOT reviewed.
No revisions are recommended.

Wis. Stat. Chapter 906: Evidence - Witnesses

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 601 as modified
Wis. Stat. § 906.01: General rule of competency Every person is competent to be a witness except as otherwise provided in these rules.	§ 906.01 Competency to Testify in General Every person is competent to be a witness unless these rules provide otherwise. ~~But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.~~

Judicial Council Comments:

- The proposed rule adopts the first sentence of federal Rule 601.
- The second sentence of Rule 601 is inapplicable to litigation in Wisconsin courts.

The proposed rule is substantively identical to the current Wisconsin rule, which has worked well for fifty years. It deletes the second sentence of federal Rule 601, which addresses federalism concerns about the rule of decision.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 602 as modified
Wis. Stat. § 906.02: Lack of personal knowledge A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.	§ 906.02 Need for personal knowledge A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under ~~Rule 703~~ <u>s. 907.03</u>.

Judicial Council Comments:

- The proposed rule adopts federal Rule 602.
- The proposed rule is substantively identical to the current Wisconsin rule, the only difference being the cross-reference to Wis. Stat. § 907.03 instead of the identical federal rule.

Modern practice distinguishes between “expert” and “lay” testimony. “Witnesses” themselves, however, are not so categorized, as frequently the same witness will offer testimony that falls within each category.

In both the Wisconsin and federal versions of Rule 602, there is an oblique reference to § 907.03 (Rule 703) which should be retained if only because it has done no harm over the decades and is a convenient reminder that expert testimony is a different species. Section 907.03 allows expert testimony based on a witness's personal knowledge but does not require it, unlike § 906.02. More to the point, § 907.03 permits expert opinions based on hearsay, admissible and inadmissible.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 603
Wis. Stat. § 906.03: Oath or affirmation (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so. (2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God. (3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury. (4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.	§ 906.03: Oath or affirmation to testify truthfully Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Judicial Council Comment:

- Adoption of current federal Rule 603 is recommended.
- The proposed rule is substantively identical to the current Wisconsin rule yet it is clearer and more succinct.

It is recommended that the court adopt the current federal rule, as proposed. It is short, to the point, and substantively identical to the current Wisconsin rule, which uses about 150 more words to say what is in the proposed rule.

Recent case law has stressed the flexibility and discretion that appears even in the current rule. See *State v. Moeser*, 2022 WI 76, ¶38, 405 Wis.2d 1, 982 N.W. 2d 45 (“This statute repeatedly employs the flexible language, “may,” when it considers the administration of an oath to a witness. Even though § 906.03 provides sample language in two potential versions which

“may” be used in the administration of an oath or affirmation, it requires neither. The statute requires only that an oath or affirmation be “in a form calculated to awaken the witness’s conscience and impress the witness’s mind with the witness’s duty to [testify truthfully].” § 906.03(1).”).

In short, the proposed rule is succinct, clear, and consistent with recent case law.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 604
Wis. Stat. § 906.04: Interpreters An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.	§ 906.04: Interpreter An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Judicial Council Comment:

- Adoption of current federal Rule 604 is recommended.
- The proposed rule is consistent with current Wisconsin law and federal practice; no substantive changes will result.

The proposed rule is substantively identical to the current Wisconsin rule yet more concise and clearer. The current rule's reference to "chs. 901 to 911" as well as the vague reference to qualifying as an "expert" are unnecessary and unhelpful. The genesis of the "expert" language stems, it seems, from apparent problems in the mid-1970s with inept interpreters who hindered judicial proceedings. The proposed rule focuses on the interpreter's qualification to provide a "true translation." Nothing is gained by further denominating him or her an "expert," especially in light of the "specialized knowledge" requirements of current § 907.02, which are inapt when applied to interpreters.

The proposed rule is also consistent with SCR Ch. 63, which governs the "ethics" for court interpreters. See SCR 63.002.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 605
Wis. Stat. § 906.05: Competency of judge as witness The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.	§ 906.05: Judge’s competence as a witness The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Judicial Council Comments:

- The proposed rule is current federal Rule 605.
- It is substantively identical to the current Wisconsin rule.

The proposed rule is current federal Rule 605. The current Wisconsin and federal rules are consistent and adoption of the federal model poses no substantive change.

Essentially, judges are “incompetent” to “testify” as witnesses in cases over which they preside. In modern practice one does not see the trial judge leaving the bench to speak from the witness “stand,” (although there are examples of this in U.S. history). The cases reveal instances of judges finding facts that are of their own personal knowledge and not evidence found in the trial record. Generally, these are rare, inadvertent miscues. The case law has applied § 906.05 in those (few) scenarios without difficulty.

The second sentence of both rules frees lawyers from having to cross swords with the trial judge on the record in order to preserve the issue for appeal – although lawyers retain the option to educate a trial judge who (perhaps) inadvertently steps over the line. It is suggested that Wisconsin adopt the wording of federal Rule 605 in the interest of conformity with the federal rules. Note that the word “competence” appears only in the rule’s title, not the rule itself, and thus is not part of the rule. Perhaps a better rule would clearly declare that a “presiding judge is not a competent witness at the trial,” but the case law reveals no need to clarify the point at the risk of complicating current practice.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 606
Wis. Stat. § 906.06: Competency of juror as witness (1) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury. (2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.	§ 906.06: Juror's competency as a witness (1) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence. (2) During an Inquiry into the Validity of a Verdict or Indictment. (a) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters. (b) Exceptions. A juror may testify about whether: 1. extraneous prejudicial information was improperly brought to the jury's attention; 2. an outside influence was improperly brought to bear on any juror; or 3. a mistake was made in entering the verdict on the verdict form.

Judicial Council Comments:

- The proposed rule adopts federal Rule 606.
- Current Wisconsin law is substantively consistent with the proposed rule.

Current § 906.06(1) and the case law construing it is consistent with federal Rule 606(a), the wording of which is clearer and more succinct. Its adoption also eases the way for using federal case law when helpful.

For the same reasons, it is recommended that Wisconsin adopt federal Rule 606(b). Current § 906.06(2) is consistent with the substance of federal Rule 606(b)(1). The substantial body of Wisconsin case law will not be affected. The federal rule, however, is better organized

and easier to read. (The current Wisconsin rule consists of two sentences, the first of which is a 102 word run-on sentence.)

The three “exceptions” that appear in proposed § 906.06(2)(b) are taken from federal Rule 606(b)(2) and are also consistent with current Wisconsin practice. The first two exceptions are already found in § 906.06(2). The third federal exception (verdict “mistake”) is consistent with long-standing Wisconsin case law that has addressed the handling of “clerical errors” in verdicts.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 607
Wis. Stat. § 906.07: Who may impeach The credibility of a witness may be attacked by any party, including the party calling the witness.	§ 906.07: Who may impeach a witness Any party, including the party that called the witness, may attack the witness's credibility.

Judicial Council Comments:

- The proposed rule adopts federal Rule 607, which is consistent with current Wisconsin law.

The proposal entails no substantive change in Wisconsin law. The current Wisconsin rule was based on the original federal rule, which became effective in 1975. The current federal Rule 607 was “restyled” for clarity in 2011.

Proposed Rule Retain current Wis. Stat. § 906.08 as modified
§ 906.08: Evidence of character and conduct of witness (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness. (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to <u>s. 901.08</u> and s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness. (3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

Judicial Council Comment:

- No change is proposed to current Wis. Stat. § 906.08 except to add a reference to § 901.08, which provides rape shield protection in civil litigation.

Wis. Stat. § 906.08 was last revised by the Wisconsin Supreme Court in 2017, the change coming in response to a petition by the Judicial Council. It is entirely consistent with federal Rule 608 and has worked well in practice. No changes are proposed except for an additional cross-reference to § 901.08, the “rape shield” statute that applies in civil cases.

Proposed Rule
Retain current Wis. Stat. § 906.09

§ 906.09: Impeachment by evidence of conviction of crime or adjudication of delinquency

(1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.

(2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:

- (a) The lapse of time since the conviction.
- (b) The rehabilitation or pardon of the person convicted.
- (c) The gravity of the crime.
- (d) The involvement of dishonesty or false statement in the crime.
- (e) The frequency of the convictions.
- (f) Any other relevant factors.

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the court determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

Judicial Council Comments:

- No change to § 906.09 is proposed.

Wis. Stat. § 906.09 was last revised by the Wisconsin Supreme Court in 2017, the change coming in response to a petition by the Judicial Council. It differs substantially from federal Rule 609, reflecting Wisconsin's long-standing practice for impeachment with prior criminal convictions. The 2017 revision was excellent and has worked well in practice. There is no need to change the rule.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 610
Wis. Stat. § 906.10: Religious beliefs or opinions Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.	§ 906.10: Religious beliefs or opinions Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Judicial Council Comments:

- The proposed rule adopts federal Rule 610
- No substantive change to Wisconsin law will occur.

It is recommended that the court adopt the current federal rule. It is substantively identical to the current Wisconsin rule. The rule is seldom litigated, which makes the ability to draw readily on federal case law all the more valuable.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 611 as modified
Wis. Stat. § 906.11: Mode and order of interrogation and presentation (1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following: (a) Make the interrogation and presentation effective for the ascertainment of the truth. (b) Avoid needless consumption of time. (c) Protect witnesses from harassment or undue embarrassment. (2) SCOPE OF CROSS-EXAMINATION. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination. (3) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.	§ 906.11: Mode and order of examining witnesses and presenting evidence (1) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (a) make those procedures effective for determining the truth; (b) avoid wasting time; and (c) protect witnesses from harassment or undue embarrassment. (2) SCOPE OF CROSS-EXAMINATION. <u>A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.</u> ~~(b) SCOPE OF CROSS-EXAMINATION. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.~~ (3) Leading Questions. Leading questions should not be used on direct examination except to assist in developing the witness's testimony. Ordinarily, the court should allow leading questions: (a) on cross-examination; and (b) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Judicial Council Comments:

- The proposed rule combines current federal Rule 611 with language from Wis. Stat. § 906.11(2).
- Regarding the scope of cross-examination, the proposed rule maintains Wisconsin's long-standing commitment to "wide-open" cross-examination. Wis. Stat. § 906.11(2) above.

- Leading questions are permitted on direct examination to “assist” in developing the witness’s testimony, such as laying a foundation for an exhibit. Wis. Stat. § 906.11(3) above.

The proposed rule is broadly consistent with the current Wisconsin and federal rule, although it draws from both sources. The federal styling is recommended because it is clearer, easier to read, and facilitates the use of federal case law when appropriate.

Proposed sub. (1) is consistent with the current Wisconsin rule. Subsection (2) retains Wisconsin’s rule of “wide-open” cross-examination, unlike the federal rule which limits cross-examination to whatever was discussed on direct examination (or impeachment), unless the judge orders otherwise. The current Wisconsin practice is a mainstay of trials and has produced no problems. A trial judge may, in her discretion, limit or restrict cross-examination. Wis. Stat. § 906.11.

Proposed sub. (3) permits the use of leading questions on direct examination when they “assist” in developing testimony. Leading questions are especially useful in laying foundations for all sorts of exhibits (photos, prior statements, documents) or opinions (lay or expert). The federal template imposed a “necessity” standard – “except as necessary to develop . . .” -- which is both too fussy and itself “unnecessary.” The “hostile” witness provision in proposed § 906.11(3)(b) applies in both civil and criminal cases.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 612 as modified
Wis. Stat. § 906.12: Writing used to refresh memory If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.	§ 906.12: Writing used to refresh a witness (1) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (a) while testifying; or (b) before testifying, ~~if the court decides that justice requires the party to have those options.~~ (2) Adverse Party's Options; Deleting Unrelated Matter. ~~Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, An~~ adverse party is entitled to have the writing produced ~~at the hearing~~, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. (3) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Judicial Council Comments:

- The proposed rule draws from both the current Wisconsin and federal rules.
- Federal Rule 612 provides the basic structure for the proposed rule.
- The proposed rule, however, retains the current Wisconsin feature that draws no distinction between writings used to refresh memory while the witness testifies or before he testifies. In either event, the writing is subject to disclosure.
- The term “hearing” in § 906.12 does not extend to depositions.
- The rule on refreshed memory is also subject to the rule of completeness, § 901.07.

