

1398C MAKING A REPRODUCTION OF A PRIVATE REPRESENTATION WITHOUT CONSENT—§ 942.09(3m)(a)3.**Statutory Definition of the Crime**

Section 942.09(3m)(a)3. of the Criminal Code of Wisconsin is violated by a person who makes a reproduction of a private representation, if the actor knows that the person depicted in the reproduction did not consent to the making of the reproduction.

State's Burden of Proof

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

Elements of the Crime That the State Must Prove

1. The defendant made a reproduction of a private representation.
2. The defendant knew that the person depicted in the reproduction did not consent to the making of the reproduction.

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.¹

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.²

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].³

Meaning of “Did Not Consent”

“Did not consent” means that (name) did not freely agree to the making of the reproduction of the private representation.⁴

Jury’s Decision

If you are satisfied beyond a reasonable doubt that both 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.⁵

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 1398C was approved by the Committee in February 2026.

This instruction is for a violation of sub. (3m)(a)3. of § 942.09 as created by 2025 Wisconsin Act 34 [effective date: October 4, 2025].

Two other offenses are defined in § 942.09(3m)(a). § 942.09(3m)(a)1. 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. § 942.09(3m)(a)2. applies to one 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 of the person depicted.” See Wis JI–Criminal 1398B.

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

3. 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).

4. § 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.

5. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of § 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.