

1380 DEFAMATION — § 942.01**Statutory Definition of the Crime**

Defamation, as defined in § 942.01 of the Criminal Code of Wisconsin, is committed by one who, with intent to defame, communicates any defamatory matter to a third person without the consent of the person defamed.

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 (five) (six)¹ elements were present.

Elements of the Crime That the State Must Prove

1. The defendant communicated some information or matter about (name of defamed person).

"Communicate" means to make something known, such as stating something, writing something, or even drawing a picture of something.²

2. This communication about (name of defamed person) was made to a third person.

The crime of defamation is not committed if the matter or information is communicated only to the person allegedly defamed.³

3. The information or matter communicated about (name of defamed person) was defamatory matter.

"Defamatory matter" is anything which exposes a person to hatred, contempt, ridicule, degradation or disgrace in society, or injury in business or occupation.⁴

With respect to the crime of defamation, it is not necessary that the reputation of the person defamed be actually harmed. It is necessary only that the matter or information communicated tends to have a defamatory effect.⁵

4. The defendant communicated this information or matter with the intent to defame (name of defamed person).

The phrase "with the intent to" means that the defendant had the purpose to defame (name of defamed person) or was aware that this conduct was practically certain to cause that result.⁶

5. (Name of defamed person) did not consent to the communication.

ADD THE FOLLOWING IF AN ORAL COMMUNICATION IS INVOLVED.

- [6. Two other persons heard and understood the oral statement as defamatory.]⁷

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 in this case bearing upon intent.

ADD THE FOLLOWING IF THERE IS EVIDENCE OF THE EXCEPTION[S] RECOGNIZED IN § 942.01(3):⁸

[You must also consider whether the defamatory matter was true and was communicated with good motives and for justifiable ends. The burden is on the State to satisfy you beyond

a reasonable doubt that the defamatory matter was not true or was not communicated with good motives and for justifiable ends.^{9]}

[You must also consider whether the communication was privileged. A communication is privileged when (describe the privilege). The burden is on the State to satisfy you beyond a reasonable doubt that the communication was not privileged.]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (five) (six)¹⁰ elements of this offense have been proved [and that the defamatory matter was not true or was not communicated with good motives and for justifiable ends]¹¹ [and that the communication was not privileged],¹² you should find the defendant guilty.

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

COMMENT

Wis JI-Criminal 1380 was originally published in 1974 and revised in 1977 and 1994. This revision was approved by the Committee in June 2007 and involved adoption of a new format and nonsubstantive changes to the text.

Defamation, as defined in § 942.01, must be interpreted in light of Article 1, Section 3 of the Wisconsin Constitution, which provides:

Free speech; libel. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libel be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Subsection (3) of § 942.01 recognizes an exception regarding a communication made "with good motives and for justifiable ends." See the instruction at footnote 8.

Subsection (4) of § 942.01 provides that "No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of 2 other persons that they heard and

understood the oral statement as defamatory or upon a plea of guilty or no contest." See bracketed element 6 of the instruction.

1. Choose the appropriate number. Six elements are to be used if an oral communication is involved.
2. Volume V, 1953 Judiciary Committee Report on the Criminal Code, p. 91 (Wis. Legislative Council, February 1953).
3. Section 942.01(1); 1953 Judiciary Committee Report, *supra* note 4, p. 91.
4. Section 942.01(2).
5. 1953 Judiciary Committee Report, *supra* note 4, p. 91.
6. Section 939.23(4).
7. Include this element only if the defamatory matter was communicated through an oral statement. See § 942.01(4).

8. Subsection (3) of § 942.01 provides: "This section does not apply if the defamatory matter was true and was communicated with good motives and for justifiable ends or if the communication was otherwise privileged." [Note that the references to "true . . . with good motives and for justifiable ends" are based on Article I, Section 3 of the Wisconsin Constitution.] Thus, the subsection contains exceptions to the statute and reference to privileges. The Committee's recommended approach is to treat these matters as follows. The matters referred to are not issues in the case until there is some evidence of those facts. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the exception or the privilege does not apply. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). In these cases, the appropriate bracketed material should be included in the instruction. The same material should also be added to the "Jury's Decision" paragraph. See notes 11 and 12, below.

Privileges available to a defendant under common law are in general the same as the privileges relating to civil defamation. 1953 Judiciary Committee Report on the Criminal Code, p. 91 (Wis. Legislative Council, 1953). The 1953 Report referred to sections of the Restatement of Torts, found at §§ 582-612 of Restatement of Torts 2d (1977 ed.). A helpful summary of civil defamation law, including privileges, is provided at Wis JI-Civil 2500 Defamation: Law Note For Trial Judges.

In State v. Gilles, 173 Wis.2d 101, 496 N.W.2d 133 (Ct. App. 1992), the court confirmed that conditional privileges recognized in civil defamation cases also apply to the criminal charge. On the facts of that case, the court found that it was proper for the trial judge to refuse to submit the privilege issue to the jury because the evidence supporting it was insufficient as a matter of law.

In State v. Cardenas-Hernandez, 214 Wis.2d 71, 571 N.W.2d 406 (Ct. App. 1997), convictions for criminal defamation were reversed. The statements on which the charges were based were made during a John Doe proceeding. The court held that an absolute privilege applies to statements made in judicial proceedings.

9. The Committee concluded that the state may meet its burden of disproving the exception by proving either that the defamatory material was not true OR that it was not communicated with good motives and for justifiable ends.

10. Choose the appropriate number. Six elements are to be used if an oral communication is involved.

11. Add the bracketed material if the jury was instructed on the exception recognized in sec. 942.01(3).

12. Add the bracketed material if the jury was instructed on a privilege recognized in sec. 942.01(3).