Rule 612 is both a rule of procedure (discovery) and evidence. When a witness reviews a writing for purposes of refreshing his or her memory, the adverse party may demand that it be

produced for inspection, cross-examine the witness about it, and introduce any part that relates to the testimony. In 1974 Wisconsin adopted the original draft of proposed federal Rule 612, which did not distinguish between the use of a writing to refresh “before” or “while” the witness testified. The federal version was later amended during Congressional review to distinguish the two scenarios. As a result, in federal proceedings a writing used to refresh memory before the witness testified was subject to mandatory production only if the court found that “justice requires” its production, inspection, etc. Writings used to refresh while the witness testified were subject to automatic production – as occurs when any exhibit is displayed to a witness. “Unrelated” parts of a writing may be redacted as provided by the rule.

Current federal Rule 612 continues to distinguish between refreshed memory “before” and “while” the witness testifies. Often the real issue is the waiver of privilege that occurs when unwary counsel shows privileged documents (e.g., work product, lawyer-client communications) to a witness in preparation for testimony. Wisconsin’s use of the original rule – automatic production whether the writing was used to refresh before or while testifying – has been without incident or problems. It is strongly recommended that this feature remain.

The proposed rule tracks the current federal styling and eliminates the inapplicable reference to the Jencks Act while continuing to apply its mandatory production feature regardless of when the writing is shown to the witness to refresh his or her memory. (The term “writing” embraces both traditional hardcopy as well as electronic documents. See proposed § 901.01).

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 613 as modified
Wis. Stat. § 906.13: Prior statements of witnesses (1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination. (2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable: 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement. 2. The witness has not been excused from giving further testimony in the action. 3. The interests of justice otherwise require. (b) Paragraph (a) does not apply to admissions of a party-opponent as defined in s. 908.01 (4) (b).	§ 906.13: Witness’s prior statement (1) Showing or Disclosing the Statement During Examination. When examining a witness about the witness’s prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party’s attorney. (2) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. ~~Unless the court orders otherwise, extrinsic evidence of a witness’s prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.~~ Subdivision <u>(2)</u> does not apply to an opposing party’s statement under <u>s. 908.01(4)(b)</u>.

Judicial Council Comments:

- The proposed rule is consistent with Wisconsin practice and is substantively identical to the current Wisconsin rule, except that the proposed rule allows disclosure upon request with no further qualifier; the current Wisconsin rule speaks of disclosure “upon completion of that part of the examination.”
- The proposed rule gives judges discretion to forego the examination requirement when the interests of justice so require, as does the current rule.

It is proposed that the court adopt federal Rule 613, as modified, which is substantively identical to Wis. Stat. § 906.13 and consistent with Wisconsin practice since 1974. See *State v. Nelis*, 2007 WI 58, ¶¶31-34, 300 Wis.2d 415, 733 N.W. 2d 619 (especially the concurrence by Justice A.W. Bradley at ¶63). Unlike § 906.13, federal Rule 613 does not explicitly indicate that the prior statement may be written or oral, but it is submitted that this is so well understood that such language is unnecessary.

Proposed § 906.13 applies to all species of prior statement. Subs. (2) applies to only extrinsic evidence of prior inconsistent statements. Case law imposes a further requirement,

namely, that any extrinsic evidence regarding a prior inconsistent statement must relate to a non-collateral matter. This is, we think, a well-known requirement that has raised no problems in Wisconsin or federal litigation.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 614
Wis. Stat. § 906.14: Calling and interrogation of witnesses by judge (1) CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. (2) INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party. (3) OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.	§ 906.14: Court's calling or examining a witness (1) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness. (2) Examining. The court may examine a witness regardless of who calls the witness. (3) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 614.

Current federal Rule 614 is consistent with § 906.14 and the relatively few cases that have addressed issues arising under the rule (e.g., trial judges may examine witnesses but should refrain from advocacy for one side or the other). It is recommended that Wisconsin adopt Rule 614, especially in the interest of drawing on federal precedent when such issues are in play.

Proposed Rule
Retain current Wis. Stat. § 906.15
as modified

§ 906.15: Exclusion of witnesses

(1) At the request of a party, the judge or a circuit court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

(a) A party who is a natural person.

(b) An officer or employee of a party which is not a natural person designated as its representative by its attorney.

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(d) A victim, as defined in Wis. Const. § 9m(1), in a criminal case or in a delinquency proceeding under ch. 938, if the victim requests to attend all proceedings involving the case, as required by Wis. Const. § 9m(2)(e).

~~(d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact finding hearing for the juvenile.~~

(3) The judge or circuit court commissioner may direct that all excluded and non-excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

Judicial Council Comments:

- No change to § 906.15 is proposed except to add necessary language from Marsy's law in sub. (2)(d).

The Judicial Council recommends that the court retain current § 906.15 with modifications to sub. (2)(d) to reflect Marsy's law.

This change to § 906.15(2)(d) is appropriate following the April 2020 amendment to the Wisconsin Constitution known as the victims' rights amendment, which is found in Wis. Const. art. 1, § 9m. That amendment created a constitutional definition of "victim" for purposes of criminal cases and delinquency proceedings, and eliminated a prior constitutional provision permitting sequestration of a victim when "the trial court finds sequestration is necessary to a fair trial for the defendant." Wis. Const. art. 1, § 9m(6) states that the constitutional victims' rights provision was "not intended and may not be interpreted to supersede a defendant's federal constitutional rights." In deleting the reference in § 906.15(2)(d) to a fair trial, the Council

merely aligns the evidentiary rule with the state constitutional change. The Council takes no position on whether federal constitutional rights will impact the evidentiary rule. That issue is for the courts in particular cases.

Proposed Rule Retain current Wis. Stat. § 906.16
§ 906.16: Bias of witness For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

Judicial Council Comments:

- No change is proposed to § 906.16.

Wis. Stat. § 906.16 was created by the Wisconsin Supreme Court in 2017 based on a petition filed by the Judicial Council. It has created no ripples in the case law. No change is proposed or necessary.

Wis. Stat. Chapter 907: Evidence - Opinions and Expert Testimony

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 701 as modified
Wis. Stat. § 907.01: Opinion testimony by lay witnesses If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are all of the following: (1) Rationally based on the perception of the witness. (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. (3) Not based on scientific, technical, or other specialized knowledge within the scope of a witness under s. 907.02 (1).	§ 907.01: Opinion Testimony by Lay Witnesses If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of ~~Rule 702~~ <u>§ 907.02</u>.

Judicial Council Comments:

- The proposed rule adopts federal rule 701, which is substantively identical to the current Wisconsin rule.

The proposed rule, based on current federal Rule 701, is substantively the same as the current Wisconsin rule but with excess verbiage removed for clarity and succinctness. No substantive changes are intended.

Current Wisconsin Rule	Proposed Rule Retain Wis. Stat. § 907.02 as modified
Wis. Stat. § 907.02: Testimony by experts (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. (2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.	§ 907.02: Testimony by experts (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the proponent demonstrates to the court that it is more likely than not that the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness's opinion reflects a reliable application of the principles and methods to the facts of the case. (2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.

Judicial Council Comments:

- No substantive or stylistic changes are proposed to current § 907.02.

The current Wisconsin statute was revised by the legislature in 2026 at 2025 Wisconsin Act 92, effective date March 7, 2026. The Judicial Council is not recommending any changes to the current rule.

Proposed Rule Retain current Wis. Stat. § 907.03
§ 907.03: Bases of opinion testimony by experts The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Judicial Council Comments:

- No changes are recommended.

Current Wis. Stat. § 907.03 was revised by the legislature in 2011. No revisions are proposed. That said, the Supreme Court's recent decision in *Smith v. Arizona*, 602 U.S. ___, 144 S. Ct. 1785 (2024) drastically restricts and reshapes the government's use of rules like § 907.03 in criminal cases that implicate the Sixth Amendment's confrontation right.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 704 as modified
Wis. Stat. § 907.04: Opinion on ultimate issue Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.	§ 907.04: Opinion on an ultimate issue (1) In General — ~~Not Automatically Objectionable~~. An opinion is not objectionable just because it embraces an ultimate issue. (2) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 704.
- Proposed sub. (1) is substantively identical to the current Wisconsin rule. No substantive changes are involved. A new title is proposed.
- Proposed sub. (2) would be a new Wisconsin rule that draws on the current federal rule.

As to sub. (1), titles of rules are not part of the rule (Wis. Stat. § 990.001(6)) but the “not automatically objectionable” label is unhelpful, misleading and, well, objectionable because it could be affixed to every rule of evidence. The “in general” language is little better but does not cast a misleading shadow. Rule 704(a) is otherwise consistent with Wis. Stat. § 907.04.

It is also recommended that Wisconsin adopt sub. (2), which opens the library of federal case law on Rule 704(b), which was created in the 1980s to restrict the use of expert evidence in criminal cases involving “diminished capacity” and mental responsibility. Wisconsin case law had already trimmed excesses by both prosecutors and defenders in such cases. Case law also precludes any witness, including experts, from testifying about whether another witness’s testimony is truthful or accurate (the so-called “Haseltine rule”).

More troubling has been the advent of testimony by experienced police officers to prove the defendant’s mental state and conduct. Myriad cases reflect “police experts” who testify to opinions about a defendant’s intent in drug, gang, and sexual assault cases. Certainly there is no objection to police experts describing what they saw or found, etc., but their “specialized knowledge” predicated on many such investigations does not extend to mind reading (e.g., the drugs were possessed with an intent to deliver). Under existing rules, the parties slug this out using § 907.02 and § 904.03, or through ineffective assistance of counsel. Subsection (2) is far from perfect but offers some modicum of restraint.

Federal case law, however, poses no panacea. Recently, the Supreme Court took up the reach of Rule 704(b) in *Diaz v. United States*, 602 U.S. 526, 144 S. Ct. 1727 (2024). Diaz was caught with drugs stashed in her “boyfriend’s” car as she drove from Mexico into the United States. She claimed to be unaware of the hidden drugs. An experienced federal agent with no other involvement in the case testified that “most” drug “mules,” like Diaz, were aware of the drugs. Addressing only federal Rule 704(b), the Supreme Court found that the agent’s testimony

did not cross the line because he spoke only in terms of “most” drug traffickers and did not testify that Diaz herself “knew” or was otherwise aware. Justice Jackson, concurring, saw the Diaz case as a means by which defendants might offer background expert testimony in their own defense. The appellate posture of the case precluded the Court from addressing how Rule 702 applied to such experts and what standards of reliability policed their methods and data (assuming . . .).

Is Rule 704(b) a solution? Certainly not at present, but *Diaz* is not binding on Wisconsin courts and other, better interpretations of the rule are available. Regardless, the proposed rule is certainly better than the current rule, which offers no protection.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 705
Wis. Stat. § 907.05: Disclosure of facts or data underlying expert opinion The expert may testify in terms of opinion or inference and give the reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.	§ 907.05: Disclosing the facts or data underlying an expert's opinion Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 705.
- The proposed rule is substantively identical to the current Wisconsin rule, which was based on the original federal rule in the 1970s.

