

**1200A SEXUAL CONTACT — § 940.225(5)(b)**

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

**Meaning of "Sexual Contact"**

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[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, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)<sup>4</sup> (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)<sup>5</sup>]

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)<sup>6</sup> (of the defendant) (of another person upon the defendant's instruction)<sup>7</sup>, if the defendant intentionally caused<sup>8</sup> (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).)<sup>9</sup> (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)<sup>10</sup>

FOR SEXUAL CONTACT INVOLVING INTENTIONAL  
EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES  
UPON THE COMPLAINANT:

[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>11</sup> upon any part of the body clothed or unclothed of (name of victim).<sup>12</sup>

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)<sup>13</sup>

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING  
THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY  
PART OF THE DEFENDANT'S BODY:

[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>14</sup>

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)<sup>15</sup>

GIVE THE FOLLOWING IN ALL CASES.

### Deciding About Intent

You cannot look into a person's mind to find intent. Intent 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.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OFFENSE.

#### COMMENT

Wis JI-Criminal 1200A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

[An instruction formerly numbered Wis JI-Criminal 1200A, FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE CAUSING PREGNANCY, has been renumbered Wis JI-Criminal 1201A.]

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 2101A for offenses in violation of § 948.02. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 940.225(5)(b), addressed in this instruction, and the definition of the same term provided in § 948.01(5), addressed in Wis JI-Criminal 2101A. This instruction should be used only for violations of § 940.225.

The following definition of "sexual contact" is provided in § 940.225(5)(b), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(b) "Sexual contact" means any of the following:

1. Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19 (1):

a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

b. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

1. The definition of "sexual contact" in § 940.225(5)(b) 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 5, 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. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two intent alternatives do apply to that type of case.

"Intent to cause bodily harm" is derived from that part of the statutory sexual contact definition which prohibits touchings which "contain the elements of actual or attempted battery as defined in § 940.19(1)." The elements of battery are: (1) that the defendant caused bodily harm to another person; (2) that the defendant intended to cause bodily harm; (3) that the bodily harm was caused without the consent of the victim; and (4) that the defendant knew the victim did not consent. [See Wis JI-Criminal 1220.] Attempted battery requires

proof of intent to commit all the elements of battery and an unequivocal act indicating that intent. (See Wis JI-Criminal 580.)

There is some difficulty in smoothly integrating the elements of battery, or attempted battery, into sexual contact offenses under § 940.225. The Committee determined that the essential element of battery or attempted battery that carries over to sexual contact offenses is that of intent to cause bodily harm.

The actual causing of bodily harm by the defendant (the first element of battery, supra) would be implicated only where offenses under § 940.225(1)(a) (see Wis JI-Criminal 1201) and 940.225(2)(b) (see Wis JI-Criminal 1211) are charged. In both offenses, the causing of bodily harm would be covered by other elements of the crime: with subsection (1)(a), the causing of great bodily harm would include it; with subsection (2)(b), the causing of injury, illness, etc., would include it.

For other sexual contact offenses, the causing of physical injury is not a required element. Therefore, these offenses would probably involve the elements of attempted battery. The Committee feels that the elements of a criminal attempt are established by including "intent to do bodily harm" as an element of the sexual contact offense. The "intentional touching" that is required for all sexual contact offenses would furnish the "unequivocal act" required for a criminal attempt. The requirement that intent to do bodily harm be proved fulfills the other element of a criminal attempt, that the defendant intend to commit the completed crime.

The other two elements of battery and attempted battery require that the victim not consent to the touching and that the defendant know of this fact. However, not all sexual assaults have "without consent" as an element (see § 940.225(1)(d) and (2)(c) through (e)). In these instances, the legislature has apparently made the decision that the consent of the victim should be irrelevant because of the victim's young age, mental disability, or unconsciousness. In these cases, the Committee concluded that the reference to the "elements of battery or attempted battery" should not be read to overrule the sexual assault subsections that do not require that "without consent" be proved.

If the "without consent" element is interpreted in this way, the only essential element of battery and attempted battery that carries over to the sexual contact offenses is the element of "intent to cause bodily harm." The Committee determined that it was better to select this distinctive element and make it an element of sexual contact offenses than to incorporate all the elements of battery or attempted battery into the instructions.

5. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with purpose as a second part of the sexual contact definition. The Committee also 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. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of . . ." No change in meaning is intended.

6. See note 2, supra.

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

8. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b)1.b. requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

9. Note that this alternative – intent to cause bodily harm – is not to be used for cases based on sexual contact involving intentional ejaculation or intentional emission of urine or feces. The remaining two alternatives do apply to that type of case. See note 4, supra.

10. See notes 4 and 5, supra.

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

12. This is the type of "sexual contact" defined in sub. (5)(b)2. of § 940.225. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

13. See notes 4 and 5, supra.

14. This is the type of "sexual contact" defined in sub. (5)(b)3. of § 940.225. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

15. See notes 4 and 5, supra.