

999 MINOR PASSENGER IN THE VEHICLE — §§ 346.65(2)(f)2., 346.65(2j)(d), 346.65(3m), 940.09(1b), and 940.25(1b)

CAUTION: THIS INSTRUCTION IS TO BE USED FOR CHARGES UNDER § 940.09(1b) AND § 940.25(1b) ONLY WHEN THE OFFENSES OCCURRED BEFORE FEBRUARY 1, 2003. IT IS TO BE USED FOR CHARGES UNDER § 346.65(2)(f)2., § 346.65(2j)(d), AND § 346.65(3m) REGARDLESS OF THE DATE THE OFFENSE OCCURRED.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The (information) (complaint) alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was a passenger under 16 years of age in the motor vehicle at the time.

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

"Was there a passenger under 16 years of age in the motor vehicle at the time?"

If you are satisfied beyond a reasonable doubt that there was a passenger under 16 years of age in the motor vehicle at the time, you should answer the question "yes."

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

COMMENT

Wis JI-Criminal 999 was originally published in 1996 and revised in 1999 and 2003. This revision added to the "caution." This revision made changes in the Comment and was approved by the Committee in June 2010.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109 (effective date: February 1, 2003). This instruction is to be used for charges under these statutes only when based on conduct occurring before February 1, 2003. The substance of the repealed statutes was recreated as an aggravating factor to be considered at sentencing. See § 973.017(7). The motor vehicle code provisions were not affected by Act 109.

2009 Wisconsin Act 100 created § 346.65(2)(f)1. which makes a first OWI offense a crime if there was a minor passenger under 16 years of age in the vehicle. A separate instruction has been drafted for that offense. See Wis JI-Criminal 2663D.

1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. 1997 Wisconsin Act 295 amended two of these penalty provisions – §§ 940.09(1b) and 940.25(b) – to apply when there is an unborn child in the vehicle. [Effective date: July 1, 1998.] See Wis JI-Criminal 999A.

The penalty provisions are found in the following statute sections:

- § 346.65(2)(f) - applicable to violations of § 346.63(1), operating under the influence or with a prohibited alcohol concentration
- § 346.65(2j)(d) - applicable to violations of § 346.63(5), involving offenses by a person holding a commercial operator's license
- § 346.65(3m) - applicable to violations of § 346.63(2) and (6), involving causing of injury by regular and commercial operators
- § 940.09(1b) - applicable to violations of § 940.09, homicide by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]
- § 940.25(1b) - applicable to violations of § 940.25, injury [great bodily harm] by intoxicated use of a vehicle
[Repealed by 2001 Wisconsin Act 109.]

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____ under Wis. Stat. § ____ at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there a passenger under 16 years of age in the motor vehicle at the time?"

The instruction, and the suggested verdict, depart from the text of the statute in two respects. First, the statute refers to "minor passenger under 16 years of age." The instruction does not include "minor" because all passengers under age 16 are "minors." Second, the statute refers to the minor or unborn child being in the vehicle "at the time of the violation that gave rise to the conviction." The instruction drops "of the violation that gave rise to the conviction" to simplify the instruction and to avoid confusion that might result from referring to a "conviction." Literally speaking, the conviction does not occur until after the verdict is received.