It is recommended that Wisconsin adopt the language of current federal Rule 705, which is substantively identical to § 907.05. The point of the rule is to free counsel from the onus of hypothetical questions, which purportedly required the disclosure of all facts and data relied upon by the expert in arriving at her opinions. (The onus was more a problem for poor lawyers than good ones.) Wisconsin case law led the nation in overthrowing the suzerainty of the hypothetical opinion rule years before the federal rules were proposed in the 1970s. See *Rabata v. Dohner*, 45 Wis.2d 111, 129, 172 N.W. 2d 409 (1969). The federal rule is clear, succinct, and consistent with current Wisconsin law.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 706 as modified
Wis. Stat. § 907.06: Court appointed experts (1) APPOINTMENT. The judge may on the judge's own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of the judge's own selection. An expert witness shall not be appointed by the judge unless the expert witness consents to act. A witness so appointed shall be informed of the witness's duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, if any; the witness's deposition may be taken by any party; and the witness may be called to testify by the judge or any party. The witness shall be subject to cross-examination by each party, including a party calling the expert witness as a witness. (2) COMPENSATION. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and cases involving just compensation under ch. 32. In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by s. 814.04 (2).	§ 907.06: Court-appointed expert witnesses (1) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. (2) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert: (a) must advise the parties of any findings the expert makes; (b) may be deposed by any party; (c) may be called to testify by the court or any party; and (d) may be cross-examined by any party, including the party that called the expert. (3) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows: (a) in a criminal case or in a civil case involving just compensation under <u>ch. 32 or the Fifth Amendment</u>, from any funds that are provided by law; and (b) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs <u>but without the limitation</u>

(3) DISCLOSURE OF APPOINTMENT. In the exercise of discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness. (4) PARTIES' EXPERTS OF OWN SELECTION. Nothing in this rule limits the parties in calling expert witnesses of their own selection. (5) APPOINTMENT IN CRIMINAL CASES. This section shall not apply to the appointment of experts as provided by s. 971.16.	<u>upon expert witness fees prescribed by s. 814.04 (2).</u> (4) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert. (5) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts. <u>(6) APPOINTMENT IN CRIMINAL CASES. This section shall not apply to the appointment of experts as provided by s. 971.16.</u>
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Judicial Council Comments:

- The proposed rule adopts current federal Rule 706 with modifications that conform to the current Wisconsin rule.

It is proposed that Wisconsin adopt current federal Rule 706 to better facilitate the use of federal case law when appropriate. Wisconsin case law is sparse because trial courts rarely appoint expert witnesses. The numbering of the Wisconsin statute has been slightly altered to reflect the split between the "appointment" and "role" provisions in the federal rule.

Proposed Rule Retain current Wis. Stat. § 907.07
§ 907.07: Reading of report by expert An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness. Before its use, a copy of the report shall be provided to the opponent.

Judicial Council Comments:

- No change is recommended.

This venerable Wisconsin rule has not created any stirs in the case law. It is unique. There is no federal equivalent. According to the 1974 Judicial Council Committee's note, § 907.07 is taken from Model Code of Evidence Rule 408 and accords with "the widespread practice favored by proponent and opponent [sic] of the expert's testimony."

Section 907.07 allows a report to be read by a witness who "made or joined" in making the report. In effect, it is a hearsay exception that often embraces multiple layers. Another way to think of it is as an adjunct to § 906.12, which allows a witness's memory to be refreshed by anything, including such reports. The witness's reading of the report is likely a cleaner, less disjointed presentation of her opinions and explanations than might otherwise occur if the witness was compelled to make frequent requests to "refresh" her memory. Concerns about canned testimony are compelling, yet is something that can be addressed through impeachment and, as needed, hearings outside the jury's presence.

Pretrial orders, discovery procedures, and, one hopes, professional courtesy will usually result in pretrial disclosure to the opponent. Nonetheless, § 907.07 compels its disclosure before the proponent may "use" the report at trial. Opposing counsel should insist on sufficient time to scrutinize the report for inadmissible statements of any stripe. Many such reports will contain multiple layers of hearsay, some of it otherwise inadmissible, from declarants who may very well not be called as witnesses. See Wis. Stat. § 907.03.

It is difficult to know how often this rule is invoked and used at trial. Regardless, it has produced no discernable problems in the case law since its creation in 1974.

Wis. Stat. Chapter 908: Evidence - Hearsay

Hearsay Definitions

Current Wisconsin Rule §§ 908.01(1)-(3)	Proposed Rule Adopts federal Rule 801(a)-(c) as modified
Wis. Stat. § 908.01 Definitions. The following definitions apply under this chapter: (1) Statement. A “statement” is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by the person as an assertion. (2) Declarant. A “declarant” is a person who makes a statement. (3) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.	§ 908.01. Definitions That Apply to This Chapter Article; Hearsay Exceptions for Prior Statements by Witnesses and Opposing Parties Exclusions from Hearsay The following definitions apply under this chapter: (1) Statement. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. (2) Declarant. “Declarant” means the person who made the statement. (3) Hearsay. “Hearsay” means a statement that: (a) the declarant does not make while testifying at the current trial or hearing; and (b) a party offers in evidence to prove the truth of the matter asserted in the statement.

Judicial Council Comments (the hearsay definitions, §§ 908.01(1)-(3)):

- The proposed definitions adopt present Fed. R. Evid. 801(a)-(c), which are consistent with Wisconsin law. No substantive changes are intended.
- The title to § 908.01 is modified to reflect that the proposed rule denominates the rules on prior statements and opposing party’s statements as “exceptions” rather than as “exclusions” from the hearsay rule.

The definition of “statement” in sub. (1) is substantively identical to the current Wisconsin rule. The key term “assertion” has been helpfully defined in the case law: Did the declarant intend to communicate a fact, event, or condition? *State v. Kutz*, 2003 WI App 205, ¶¶38-39, 267 Wis. 2d 531, 671 N.W.2d 660. No change is intended.

The definition of “declarant” in sub. (2) is identical to the current Wisconsin rule. Thus, machine-generated statements (e.g., a cellphone call log, a car’s speedometer reading, the time

from a wall clock) are not hearsay because they were not made by a human being. This is consistent with current case law, state and federal.

The definition of hearsay in sub. (3) is drawn from the current federal rule and is consistent with the current Wisconsin rule and practice. The definition of hearsay has two distinct facets. First, hearsay consists of “statements” made by the declarant other than while testifying in the current trial or hearing. Thus, any statement, oral or written, made by the declarant before taking the witness stand is covered by this definition. By adopting the current federal definition, courts and parties can more freely draw on federal case law when appropriate.

Second, a statement is hearsay only if the proponent is using it to prove the truth of the matter asserted in the statement. Statements used to prove a declarant’s state of mind (e.g., knowledge, intent), its effect on a listener (e.g., notice), or a verbal act (e.g., slander, conspiracy) are not used for their truth and hence are not hearsay. As before, opposing counsel must make a timely objection on hearsay grounds if there is any question about whether the statement is being used for its truth. Proponents may assert that they are not offering a statement for its truth but closer examination may reveal they are “mistaken” or obfuscating. This is especially true when examining expert witnesses where § 907.03 explicitly allows opinions based on “inadmissible” evidence. See *Smith v. Arizona*, 602 U.S. ___, 144 S. Ct. 1785, 1798, 219 L.Ed.2d 420 (2024) (wisely observing: “If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise?”).²

² *Arizona v. Smith* invoked the confrontation right of the Sixth Amendment. The Court had no occasion to address Fed. R. Evid. 703 or state equivalents. The same issues frequently arise in Wisconsin cases.

Prior Statements by Witnesses

Current Wisconsin Rule § 908.01(4)(a)	Proposed Rules New rules based on modified Wis. Stat. § 908.01(4)(a) and federal Rule 801(d)(1)
§ 908.01, con't. (4) Statements which are not hearsay. A statement is not hearsay if: (a) <i>Prior statement by witness.</i> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony, or 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or 3. One of identification of a person made soon after perceiving the person; or	§ 908.01, con't (4) Hearsay Exceptions: Prior Statements by Witnesses and Party Opponents (a) Prior Statement by Witness. A declarant's own statement is not excluded by the rule against hearsay, if (1) the declarant is testifying as a witness at the current trial or hearing, (2) the declarant is subject to cross-examination about the statement, and (3) the statement falls within one of the following categories: 1. Prior Inconsistent Statements. The statement is inconsistent with the declarant's testimony; or 2. Prior Consistent Statements. The statement is consistent with the declarant's testimony and is offered: a. to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or b. to rehabilitate the declarant's credibility as a witness when attacked on another ground; or 3. Statements of Identification. The statement identifies a person as someone the declarant perceived earlier; or 4. Recorded recollection. A written or recorded statement that: a. is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; b. was made or adopted by the witness when the matter was fresh in the witness's memory; and

	c. accurately reflects the witness's knowledge. <u>The writing or record may be received into the record as an exhibit when offered by either party.</u>
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Judicial Council Comments (prior statements by witnesses):

- The proposed rule is an amalgam of current Fed. R. Evid. 801(d)(1) with the addition of the past recollection recorded exception, which is currently at Wis. Stat. § 908.03(5).
- The introductory language that a declarant's own statement "is not excluded by the rule against hearsay" tracks the same language used in Fed. R. Evid. 803 and 804(b) as well as the current Wisconsin equivalents to introduce those hearsay exceptions. See Wis. Stat. § 908.03, § 908.045, and proposed § 908.07 (introductory phrases).
- It explicitly recasts the rules as hearsay "exceptions" rather than as "exclusions" that are "not hearsay," the conceit still followed by the federal rules. Thus, the hearsay exceptions are grouped in § 908.01(4), § 908.03, § 908.04, and proposed § 908.07.
- The recasting of these rules as "exceptions" has no effect on how they may be used as evidence at trial. Put differently, the change is conceptual, not substantive in terms of proof. The proposed rule eliminates the oddity of labelling the prior statements as "not hearsay" but then permitting their use for the truth of the matters asserted.

- The proposed rule adds “past recollection recorded” to the exceptions for prior statements by witnesses, as it also requires that the declarant testify as a witness – unlike any other of the § 908.03 exceptions.
- The proposed rules carry captions describing the exceptions (e.g., “Prior Inconsistent Statements”) for both the readers’ convenience and to conform with the exceptions in § 908.03 and § 908.045.

The proposed rule presents an important conceptual change to the hearsay rule aimed at dispelling long-standing confusion. It involves no substantive change in practice. Put differently, the same statements admissible under current law are also admissible under the proposed rule. The change is not academic. The current rule has created unwarranted confusion.

In 1974, the current Wisconsin rule adopted the federal approach that distinguishes among “exemptions” (§ 908.01(4)) and “exceptions” (§§ 908.03 and 908.045) to the hearsay rule. The distinction was conceptual yet in a way that was chimerical and even capricious: “exemptions” were justified by adversarial imperatives (e.g., specified prior statements by witnesses, a party opponent’s “admissions”) while “exceptions” were deemed to be “reliable” forms of hearsay. Under either heading the statement was admissible to prove its truth or any other relevant proposition. Labelling rules as exemptions or exceptions was, at bottom, arbitrary and inconsistent (e.g., past recollection recorded, § 908.03(5)).

A more serious conceptual problem is that the current rule labels the exemptions as “not hearsay” even though they are being used for their truth (i.e., as “hearsay”!). Wis. Stat. § 908.01(4). This convention sparked confusion from the start in the mid-1970s. A number of states that adopted the federal rules have already jettisoned the distinction. The federal Advisory Committee also proposed to jettison it back in 2010, but support fell short. Indeed, the proposed change in the Wisconsin rule is taken from one of the proposed federal alternatives.³

The “not excluded” language is consistent with current § 908.03 and § 908.045. It also deletes the unnecessarily confusing “not hearsay” tag. The “not hearsay” label made no sense in 1974 and no case we are aware of, state or federal, had defended or justified it.⁴ For those reasons, the current “exemptions” are now explicitly labelled “exceptions” in the proposed rule to better make the point.

The proposal also retains the “exclusions” in their current location, § 908.01(4). Moving the “prior statement” and party opponent rules into either § 908.03 or § 908.045 is unnecessary, certain to breed confusion, and too disruptive to electronic searches drawing on nearly 50 years of case law.

Turning to the substance of the rules, there are four exceptions. The much-used exception for prior inconsistent statements is unchanged. Indeed, the corresponding federal rules has been revised to take the very same approach toward prior inconsistent statements (effective December 1, 2026). In short, the Wisconsin rule (and the new federal version) permit a witness’s prior inconsistent statement to be used to impeach her testimony, to prove the truth of the matter asserted (hearsay), or for both purposes. The proposed exception for prior consistent statements draws from the current federal rule, which helpfully covers both statements used to rebut improper motives and those used to rehabilitate credibility “when attacked on another ground” (e.g., bad memory). Third, it retains the rule governing prior statements of identification.

