

**1399 SOLICITING AN INTIMATE OR PRIVATE REPRESENTATION —
§ 942.09(4)**

Statutory Definition of the Crime

Section 942.09(4) of the Criminal Code of Wisconsin is violated by a person who solicits an intimate or private representation from a person who the actor believes or has reason to believe has not attained the age of 18 years.

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant solicited an intimate or private representation from a person.
2. The defendant believed or had reason to believe that the person had not attained the age of 18 years at the time of the alleged offense.

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 "Intimate Representation"]

["Intimate representation" means (a representation of a nude or partially nude person) (a representation of clothed, covered, or partially clothed or

covered genitalia or buttock that is not otherwise visible to the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact).]²

[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.]³

[Meaning of "Nude or Partially Nude Person"]⁴

["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).]

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.

COMMENT

Wis JI-Criminal 1399 was approved by the Committee in February 2018.

This instruction is for a violation of sub. (4) of § 942.09, which was created by 2017 Wisconsin Act 129 [effective date: December 10, 2017]. The offense does not apply if the person soliciting the representation has not attained the age of 18 years. See sub. (4)(c). The offense is a Class I felony, unless the defendant is under age 21 and not more than three years older than the victim – then it is a Class A misdemeanor. See sub. (4)(b).

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

2. This is the definition provided in § 942.09(1)(ag), as created by 2015 Wisconsin Act 292 [effective date: April 1, 2016]. That definition provides a cross reference to §§ 940.225(5)(b) and (c) for definitions of "sexual contact" and "sexual intercourse." See Wis JI-Criminal 1200A [sexual contact] and 1200B [sexual intercourse].

3. 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.

4. Add this definition when the basis for the representation being an "intimate representation" or "private representation" is that it involved a nude or partially nude person. The definition is the one provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).