

**1398B PUBLISHING A DEPICTION THAT IS KNOWN TO BE A PRIVATE REPRESENTATION OF NUDITY WITHOUT CONSENT— § 942.09(3m)(a)2.**

**Statutory Definition of the Crime**

Section 942.09(3m)(a)2. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation without the consent the person depicted.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant [(posted) (published)]<sup>1</sup> [(caused to be (posted) (published))] a depiction of a person.
2. The defendant knew that the depiction was a private representation.
3. The person who is depicted did not consent to the (posting) (publication) of the private representation.

**Meaning of “Representation”**

“Representation” means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.<sup>2</sup>

**Meaning of “Did Not Consent”**

“Did not consent” means that (name) did not freely agree to the (posting) (publishing) of the private representation.<sup>3</sup>

**Meaning of “Private Representation”**

“Private representation” means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.<sup>4</sup>

**Meaning of “Nude or Partially Nude Person”**

“Nude or partially nude person” means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].<sup>5</sup>

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD

NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.<sup>6</sup>

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer is “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI-Criminal 1398B was originally published in 2015 and revised in 2017, 2018, and 2019. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of “representation.” This revision was approved by the Committee in 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16.

This instruction is for a violation of sub. (3m)(a)2. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

A second, very similar offense is defined in § 942.09(3m)(a)1. that applies to one who: “posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted did not consent to the posting or publication . . .” See Wis JI-Criminal 1398A.

In State v. Culver, 2018 WI App 55, 384 Wis.2d 222, 918 N.W.2d 103, the Wisconsin Court of Appeals held that § 942.09(3m)(a)2. was not overbroad in violation of the First Amendment and was unconstitutionally vague.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016] The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: “‘Post or publish’ includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public.”

2. This is the definition provided in § 942.09(1)(c).

3. § 942.09(1)(ae) defines “consent”:

. . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of

consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines “did not consent” in essentially the same manner as the instructions for sexual assault under § 940.225 define “without consent.” A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim’s not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

4. This is the definition provided in § 942.09(1)(bn).

If a definition of “sexually explicit conduct” is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening either by a person or upon the person’s instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

5. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.