The fourth rule relocates the longstanding exception for past recollection recorded from § 908.03(5) to § 908.01(4). Its current placement in § 908.03(5) -- which followed the federal conceit -- never made sense as none of the other exceptions in § 908.03 required the declarant’s presence as a witness. The proposed placement tidies things up and is being

³ Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules, September 16, 2010, p. 3 (setting forth a “minimalist alternative”) (available online).

⁴ Current Fed. R. Evid. 801 uses the phrase “exclusions” in its title (“Exclusions from Hearsay”) but injects the noxious “not hearsay” phrase into the introduction to Rule 801(d): “**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:”

successfully used in other jurisdiction as well. The substance of the proposed rule is identical to current Wisconsin law and the federal rule. Unlike the federal rule, however, current Wisconsin practice allows the written or recorded statement to be admitted as an exhibit or read into the record. The proposed rule continues that Wisconsin practice. (The federal rule only permits the writing to be read into the record.) Note: the gap in § 908.03 created by this move can be replaced by the phrase “Transferred to s. 908.01(4)(a)(4)” or some such in order avoid renumbering the remaining rules in § 908.03.

Statements by a Party Opponent

Current Wisconsin Rule § 908.01(4)(b)	Proposed Rule New rules based on modified Wis. Stat. § 908.01(4)(b) and federal Rule 801(d)(2)
§ 908.01(4), con't (b) Admission by party opponent. The statement is offered against a party and is: 1. The party's own statement, in either the party's individual or a representative capacity, or 2. A statement of which the party has manifested the party's adoption or belief in its truth, or 3. A statement by a person authorized by the party to make a statement concerning the subject, or 4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or 5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.	§ 908.01 (4) (b). Hearsay exceptions for statements by an opposing party or representative. A statement is not excluded by the rule against hearsay if it is offered against an opposing party and has been made under any of the following circumstances: 1. Party's own statement. The statement was made by the party, whether on the party's own behalf or on behalf of another person or entity. 2. Party's adopted statement. The statement is one the party manifested that it adopted or believed to be true. 3. Party-authorized statement. The statement was made by a person whom the party authorized to make a statement on the subject. 4. Statement by Party's Agent or employee. The statement was made by the party's agent or employee on a matter within the scope of that relationship and while it existed. 5. Statement by Party's Coconspirator. The statement was made by the party's coconspirator during and in furtherance of the conspiracy. 6. Derivative Statements. If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

	The statement admitted under sub. (b) must be considered toward, but does not by itself establish, the declarant's authority under sub.(4)(b)3; the existence or scope of the relationship under sub.(4)(b)4; or the existence of the conspiracy or participation in it under sub. (4)(b)5.
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Judicial Council Comments (statements by opposing parties):

- The proposed rule is largely current federal Rule 801(d)(2) with some stylistic variations to promote clarity.
- It is consistent with the current Wisconsin rule, which in turn was based on the original federal rule.
- The proposed rule on “derivative statements,” § 908.01(4)(b)6, is found in current federal Rule 801(d)(2) (last paragraph).

The proposed rules for statements by party opponents are drawn from the current federal rules. They pose no substantive change in Wisconsin law. Like § 908.01(4)(a), it also begins with the phrase “is not excluded by the rule against hearsay” as does the other hearsay exceptions found in § 908.03, § 908.045 and proposed § 908.07. The six statements by party opponents are also deemed to be exceptions to the hearsay rule, as are the preceding four rules for prior statements by witnesses. In short, such statements are admissible to prove their truth or for any relevant purpose, including attacking or supporting a witness’s credibility.

Although the rule on “derivative statements” is new, it is drawn from the federal rule and consistent with current practice. Thus, prior Wisconsin cases as well as federal case law are available in applying these rules.

The federal restyling of 2011 deleted the word “admission” that appears in the current Wisconsin rule because it connoted a broader reach than the term “statement.” It is recommended to follow the federal version, with minor wording changes for clarity. Federal case law is abundant and will be helpful. The rule’s title is new and accurately descriptive: categories for a “party’s own statement” and an “adopted statement” are in fact a party’s own statement; authorized person, agent/employee, and co-conspirators are actual or constructive representatives of the party. Beginning each rule with the phrase “a statement” or “the statement” brings these rules into conformity with the wording of the exceptions, e.g., Wis. Stat. § 908.03.

Except as noted above, the wording follows the federal rules. The anti-bootstrapping rule in sub.(b) is incorporated in the interest of uniformity. Predictably, it has not proved to be much of a hurdle to admissibility regardless and will not disrupt current Wisconsin practice.

Proposed Rule Retains current Wis. Stat. § 908.02
§ 908.02 Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules adopted by the supreme court or by statute.

Judicial Council Comments:

- No change is proposed.

It is recommended that no changes be made to the rule. The corresponding federal rule, below, offers nothing better:

Rule 802: The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise.

- a federal statute;
 - these rules;
- or other rules prescribed by the Supreme Court.

Current Wisconsin Rule 908.03(1)-(5)	Proposed Rules Adopt federal Rules 803(1) through 803(5) as modified
Wis. Stat. § 908.03: Hearsay exceptions; availability of declarant immaterial The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. (2) EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. (3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. (5) RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.	§ 908.03: <u>Hearsay Exceptions to the Rule Against Hearsay</u>— Regardless of the Declarant's Availability as a Witness The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: (1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. (4) Statement Made for Medical Diagnosis or Treatment. A statement that: (a) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (b) describes medical history; past or present symptoms or sensations; their inception; or their general cause. (5) [Recorded recollection.] <i>Transferred to s. 908.01(4)(a)4.</i>

Judicial Council Comment (Proposed §§ 908.03(1)-(5)):

- The proposed rules adopt the wording of the current federal rules, as explained below. No substantive changes are proposed.

Neither the revised title to § 908.03 nor proposed rules §§ 908.03(1) through (4) work any substantive change to Wisconsin law. The revised title eliminates the outmoded term “immaterial” and emphasizes that none of the proposed s. 908.03 exceptions require the declarant to testify. (Note: The sole exception – one never adequately defended – was past recollection recorded, § 908.03(5), which the proposal now nestles among the other exceptions for prior statements by witnesses – where it always belonged.)

Proposed exceptions § 908.03(1) through (4) adopt the wording of the corresponding federal rules which in turn were substantively identical to the current Wisconsin rules. In this way the courts can rely on prior Wisconsin and federal case law when helpful.

To be noted, the adjective “medical” in current § 908.03(4) has been broadly interpreted by Wisconsin case law to embrace health care providers who are not, strictly speaking, practicing “medicine.” No change is intended.

Current Wisconsin Rule §§ 908.03(6) and (6m)	Proposed Rules Modified federal Rule 803(6) and Wis. Stat. § 908.03(6)
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.	(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if: (a) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (b) the record was kept in the course of a regularly conducted activity ~~of a business, organization, occupation, or calling, whether or not for profit;~~ (c) making the record was a regular practice of that activity; and (d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with ~~Rules 902(11) or (12)~~ <u>§§ 909.02(11) or (12)</u> or with a statute permitting certification. (e) <u>A record meeting the criteria of sub. (a) through (d) may be excluded if the opponent shows that the source of information or other circumstances indicate a lack of the record's trustworthiness.</u>

Judicial Council Comment (§ 908.03(6)):

- The proposed rule is a hybrid of both the current federal Rule 803(6) (below) and the current Wisconsin rule.
- No change in substance is intended.

The proposal recommends the adoption of a hybrid of the current federal and Wisconsin versions. The proposed version follows the federal use of the word “record” to include all types of records without attempting to enumerate them unnecessarily. For the same reason, it follows the Wisconsin version by omitting the federal rule’s enumeration of types of regular activities. It adds the substance of the federal revision clarifying that the burden of proving “lack of trustworthiness” is on the objecting party, rewords that to eliminate the awkward “does not show” as an affirmative element, and eliminates some excess verbiage in the federal version that is absent from the Wisconsin version. For convenience, the current federal Rule 803(6) appears below.

All declarants involved in record keeping under this rule must be under a business duty to accurately observe and report. Wisconsin case law is consistent. See also Wis. Stat. § 908.03(6) Judicial Council Committee’s Note (discussing Wisconsin case law pre-1974).

Current Fed. R. Evid. 803(6)

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Proposed Rule
Retain Wis. Stat. § 908.03(6m)

(6m) PATIENT HEALTH CARE RECORDS. (a) *Definition.* In this subsection:

1. “Health care provider” has the meanings given in [ss. 146.81\(1\)](#) and [655.001\(8\)](#).
2. “Patient health care records” has the meaning given in [s. 146.81\(4\)](#).

(b) *Authentication witness unnecessary.* A custodian or other qualified witness required by sub. (6) is unnecessary if the party who intends to offer patient health care records into evidence at a trial or hearing does one of the following at least 40 days before the trial or hearing:

1. Serves upon all appearing parties an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian.
2. Notifies all appearing parties that an accurate, legible and complete duplicate of the patient health care records for a stated period certified by the record custodian is available for inspection and copying during reasonable business hours at a specified location within the county in which the trial or hearing will be held.

(bm) *Presumption.* Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient. Any party attempting to rebut the presumption of the reasonable value of the health care services provided may not present evidence of payments made or benefits conferred by collateral sources.

(c) *Subpoena limitations.* Patient health care records are subject to subpoena only if one of the following conditions exists:

1. The health care provider is a party to the action.
2. The subpoena is authorized by an ex parte order of a judge for cause shown and upon terms.
3. If upon a properly authorized request of an attorney, the health care provider refuses, fails, or neglects to supply within 2 business days a legible certified duplicate of its records for the fees under [s. 146.83\(1f\)](#) or [\(3f\)](#), whichever is applicable.

Judicial Council Comment:

- No change is proposed.

This is a rule of long-standing that has worked well. No change is recommended.

Current Wisconsin Rule § 908.03(7)	Proposed Rule Adopts federal Rule 803(7) as modified
(7) ABSENCE OF ENTRY IN RECORDS OF REGULARLY CONDUCTED ACTIVITY. Evidence that a matter is not included in the memoranda, reports, records or data compilations, in any form, of a regularly conducted activity, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.	(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in <u>subs. (6)</u> ~~paragraph (6)~~ if: (a) the evidence is admitted to prove that the matter did not occur or exist; (b) a record was regularly kept for a matter of that kind; and (c) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

Judicial Council Comment:

- The proposed rule adopts the language of current federal Rule 803(7). No substantive change is intended.

The proposed rule is drawn from the current federal rule which is also consistent with the seldom used Wisconsin rule. The absence of state case law and the ability to draw on federal precedent when helpful also supports the proposal.

Current Wisconsin Rule § 908.03(8)	Proposed Rule Adopts federal Rule 803(8)
(8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	(8) Public Records. A record or statement of a public office if: (a) it sets out: 1. the office's activities; 2. a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or 3. in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (b) the opponent does not show that the source of information or other circumstances indicate a lack of the record's trustworthiness.

Judicial Council Comments:

- The proposed rule adopts the language of current federal Rule 803(8), which is substantively the same as the current Wisconsin rule.

The proposed rule, like the present Wisconsin rule, recognizes three broad categories of public records. First, those records that set forth the office's activities. Second, matters observed by public officials while under a legal duty to report. Third, "factual findings" that arise from an investigation authorized by law. Cf. Wis. Stat. § 346.73 (precluding the use of traffic accident reports as "evidence.") The Wisconsin enumeration of types of records has been reduced to conform to the federal version.

This second provision, § 908.03(8)(a)2, however, works a change in Wisconsin law by excluding such reports in criminal cases when the matter was observed by law-enforcement personnel regardless of whether it is offered by the prosecution or the defense. An earlier version of this restriction was imposed by Congress in the 1970s, but only after Wisconsin had adopted the original proposed federal Rule 803(8) which contained no such language. Case law does not suggest that this has made much of any difference. Suffice to say, the government's use of such hearsay is more restrictively limited by the Sixth Amendment confrontation right, so this change will not impact prosecutors to any appreciable extent. As for the defense, nothing in the federal case law remotely suggests that it has been disadvantaged in any way. For example, adept lawyers will offer the very same report as a record of a regularly conducted activity under § 908.03(6) or any other exception.

