

**934 SEXUAL CONTACT — § 939.22(34)**

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE OFFENSE.<sup>1</sup>

**Meaning of "Sexual Contact"**

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF ANOTHER PERSON [ ' 939.22(34)(a) ]:

[Sexual contact is an intentional touching of the (name intimate part)<sup>2</sup> of (name of victim) (by the defendant) (by another person upon the defendant's instruction).<sup>3</sup> The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object or device, but it must be an intentional touching.

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).]<sup>4</sup>

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF ANY PART OF ANOTHER PERSON'S BODY WITH THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON [ § 939.22(34)(b) ]:

[Sexual contact is an intentional touching of any part of the body, clothed or unclothed, of (name of victim) with the (name intimate part), clothed or unclothed, of (the defendant) (another person upon the defendant's instruction).<sup>5</sup>

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).]<sup>6</sup>

FOR SEXUAL CONTACT INVOLVING INTENTIONAL PENILE  
EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES  
UPON ANOTHER PERSON [§ 939.22(34)(c)]:

[Sexual contact is (intentional penile ejaculation of ejaculate) (or) (intentional emission of urine or feces) (by the defendant) (by another person upon the defendant's instruction)<sup>7</sup> upon any part of the body, clothed or unclothed, of (name of victim).<sup>8</sup>

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).]<sup>9</sup>

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING  
ANOTHER PERSON TO EJACULATE OR EMIT URINE OR FECES ON  
ANY PART OF THE DEFENDANT'S BODY [§ 939.22(34)(d)]:

[Sexual contact is (ejaculation) (or) (emission of urine or feces) by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.<sup>10</sup>

Sexual contact also requires that the defendant acted for the purpose of sexual (humiliation) (degradation) (arousal) (or) (gratification).]<sup>11</sup>

GIVE THE FOLLOWING IN ALL CASES.

### **Deciding About Intent and Purpose**

You cannot look into a person's mind to find intent or purpose. Intent or purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent and purpose.

CONTINUE WITH THE INSTRUCTION FOR THE OFFENSE.

**COMMENT**

Wis JI-Criminal 934 was approved by the Committee in June 2010.

The Wisconsin criminal statutes provide three definitions of "sexual contact" which are substantially similar but not identical. This instruction addresses § 939.22(34), which applies to criminal offenses requiring sexual contact and not appearing in § 940.225 or in Chapter 948. See, for example, sub. (1)(a) of § 940.302, Human Trafficking, and sub. (5) of § 944.30, Prostitution.

The other two definitions of "sexual contact" are found in:

X § 940.225(5)(b), which applies to offenses defined in § 940.225 [see Wis JI-Criminal 1200A]; and,

X § 948.01(5), which applies to offenses defined in Chapter 948 [see Wis JI-Criminal 2101A].

This instruction provides all four alternatives specified by § 939.22(34); each alternative includes the type of touching or emission of bodily substances and the purpose of the touching or emission. This is intended to be more convenient to the users of the instructions and to make it easier to prepare an instruction that is tailored to the facts of the case.

1. The definition of "sexual contact" in § 939.22(34) applies to offenses not found in § 940.225, where the definition in § 940.225(5)(b) applies, or Chapter 948, where the definition in § 948.01(5) applies. Section 939.22(34) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a prohibited purpose. See note 4, below.

2. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. §948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for a prohibited purpose. The Committee concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is

reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nicholson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

5. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

6. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

7. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

8. This is the type of "sexual contact" defined in § 939.22(34)(c). It was created by 1995 Wisconsin Act 69, which first applied to offenses committed on December 2, 1995.

9. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.

10. This is the type of "sexual contact" defined in § 939.22(34)(d). It was created by 2005 Wisconsin Act 273, which first applied to offenses committed on April 20, 2006.

11. Each alternative definition includes the requirement that the contact be for a prohibited purpose. See note 4, supra.