As for the third category, its limitation to civil cases or the use of an investigative report against the government in a criminal case works no change in the law.

Finally, consistent with proposed § 908.03(6), the burden is on the opponent to show that a record is untrustworthy.

Current Wisconsin Rules Wis. Stat. §§ 908.03(9) and (10)	Proposed Rules Adopts federal Rules 803(9) and (10) as modified
(9) RECORDS OF VITAL STATISTICS. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law. (10) ABSENCE OF PUBLIC RECORD OR ENTRY. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with s. 909.02, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.	(9) Public Records of Vital Statistics. A record of a birth, <u>fetal death</u>, death, marriage, <u>or domestic partnership</u>, if reported to a public office in accordance with a legal duty. (10) Absence of a Public Record. Testimony--or a certification under ~~Rule 902~~ sec. 909.02--that a diligent search failed to disclose a public record or statement if ~~(A)~~ the testimony or certification is admitted to prove that (a) the record or statement does not exist; or (b) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind. ~~(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or the objection~~

Judicial Council Comments:

- Proposed Rules § 908.03(9) and § 908.03(10) largely adopt the corresponding federal rules, which are substantively identical to the current Wisconsin rules.
- Added are references to a fetal death and domestic partnerships,

The proposed rules represent the current federal rules as modified. Both proposals are also consistent with current Wisconsin law.

Proposed § 908.03(10) omits the criminal case provision in Fed. R. Evid. 803(10)(B). The language is unnecessary as prosecutors' use of such records is governed by the confrontation right where the record is testimonial hearsay. Moreover, trial courts can effectively use scheduling orders to regulate the use of this evidence.

Current Wisconsin Rules Wis. Stat. §§ 908.03(11)-(13)	Proposed Rules Adopts federal Rules 803(11)-13 as modified
(11) RECORDS OF RELIGIOUS ORGANIZATIONS. Statements of births, marriages, divorces, deaths, whether a child is marital or nonmarital, ancestry, relationship by blood, marriage or adoption, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. (12) MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter. (13) FAMILY RECORDS. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.	(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, <u>domestic partnership</u>, divorce, death, relationship by blood, <u>adoption</u>, <u>domestic partnership</u> or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization. (12) Certificates of Marriage, <u>Domestic Partnership</u>, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate: (a) made by a person who is authorized by a religious organization or by law to perform the act certified; (b) attesting that the person performed a marriage, <u>domestic partnership</u>, or similar ceremony or administered a sacrament; and (c) purporting to have been issued at the time of the act or within a reasonable time after it. (13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

Judicial Council Comments:

- The proposed rules contain the language of current federal Rule 803(11), (12), and (13), which are substantively identical to the current Wisconsin rules.
- References to “domestic partnerships” and “adoption” are added where applicable.

The proposed rules adopt the language of the corresponding federal rules. Fittingly, the words “adoption” and domestic partnership are added to Rule 803(11). The proposals work no substantive change to Wisconsin law.

Current Wisconsin Rules Wis. Stat. §§ 908.03(14) – (17)	Proposed Rule Adopts federal rules 803(14)-(17)
(14) RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office. (15) STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. (16) STATEMENTS IN ANCIENT DOCUMENTS. Statements in a document in existence 20 years or more whose authenticity is established. (17) MARKET REPORTS, COMMERCIAL PUBLICATIONS. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.	(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if: (a) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; (b) the record is kept in a public office; and (c) a statute authorizes recording documents of that kind in that office. (15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document’s purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document. (16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established. (17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

Judicial Council Comments:

- Proposed § 908.03(16) (ancient documents) adopts the language of current federal Rule 803(16), which is a dramatic departure from the current rule (explained below).
- Proposed rules § 908.03(14), (15), and (17) adopt the language of the current federal rules.

The proposals adopt current federal Rules 803(14), 803(15), and 803(17). They differ only in styling from the current Wisconsin rules. The proposed rules work no substantive change with one important exception.

A major revision is proposed for “ancient documents.” Suffice to say, the ancient documents exception never contemplated the internet when the Wisconsin rules were first adopted in 1974. Current Wis. Stat. § 908.03(16) imposes a rolling 20-year timeline, which was reasonable in the age of paper and punch-card computing. It is strongly recommended that Wisconsin adopt the wording of current federal Rule 803(16) which imposes a hard date of January 1, 1998 (twenty years from the time the federal rule became effective). This is sound public policy, particularly in light of AI and myriad issues with the reliability of internet information. It also allows Wisconsin courts to draw on federal case law when helpful. To be clear, internet information post January 1998 is not deemed inadmissible; rather, the proponent must seek another pathway to admissibility.

**Proposed Rule
Retains Wis. Stat. § 908.03(18)
as modified**

(18) LEARNED TREATISES. A published treatise, periodical or pamphlet ~~on a subject of history, science or art~~ is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession as an expert in the subject or the publication is recognized as a reliable authority on the subject.

(a) No published treatise, periodical or pamphlet ~~constituting a reliable authority on a subject of history, science or art~~ may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(b) No rebutting published treatise, periodical or pamphlet ~~constituting a reliable authority on a subject of history, science or art~~ shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

Judicial Council Comments:

- The proposed rule is a revision of current § 908.03(18).
- It retains the pretrial notice requirements found in the existing rule.

The proposed rule adheres to the substance of the current Wisconsin rule but deletes the unhelpfully broad delineation that limits the subject matter ("history, science, or art"). These terms in the current rule were intended to broaden the rule but are no longer necessary or helpful where the library has become the internet. Reliability may be shown by either qualifying the author as an expert in the field or by showing the publication is regarded as a reliable authority. The Evidence and Civil Procedure Committee pointed to the "PDR" as an example of one such "treatise" that is commonly used in litigation as well as medical practice.

It is often difficult to identify a particular author of a given chapter or section but the overall indicia of reliability support admission of those parts of the work. As the proposal allows the foundation be shown through the author's expertise or the publication's status as a reliable authority, it changes Wisconsin law. See *Ansani v. Cascade Mountain, Inc.*, 223 Wis. 2d 39, 51 588 N.W.2d 321, 326 (Ct. App. 1998) (claim for injuries suffered in a skiing accident; parts of an article on the effects of alcohol were erroneously admitted during cross-examination of an expert on alcohol ingestion, although the error was harmless: the journal itself was "widely recognized and from

that the court assumed the Article was reliable” yet the rule “specifically requires that the writer of a treatise or an article be recognized as an expert in the field. The status of the publication itself is not sufficient to establish that the writer of an article included therein is reliable.”).

Finally, the application of any rule requires diligence by counsel. A failure to object may result in flagrant violations of a rule. See *State v. Molde*, 2025 WI 21, ¶¶18, ¶¶21 (filed 13 June 2025) (unanimous) (no error in admitting testimony by pediatrician that only one percent of reported child sexual abuse are false but who did not take the “extra step” of “actually opining on the truthfulness of the complainant,” which is proscribed by the Haseltine case). Interesting is that the pediatrician testified to the having read some “studies” supporting her “one percent” opinion but did not “know the names of them off the top of my head.” ¶4 Since opposing counsel did not object to this testimony, there was no error (or, apparently, plain error?). The *Molde* opinion suggests that objections may have been appropriate under § 904.03 and § 907.02. One can add to that list § 908.03(18).

The proposed rule retains the current features of the Wisconsin rule, which permits authentication through judicial notice or by expert testimony. The hallmark of the Wisconsin rule is that, unlike the federal rule, it is not necessary that the “treatise” be accompanied by expert testimony, the so-called “expert chaperone.” Safeguarding against abuses, the trial judge has the discretionary power to control both the mode and order of admitting evidence as well as guard against unfairness and confusion. Finally, the proposed rule, like the current rule, permits the writing itself to be admitted into evidence. Only pertinent parts of a treatise should be introduced. See Wis. Stat. § 904.03 and § 906.11.

Current Wisconsin Rules §§ 908.03(19) and (20) and (21)	Proposed Rules Adopts federal Rules 803(19)-(21) as modified
(19) REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY. Reputation among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of this personal or family history. (20) REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located. 21) REPUTATION AS TO CHARACTER. Reputation of a person’s character among the person’s associates or in the community.	(19) Reputation Concerning Personal or Family History. A reputation among a person’s family by blood, adoption, <u>domestic partnership</u>, or marriage—or among a person’s associates or in the community—concerning the person’s birth, adoption, legitimacy, ancestry, marriage, <u>domestic partnership</u>, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history. (20) Reputation Concerning Boundaries or General History. A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation. (21) Reputation Concerning Character. A reputation among a person’s associates or in the community concerning the person’s character.

Judicial Council Comment:

- Proposed §§ 908.03(19), (20), and (21) adopt the language of the current corresponding federal rules.
- No substantive changes are proposed, other than to include “domestic partnership” in sub. (19).

The proposed rules all concern the use of “reputation” (i.e., “gossip”) as sources of proof. They are identical to current federal Rules 803(19) through 803(21), which are substantively identical to the current Wisconsin rules. The term “domestic partnership” has been added after “marriage” in § 908.03(19). No other substantive changes are implicated.

Current Wisconsin Rules Wis. Stat. §§ 908.03(22) and (23)	Proposed Rules Retain Wis. Stat. § 908.03(22) as modified Adopts federal Rule 803(23) as modified
(22) JUDGMENT OF PREVIOUS CONVICTION. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of no contest, adjudging a person guilty of a felony as defined in ss. 939.60 and 939.62(3)(b), to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. (23) JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction for a felony as defined in ss. 939.60 and 939.62(3)(b), if the judgment was entered after a trial or guilty plea, but not a no contest plea, and if the evidence is admitted to prove any fact essential to the judgment. <u>However, when offered by the state against a criminal defendant for a purpose other than impeachment, only that defendant's own conviction comes within this rule.</u> The pendency of an appeal may be shown but does not affect admissibility. (23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter: (a) was essential to the judgment; and (b) could be proved by evidence of reputation.

Judicial Council Comments:

- The highlights in proposed § 908.03(22) relate to changes in the wording of the current rule and do not reflect any substantive changes.
- Proposed § 908.03(23) is the corresponding federal rule with a few stylistic changes.

These two rules govern the use of “judgments” as a source of proof under the hearsay rules. Proposed § 908.03(22) is effectively the current rule with stylistic revisions. The proposed rule on judgments affecting personal, family, and general history adopts current federal Rule 803(23), which in turn is substantively identical to the current Wisconsin rule. The differences are stylistic, not substantive.

Current Wisconsin Rule § 908.03(24)	Proposed Rule Transfer to proposed § 908.07
(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.	§ 908.03(24). <i>Transferred to § 908.07.</i>

Judicial Council Comments:

- See below; the recommendation is that this rule be transferred to a new § 908.07.

In 1974 the Wisconsin rules tracked the proposed federal evidence rules by creating two identical provisions for the “residual exceptions” in § 908.03(24) and § 908.045(6). It is proposed that a single identical rule replace both, and that it appear in new § 908.07, as proposed. This change tracks the current federal approach.

Current Wisconsin Rule § 908.04	Proposed Rule Adopts federal Rule 804(a) as modified
Wis. Stat. § 908.04: Hearsay exceptions; declarant unavailable; definition of unavailability (1) “Unavailability as a witness” includes situations in which the declarant: (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or (b) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the judge to do so; or (c) Testifies to a lack of memory of the subject matter of the declarant’s statement; or (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (e) Is absent from the hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance by process or other reasonable means. (2) A declarant is not unavailable as a witness if the declarant’s exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant’s statement for the	§ 908.04: Hearsay exceptions; declarant unavailable; definitions of unavailability. (1) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: (a) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies; (b) refuses to testify about the subject matter despite a court order to do so; (c) testifies to not remembering the subject matter; (d) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (e) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure the declarant’s attendance[.] ~~(A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or~~ ~~(B) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).~~ (2) <u>Subsec. (1)</u> does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from attending or testifying.

purpose of preventing the witness from attending or testifying.	
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Judicial Council Comment:

- The proposed rules are based on the current corresponding federal rules, which are generally consistent with the current Wisconsin rules.
- The proposed rule retains the title to the current Wisconsin rule, § 908.04.

The proposed rule adopts the federal restyling, making the language more concise and clear. The proposed rule is consistent with the current Wisconsin and the federal rules. An unavailability showing fails if the statement's proponent brought about the declarant's unavailability.

Not included from the federal rule are Rule 804(a)(A) and (B). These provisions were added to the original Advisory Committee Draft by the Senate Judiciary Committee "to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable" for certain of the federal exceptions, including those for dying declarations, statements against interest, and statement of personal or family history in federal Rule 804(b). Advisory Committee Note. Nothing in Wisconsin practice since 1974 suggests the need for the newer federal language.

Current Wisconsin Rule § 908.045(1)	Proposed Rule Adopts federal Rule 804(b)(1) as modified
Wis. Stat. § 908.045 Hearsay exceptions; declarant unavailable. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.	§ 908.045: <u>Hearsay Exceptions to the Rule Against Hearsay</u>--When the Declarant is Unavailable as a Witness. The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: (1) Former Testimony. Testimony that: (a) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (b) is now offered against a party who had--or, ~~in a civil case,~~ whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Judicial Council Comment (former testimony):

- The proposed rule adopts the language of current federal Rule 804(b)(1) and is consistent with current Wisconsin law.

The current federal and Wisconsin rules are substantively identical. The proposed rule adopts the federal restyling but eliminates the unnecessary phrase “in a civil case.”

Current Wisconsin Rule § 908.045(2)	Proposed Rule Withdraws Wis. Stat. § 908.045(2)
(2) Statement of recent perception. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.	(2). Statement of recent perception. [Withdrawn].

Judicial Council Comment (recent perception):

- It is recommended that this hearsay exception be withdrawn for the reasons indicated below.

It is strongly recommended that this rule be withdrawn. Although part of the then “proposed Federal Rules of Evidence” in 1974, it was never approved by the US Supreme Court and thus has never been applied in federal courts. Most other states eschewed it as well when adopting their versions of the federal evidence rules. Wisconsin cases have, understandably, struggled with a rule that is exceptionally difficult to apply. E.g., *Kluever by Gonring v. Evangelical Reformed Immanuel Cong.*, 143 Wis. 2d 806, 814, 422 N.W.2d 874,877 (Ct. App. 1988). Moreover, statements of “recent perception” are adequately covered under current rules by § 908.03(1) (statements of recent perception), § 908.03(2) (excited utterances), and § 908.03(3) (then existing mental, emotional, or physical condition). This rule is neither needed nor helpful.

Should the court withdraw this rule it is suggested that the subsection number remain but with the note “withdrawn.”

Current Wisconsin Rule Dying Declarations § 908.045(3)	Proposed Rule Modified federal Rule 804(b)(2)
(3) STATEMENT UNDER BELIEF OF IMPENDING DEATH. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.	§ 908.045: ~~Hearsay Exceptions to the Rule Against Hearsay~~--When the Declarant is Unavailable as a Witness. (Continued) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: ... (3) Statement Under the Belief of Imminent Death. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Judicial Council Comment (dying declaration):

- The proposed rule is largely the current federal rule which changes to accommodate current Wisconsin law.
- Note that the federal Rule carries the number 804(b)(2) while the Wisconsin version is subs. (3) – a discrepancy necessitated by Wisconsin's adoption of the recent perception exception in 1974.

Drawing from the current federal rule, the proposed language restyles the substance of the Wisconsin rule in a clear, succinct manner while retaining its original content. Unlike the current federal rule, the proposed rule is not restricted to civil cases and homicide prosecutions. Current federal Rule 804(b)(2) states:

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
...

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

The Wisconsin Supreme Court rejected the homicide limitation when it first adopted the rule in 1974. It was a wise decision. The case law reveals no problems with its application in civil or criminal cases.

Current Wisconsin Rule Wis. Stat. § 908.045(4)	Proposed Rule Adopts federal Rule 804(b)(3) as modified
(4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant[s] pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant[s] position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.	§ 908.045: <u>Hearsay Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness.</u> (Continued) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: ... (4) Statement Against Interest. A statement that: (a) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and (b) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

Judicial Council Comments:

- The proposed language is based on current federal Rule 804(b)(3).
- The proposed rule eliminates the current “against interest” category for statements that make the declarant “an object of hatred, ridicule, or disgrace.”
- In criminal cases, any corroboration indicating the statement's trustworthiness is sufficient, as is currently provided by Wisconsin law; the proposed rule eliminates the federal standard of “clear” corroboration.

Adoption of current Fed. R. Evid. 804(b)(3) will work several changes to Wisconsin law, none of them remarkable or dramatic but changes nonetheless. The “interests” at the heart of the rule mostly remain the same, namely, statements against a declarant's pecuniary or proprietary interest, or which invalidate a declarant's claim or which expose the declarant to civil or criminal liability.

The proposed rule, however, eliminates statements that “make the declarant an object of hatred, ridicule, or disgrace” as in the current Wisconsin rule. The “social disgrace” interests were in the proposed federal rule at the time Wisconsin adopted the rules in 1974 but this provision was later deleted from the Federal Rules of Evidence in 1975. In short, the “social

disgrace” language was not a “Wisconsin idea.” There is no federal case law to draw from and Wisconsin courts have struggled with this provision. Compare *State v. Stevens*, 171 Wis. 2d 106, 490 N.W.2d 753, 759 (Ct. App. 1992) with *State v. Murillo*, 2001 Wis. App 11, ¶¶17-18. 240 Wis. 2d 666, 623 N.W.2d 187. It seems to arise infrequently in the cases, and where it does it may well fall within some of the other interests enumerated in the rule. E.g., *Muller v. State*, 94 Wis. 2d 450, 463, 289 N.W.2d 570, 576 (1980) (in a child custody action involving the defendant, a declarant’s statements made during a deposition in which she admitted having sexual relations with another man were against her interest, as they subjected her to criminal liability, made her an object of “disgrace,” and “were even against her proprietary interest since they provided a foundation for depriving her of custody of her daughter.”).

A second change relates to criminal cases involving statements against interest by a third party. The current Wisconsin rule is limited to a scenario in which a criminal *defendant* offers an inculpatory statement by a third party to exculpate himself from criminal liability. Not only must the statement be against the declarant’s (the third party) interest, but it must also be “corroborated.” Wisconsin case law requires only simple corroboration: that is, “corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true.” *State v. Anderson*, 141 Wis. 2d 653, 660, 416 N.W.2d 276, 279 (1987). The current federal rule differs in two important respects: first, it requires that the corroboration “clearly indicates its trustworthiness,” and second, such statements may be offered by the government as well as the defendant.

The proposed rule adopts the federal rule but accommodates Wisconsin case law by eliminating the “clearly corroborate” feature. Simple corroboration suffices. There is no discernable problem in also allowing the government to use this rule too, subject to corroboration as well, if only because it is hard to imagine such a scenario arising with any frequency in state prosecutions. See Notes of the Advisory Committee on Rules, Fed. R. Evid. 804(b)(3) (2010 Amendment). Finally, it must be emphasized that this rule is just a hearsay exception. Wisconsin case law sets a high bar for permitting third-party defenses generally, but nothing here affects those standards. Moreover, when the government offers such statements they must also comport with the confrontation right.

Current Wisconsin Rule Wis. Stat. §§ 908.045(5) and (5m)	Proposed Rule Retain Wis. Stat. § 908.045(5) and (5m) as modified
(5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT. A statement concerning the declarant's own birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated. (5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT. A statement concerning the birth, adoption, marriage, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.	§ 908.045: <u>Hearsay Exceptions to the Rule Against Hearsay</u>--When the Declarant is Unavailable as a Witness. (Continued) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . . (5) STATEMENT OF PERSONAL OR FAMILY HISTORY OF DECLARANT. A statement about ~~concerning~~ the declarant's own birth, adoption, marriage, <u>domestic partnership</u>, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated. (5m) STATEMENT OF PERSONAL OR FAMILY HISTORY OF PERSON OTHER THAN THE DECLARANT. A statement about ~~concerning~~ the birth, adoption, marriage, <u>domestic partnership</u>, divorce, relationship by blood, adoption or marriage, ancestry, whether the person is a marital or nonmarital child, or other similar fact of personal or family history and death of a person other than the declarant, if the declarant was related to the other person by blood, adoption, <u>domestic partnership</u>, or marriage or was so intimately associated with the other person's family as to be likely to have accurate information concerning the matter declared.

Judicial Council Comments:

- The proposed rule modifies current § 908.03(5) and (5m).
- They are consistent with current federal Rule 804(b)(4).

The proposed rules add “domestic partnerships” to the list of relationships.

Current Wisconsin Rule Wis. Stat. § 908.045(6)	Proposed Rule “Transferred” to new § 908.07
(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.	§ 908.045: <u>Hearsay Exceptions to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness.</u> (Continued) (6) Other exceptions. <i>Transferred to Wis. Stat. § 908.07.</i>

Judicial Council Comments:

- As with § 908.03(24), the recommendation is that this provision also be transferred to
- § 908.07.

In 1974 the Wisconsin rules tracked the proposed federal evidence rules by creating two identical provisions for the “residual exceptions” in § 908.03(24) and § 908.045(6). It is proposed that a single identical rule replace both, and that it appear in § 908.07.

Proposed Rule Adopts federal Rule 804(b)(6) as Wis. Stat. § 908.045(7)
Wis. Stat. § 908.045: <u>Hearsay Exceptions</u> to the Rule Against Hearsay--When the Declarant is Unavailable as a Witness. (Continued) (7) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Judicial Council Comments:

- This proposed rule adopts the current federal rule on “forfeiture by wrongdoing”; Wisconsin case law recognizes this doctrine but there is no provision for it in the Wisconsin Rules of Evidence. It is often used in criminal cases.
- If adopted, the new rule should bear the citation § 908.045(7).

This is a new rule that tracks current case law. Wisconsin first adopted the “forfeiture by wrongdoing” doctrine in *State v. Jensen*, 299 Wis. 2d 267, 727 N.W.2d 518 (2007). Although *Jensen* included no “intent” requirement, later case law imposed it as required by the Sixth Amendment’s confrontation right. See *Giles v. California*, 554 U.S. 353 (2008). *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015). See also *State v. Reinwand*, 2019 WI 25, ¶32, 385 Wis. 2d 700, 924 N.W.2d 184.

The proposed rule adopts the language of Fed. R. Evid. 804(b)(6), which in turn opens up the catalogue of federal case law. Placing this doctrine in the rules of evidence will undoubtedly assist courts and counsel.

Current Wisconsin Rule Wis. Stat. § 908.05 Hearsay within hearsay	Proposed Rule Adopts federal Rule 805 as modified
Wis. Stat. § 908.05 Hearsay within hearsay Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter.	§ 908.05 Hearsay within hearsay Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule <u>or is a non-hearsay statement</u> .

Judicial Council Comments:

- The proposed rule is based on current federal Rule 805 as modified to clarify that multiple (nested) statements may be admissible if they satisfy a hearsay exception or qualify under a non-hearsay use.

The proposed rule is substantively consistent with current Wisconsin and federal law. The committee considered substituting the phrase “statement within a statement” to accommodate situations where the layered hearsay may include a non-hearsay use but opted instead to add the final phrase “or is a non-hearsay statement.”

Current Wisconsin Rule Wis. Stat. § 908.06	Proposed Rule Adopts federal Rule 806 as modified
Wis. Stat. § 908.06 Attacking and supporting credibility of declarant When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.	§ 908.06: Attacking and Supporting the Declarant's Credibility. When a ~~hearsay~~ statement – as defined in § <u>908.01(3)</u> – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Judicial Council Comments:

- The proposed rule is substantively identical to both the current Wisconsin rule and federal Rule 806.

The proposed rule is based on current federal Rule 806 which in turn is substantively identical to the current Wisconsin rule. The only modification strikes the adjective “hearsay” before the word “statement,” which addresses the many situations in which statements are not offered for their truth and hence are not “hearsay” as defined in § 908.01(3).

Current Wisconsin Rules	Proposed Rule New Wis. Stat. § 908.07 Consolidating §908.03(24) and § 908.045(6)
§ 908.03(24) § 908.045(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.	908.07. Residual Exception. A statement not specifically covered by any of the foregoing exceptions may be admitted if it has comparable circumstantial guarantees of trustworthiness.

Judicial Council Comments:

- Proposed § 908.07 is substantively identical to the language used in both § 908.03(24) and § 908.045(6); the substance of both rules are “transferred” to this provision.
- The rule should be numbered § 908.07 since that number is currently open for adoption.

The proposed rule consolidates current Wis. Stat. § 908.03(24) and § 908.045(6) into a single rule with a new home. These twins were drawn from the proposed federal rules in 1974 which also adopted the conceit of twin rules when the federal rules came into effect in 1975. In 1997, however, the federal rules consolidated them into a single rule, Rule 807, ostensibly to “facilitate additions to Rules 803 and 804.” A cynic might suggest that this convention – identical rules in two different places – never made much sense to begin with. Regardless, consolidation of the two rules is appropriate.

The proposed rule, however, is substantively identical to the current Wisconsin rules, which have worked well in practice and given rise to case law directing lawyers and trial judges in their application. The current federal Rule 807 appears below for informational purposes.⁵ It offers no significant advantages over current Wisconsin law and its adoption would likely trigger uncertainty without improving current practice.

⁵ FRE 807. Residual Exception

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Proposed Rule
Retain current Wis. Stat. § 908.08

§ 908.08 Audiovisual recordings of statements of children

(1) In any criminal trial or hearing, juvenile fact-finding hearing under [s. 48.31](#) or [938.31](#) or revocation hearing under [s. 302.113\(9\)\(am\)](#), [302.114\(9\)\(am\)](#), [304.06\(3\)](#), or [973.10\(2\)](#), the court or hearing examiner may admit into evidence the audiovisual recording of an oral statement of a child who is available to testify, as provided in this section.

(2)(a) Not less than 10 days before the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the statement before the hearing under par. (b).

(b) Before the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or before the hearing, the court shall view the statement. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in [s. 885.44\(12\)](#).

(3) The court or hearing examiner shall admit the recording upon finding all of the following:

(a) That the recording was made:

1. Before the child's 12th birthday; or
2. Before the child's 18th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the recording is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of an audiovisual recording of a statement of a child who is at least 12 years of age but younger than 18 years of age, among the factors which the court or hearing examiner may consider are any of the following:

- (a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
- (b) The child's general physical and mental health.
- (c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
- (d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.
- (e) The child's familial or emotional relationship to those involved in the underlying proceeding.
- (f) The child's behavior at or reaction to previous interviews concerning the events involved.
- (g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.
- (h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.
- (i) Whether admission of the recording would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.
- (5)**(a) If the court or hearing examiner admits a recorded statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the statement is shown to the trier of fact. Except as provided in par. (b), if that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the statement to the trier of fact for cross-examination.
- (am) The testimony of a child under par. (a) may be taken in accordance with [s. 972.11 \(2m\)](#), if applicable.
- (b) If a recorded statement under this section is shown at a preliminary examination under [s. 970.03](#) and the party who offers the statement does not call the child to testify, the court may not order under par. (a) that the child be produced for cross-examination at the preliminary examination.
- (6)** Recorded oral statements of children under this section in the possession, custody or control of the state are discoverable under [ss. 48.293\(3\)](#), [304.06\(3d\)](#), [971.23\(1\)\(e\)](#) and [973.10\(2g\)](#).

(7) At a trial or hearing under sub. (1), a court or a hearing examiner may also admit into evidence an audiovisual recording of an oral statement of a child that is hearsay and is admissible under this chapter as an exception to the hearsay rule.

Judicial Council Comments:

- No change is proposed.

In 2026 the legislature amended § 908.08 as follows:

- The critical date is no longer the commencement of the trial or hearing but rather the child's age when the recording was made, § 908.08(3)(a) (intro.);
- The age of victims who may be recorded for purposes of § 908.08 have been raised from 16 years to 18 years, specifically the recording must be made "before" the child's 18th birthday.

2025 Wisconsin Act 246, eff. April 10, 2026.

Wis. Stat. Chapter 909: Evidence – Authentication and Identification

Current Wisconsin Rule Wis. Stat. § 901.01	Proposed Rule Retain current Wis. Stat. § 909.01
Wis. Stat. § 909.01 General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.	§ 909.01 General provision. The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Judicial Council Comments:

- The recommendation is to retain current Wis. Stat. § 909.01.

This rule governs the authentication and identification of trial evidence. It is governed by the conditional relevancy approach found in § 901.04(2). In ruling on an objection to authentication, the trial judge decides whether there is sufficient evidence from which a reasonable jury could find the matter is what its proponent claims it to be, based on the admissible evidence.

The current Wisconsin rule uses the word “matter,” which is broadly inclusive and the same language that appeared in the original draft of the federal rules in the 1970s. The federal restyling of Rule 901 changed “matter” to “item,” which might be read to suggest that the rule is limited to exhibits which is clearly not the case, as an “item” of evidence may also refer – awkwardly -- to a piece of testimony. Federal Rule 901(a) reads:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Limiting the rule to exhibits is an unduly narrow interpretation of the rule, as reflected in the bountiful illustrations in § 909.015. Retaining the current rule avoids any such misunderstandings. Moreover, the current rule has surfaced no problems in practice.

Current Wisconsin Rules	Proposed Rule Adopts federal Rule 901(b) as modified
Wis. Stat. § 909.015: General provision; illustrations By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of s. 909.01: (1) TESTIMONY OF WITNESS WITH KNOWLEDGE. Testimony of a witness with knowledge that a matter is what it is claimed to be. (2) NONEXPERT OPINION ON HANDWRITING. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation. (3) COMPARISON BY TRIER OF FACT OR EXPERT WITNESS. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. (4) DISTINCTIVE CHARACTERISTICS AND THE LIKE. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. (5) VOICE IDENTIFICATION. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. (6) TELEPHONE CONVERSATIONS. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telecommunications company to a particular person or business, if:	§ 909.015: Authenticating or Identifying Evidence: Illustrations The following are examples only -- not a complete list -- of evidence that satisfies the requirement: (1) Testimony of a Witness with Knowledge. Testimony that ~~an item~~ <u>a matter</u> <u>is</u> what it is claimed to be. (2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation. (3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact. (4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the matter, taken together with all the circumstances. (5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker. (6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(a) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or (b) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. (7) PUBLIC RECORDS OR REPORTS. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept. (8) ANCIENT DOCUMENTS OR DATA COMPILATIONS. Evidence that a document or data compilation, in any form: (a) Is in a condition that creates no suspicion concerning its authenticity; (b) Was in a place where it, if authentic, would likely be; and (c) Has been in existence 20 years or more at the time it is offered. (9) PROCESS OR SYSTEM. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. (10) METHODS PROVIDED BY STATUTE OR RULE. Any method of authentication or identification provided by statute or by other rules adopted by the supreme court.	(a) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or (b) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone. (7) Evidence About Public Records. Evidence that: (a) a document was recorded or filed in a public office as authorized by law; or (b) a purported public record or statement is from the office where items of this kind are kept. (8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it: (a) is in a condition that creates no suspicion about its authenticity; (b) was in a place where, if authentic, it would likely be; and (c) is at least 20 years old when offered. (9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result. <u>(10) Methods Provided by a Statute or Rule.</u> Any method of authentication or identification provided by statute or by other rules adopted by the supreme court.
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Judicial Council Comments:

- The proposed rule adopts much of the federal rule but is broadly consistent with current Wisconsin practice.

- The proposed “rule” is essentially an open-ended list of examples and illustrations, which provides welcomed flexibility that is subject to § 904.03.

The proposal adopts the “examples” as they appear in the corresponding federal rules subject to several minor changes. In sub. (1) the word “matter” should be retained from the current Wisconsin rule in the place of “item,” which connotes an “exhibit.” This change parallels the language in § 909.01.

The proposed change to the hearsay exception for “ancient documents” in § 908.03(16) has no bearing on the authentication “example” found here at § 909.015(8). For hearsay purposes, the foundation for authentication may be provided by any means or by using any of the “examples.”

Although most of the illustrations are taken from the federal rule, proposed § 909.015(10) is the current Wisconsin “illustration.”

Current Wisconsin Rules	Proposed Rule Adopts federal Rule 902 as modified
Wis. Stat. § 909.02 Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following: (1) Public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer or agency thereof, and a signature purporting to be an attestation or execution. (2) Public documents not under the seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in sub. (1), having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine. (3) Public documents of foreign countries. A document purporting to be executed or attested in his or her official capacity by a	§ 909.02: Evidence That is Self-Authenticating. The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: (1) Domestic Public Documents That Are Sealed and Signed. A document that bears: (a) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and (b) a signature purporting to be an execution or attestation. (2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if: (a) it bears the signature of an officer or employee of an entity named in ~~Rule 902(a)(1)~~ § 909.02(1)(a); and (b) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine. (3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must

person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3) or complying with any statute or rule adopted by the supreme court, or, with respect to records maintained by the department of transportation under s. 110.20 or chs. 194, 218, 341 to 343, 345, or 348, certified electronically in any manner determined by the department of transportation to conform with the requirements of s. 909.01.

(5) Official publications. Books, pamphlets or other publications purporting to be issued by public authority.

be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(a) order that it be treated as presumptively authentic without final certification; or

(b) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(a) the custodian or another person authorized to make the certification; or

(b) a certificate that complies with ~~Rule 902(1)(2), or (3), § 909.02(1), (2), or (3) or complying with any statute or rule adopted by the supreme court, or, with respect to records maintained by the department of transportation under s. 110.20 or chs. 194, 218, 341 to 343, 345, or 348, certified electronically in any manner determined by the department of transportation to conform with the requirements of s. 909.01.~~

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals. (7) Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin. (8) Acknowledged and authenticated documents. Documents accompanied by a certificate of acknowledgment under the hand and seal or rubber stamp of a notary public or other person authorized by law to take acknowledgments or any public officer entitled by virtue of public office to administer oaths or authenticated or acknowledged as otherwise authorized by statute. (9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411. (10) Statutory rules. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic. (11) Patient health care records. Records served upon or made available to all parties under s. 908.03 (6m). (12) Certified domestic records of regularly conducted activity. (a) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03 (6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying all of the following: 1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters. 2. That the record was kept in the course of the regularly conducted activity. 3. That the record was made of the regularly conducted activity as a regular practice.	(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control. (8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments. (9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law. (10) Presumptions Under a Statute. A signature, document, or anything else that a ~~federal~~ statute declares to be presumptively or prima facie genuine or authentic. <u>(11) Patient health care records.</u> <u>Records served upon or made available to all parties under s. 908.03 (6m).</u> <u>(12) Certified Domestic Records of a Regularly Conducted Activity.</u> <u>The original or a copy of a domestic record that meets the requirements of § 908.03(6) or § 908.03(6m), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the supreme court. Before the trial or hearing, the proponent must give an adverse party 40 days written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them, unless the trial court rules otherwise for good cause shown.</u>
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(b) A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of the offer of the record and certification into evidence to provide an adverse party with a fair opportunity to challenge the record and certification.

(13) Certified foreign records of regularly conducted activity.

(a) The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under s. 908.03 (6) if accompanied by a written declaration by its custodian or other qualified person certifying all of the following:

1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
2. That the record was kept in the course of the regularly conducted activity.
3. That the record was made of the regularly conducted activity as a regular practice.

(b) The declaration under par. (a) must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of the offer of the record and declaration into evidence to provide an adverse party with a fair opportunity to challenge the record and declaration.

There is no corresponding Wisconsin rule or statute.

(13) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of § 909.02(12), modified as follows: the certification, rather than complying with a statute or supreme court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of § 909.02(12).

(14) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12) § 909.02(12) or (13).

<i>There is no corresponding Wisconsin rule or statute.</i>	The proponent must also meet the notice requirements of ~~Rule 902(11)~~ <u>§ 909.02(12)</u>. (15) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of ~~Rules 902(11) or (12)~~ <u>§ 909.02(12) or (13)</u>. The proponent also must meet the notice requirements of ~~Rule 902(12)~~ <u>§ 909.02(12)</u>.
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Judicial Council Comments:

- The proposed rules are mostly based on the current federal rules with changes made to conform to existing Wisconsin law.
- In particular, proposed § 909.02(11), relating to health care records, was added to accommodate a long-standing, invaluable Wisconsin hearsay rule, Wis. Stat. § 908.03(6m).
- The addition of subs. (11) necessitated the renumbering of subsequent, corresponding federal rules.

The proposed rules are essentially federal Rule 902 as modified to accommodate current Wisconsin law.

Current Wisconsin Rules	Proposed Rule Adopts federal Rule 903
Wis. Stat. § 909.03: Subscribing witness' testimony unnecessary The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.	§ 909.03: Subscribing Witness's Testimony A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Judicial Council Comments:

The proposed rule is the current federal rule, which is substantively identical to the current Wisconsin rule.

Wis. Stat. Chapter 910: Evidence – Contents of Writings, Recordings and Photographs

Current Wisconsin Rule Wis. Stat. § 910.01	Proposed Rule Adopts federal Rule 1001 as modified
Wis. Stat. § 910.01 Definitions. For purposes of this chapter the following definitions are applicable. (1) Writings and recordings. “Writings” and “recordings” consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation or recording. (2) Photographs. “Photographs” include still photographs, X-ray films, and motion pictures. (3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”. (4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.	§ 910.01: Definitions That Apply to This ChapterArticle In this chapterarticle: (1)(a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form. (1)(b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner. (2) A “photograph” means a photographic image or its equivalent stored in any form. (3) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout--or other output readable by sight--if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it. (4) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Judicial Council Comments:

- The proposed rule adopts the current federal rule with a minor alteration in numbering, as explained below.

The proposed rule adopts current federal Rule 1001 which is identical to current Wisconsin practice. No substantive change is intended.

The proposal ties together the definitions of “writing” and “recording” in sub. (1). This conforms to the original rule and, more important, avoids renumbering the definitions that follow, changes that affect electronic research.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1002 as modified
Wis. Stat. § 910.02 Requirement of original. To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.	§ 910.02: Requirement of original An original writing, recording, or photograph is required <u>in order to prove its content except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute. But nothing in ch. 910 bars a witness with personal knowledge from testifying about a matter that is also described or depicted in a writing, recording, or photograph.</u>

Judicial Council Comments:

- The proposed rule combines the current Wisconsin and federal versions for clarity.
- The last sentence is a new provision that is drawn from long-standing principles of evidence law.

This version adopts the federal restyled rule, up to the word “except”; it then incorporates the current Wisconsin version to preserve state statutory cross-references.

The last sentence is new and is intended to clarify that the rule does not bar testimony from personal knowledge about an event or condition occurring outside the four corners of a writing, recording, or photograph that happens also to be described and depicted therein. Chapter 910 applies in such cases only to the extent that a witness purports to testify about knowledge gained from the writing, recording, or photograph rather than from firsthand perception. For example, a witness may testify that she bought “gas” at a service station based on her personal knowledge and memory; the receipt itself is unnecessary as relates to admissibility. Other rules of evidence may also apply, e.g., § 904.03 or the hearsay rule.

In any event, production of the original is largely forgiven by § 910.03, which allows the use of duplicates in most situations.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1003
Wis. Stat. § 910.03 Admissibility of duplicates A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. No duplicate is inadmissible solely because it is in electronic format.	§ 910.03: Admissibility of Duplicates A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1003.
- No substantive change in Wisconsin law is intended.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1004
Wis. Stat. § 910.04 Admissibility of other evidence of contents. The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if: (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or (4) Collateral matters. The writing, recording or photograph is not closely related to a controlling issue.	§ 910.04: Admissibility of Other Evidence of Content An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: (1) all the originals are lost or destroyed, and not by the proponent acting in bad faith; (2) an original cannot be obtained by any available judicial process; (3) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or (4) the writing, recording, or photograph is not closely related to a controlling issue.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1004.
- No substantive change in Wisconsin law is intended.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1005 as modified
Wis. Stat. § 910.05 Public records. The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with s. 909.02 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.	§ 910.05: Copies of Public Records to Prove Content The proponent may use a copy to prove the content of an official record--or of a document that was recorded or filed in a public office as authorized by law--if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with ~~Rule 902(4)~~ § 909.02(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1005 with a cross-reference to Wisconsin law.
- No substantive change in the Wisconsin or federal rules is intended.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1006 as modified
Wis. Stat. § 910.06 Summaries. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.	§ 910.06. Summaries to Prove Content (1) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence. (2) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court. (3) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by ~~Rule 107~~ <u>§ 901.10</u>.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1006, including new sub. (3)(c), which became effective in federal courts in December 2024. It corresponds with proposed § 901.10 (illustrative aids).

Current Wisconsin Rule	Proposed Rule Adopts Federal Rule 1007
Wis. Stat. § 910.07 Testimony or written admission of party. Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.	§ 910.07: Testimony or Statement of a Party to Prove Content The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1007.
- No substantive change is intended.

Current Wisconsin Rule	Proposed Rule Adopts federal Rule 1008 as modified
Wis. Stat. § 910.08 Functions of judge and jury. When the admissibility of other evidence of contents of writings, recordings or photographs under chs. 901 to 911 depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the judge to determine. However, when any of the following issues is raised, the issue is for the trier of fact to determine as in the case of other issues of fact: (1) Whether the asserted writing ever existed. (2) Whether another writing, recording or photograph produced at the trial is the original. (3) Whether other evidence of contents correctly reflects the contents.	§ 910.08. Functions of the Court and Jury Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under ~~Rule 1004 or 1005~~ s. 910.04 or 910.05. But in a jury trial, the jury determines — in accordance with ~~Rule 104(b)~~ § 901.04(2) — any issue about whether: (1) an asserted writing, recording, or photograph ever existed; (2) another one produced at the trial or hearing is the original; or (3) other evidence of content accurately reflects the content.

Judicial Council Comments:

- The proposed rule adopts current federal Rule 1008, as modified with cross-references to Wisconsin rules.
- No substantive change is intended.

Wis. Stat. Chapter 911: Evidence – Miscellaneous Rules

Current Wisconsin Rule	Proposed Rule Retain Wis. Stat. § 911.01 as modified
Wis. Stat. § 911.01: Applicability of rules of evidence (1) COURTS AND COURT COMMISSIONERS. Chapters 901 to 911 apply to the courts of the state of Wisconsin, including municipal courts and circuit, supplemental, and municipal court commissioners, in the proceedings and to the extent hereinafter set forth except as provided in s. 972.11. The word “judge” in chs. 901 to 911 means judge of a court of record, municipal judge, or circuit, supplemental, or municipal court commissioner. (2) PROCEEDINGS GENERALLY. Chapters 901 to 911 apply generally to proceedings in civil and criminal actions. (3) PRIVILEGES; OATH. Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings; s. 906.03 applies at all stages of all actions, cases and proceedings except as provided in ss. 901.04 (1) and 911.01 (4), and ch. 908. (4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations: (a) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04 (1).	§ 911.01: Applicability of rules of evidence (1) COURTS AND COURT COMMISSIONERS. Chapters 901 to 911 apply to: the courts of the state of Wisconsin, including municipal courts and circuit, supplemental, and municipal court commissioners, in the proceedings and to the extent hereinafter set forth except as provided in s. 972.11. The word “judge” in chs. 901 to 911 means judge of a court of record, municipal judge, or circuit, supplemental, or municipal court commissioner. (2) PROCEEDINGS GENERALLY. Chapters 901 to 911 apply generally to proceedings in civil and criminal actions. (3) PRIVILEGES; OATH. Chapter 905 with respect to privileges applies at all stages of all actions, cases and proceedings; s. 906.03 applies at all stages of all actions, cases and proceedings except as provided in ss. 901.04 (1) and 911.01 (4), and ch. 908. (4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations: (a) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04 (1).

(b) Grand jury; John Doe proceedings. Proceedings before grand juries or a John Doe proceeding under s. 968.26. (c) Miscellaneous proceedings. Proceedings for extradition or rendition; sentencing, granting or revoking probation, modification of a bifurcated sentence under s. 302.113 (9g), or adjustment of a bifurcated sentence under s. 973.195 (1r) or 973.198; hearings for the freezing of assets of a person charged with financial exploitation of an elder person under s. 971.109; issuance of subpoenas or warrants under s. 968.375, arrest warrants, criminal summonses, and search warrants; hearings under s. 980.09 (2); proceedings under s. 971.14 (1r) (c); proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969; or proceedings under s. 165.76 (6) to compel provision of a biological specimen for deoxyribonucleic acid analysis. (d) Small claims actions. Proceedings under ch. 799, except jury trials. (5) RESTITUTION HEARINGS. (a) In a restitution hearing under s. 973.20 (13), the rules of evidence are subject to waiver under s. 973.20 (14) (d). (b) When hearing evidence as to the factors that determine a restitution order under s. 800.093, the rules of evidence are subject to waiver under s. 800.093 (8) (b).	(b) Grand jury; John Doe proceedings. Proceedings before grand juries or a John Doe proceeding under s. 968.26. (c) Miscellaneous proceedings. Proceedings for: • extradition or rendition; • sentencing; • granting or revoking probation; • modification of a bifurcated sentence under s. 302.113 (9g), or adjustment of a bifurcated sentence under s. 973.195 (1r) or 973.198; • hearings for the freezing of assets of a person charged with financial exploitation of an elder person under s. 971.109; • issuance of subpoenas or warrants under s. 968.375, arrest warrants, criminal summonses, and search warrants; • hearings under s. 980.09 (2); • proceedings under s. 971.14 (1r) (c); • proceedings with respect to pretrial release under ch. 969 except where habeas corpus is utilized with respect to release on bail or as otherwise provided in ch. 969; • or proceedings under s. 165.76 (6) to compel provision of a biological specimen for deoxyribonucleic acid analysis. (d) SMALL CLAIMS ACTIONS. Proceedings under ch. 799, except jury trials. (5) RESTITUTION HEARINGS. (a) In a restitution hearing under s. 973.20 (13), the rules of evidence are subject to waiver under s. 973.20 (14) (d). (b) When hearing evidence as to the factors that determine a restitution order under s. 800.093, the rules of evidence are subject to waiver under s. 800.093 (8) (b). <u>(6) OTHER STATUTES AND RULES. A statute or a rule prescribed by the Wisconsin Supreme Court may provide for admitting or excluding evidence independently from these rules.</u>
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Judicial Council Comments:

- The proposed rule is substantively identical to the current Wisconsin rule with minor changes that clarify current law and practice.
- Proposed § 911.01(6) is based on federal Rule 1101(e).

It is recommended that current Wis. Stat. § 911.01 be retained with the addition of a new subsection (6) that explicitly recognizes the authority of the Wisconsin Supreme Court and the legislature to create new rules that exclude or admit evidence “independently” of Chs. 901 through 911. This provision is found in Fed. R. Evid. 1101(e). It is nothing new. The UCC, for example, is freighted with evidence rules. E.g., Wis. Stat. § 401.307. It is also respectfully suggested that the current rule be reformatted, especially § 911.01(4), so that it is readable, as illustrated above.

Proposed Rule Retain Wis. Stat. § 911.02
Wis. Stat. § 911.02: Title Chapters 901 to 911 may be known and cited as the Wisconsin Rules of Evidence.

Judicial Council Comments:

- There is no need to revise Wis. Stat. § 911.02.