

1461 FRAUD ON HOTEL OR RESTAURANT KEEPER — § 943.21(1m)(a)**Statutory Definition of the Crime**

Fraud on a hotel or restaurant keeper, as defined in § 943.21 of the Criminal Code of Wisconsin, is committed by one who has obtained any beverage, food, lodging, ticket or other means of admission, or other service or accommodation at any campground, hotel, motel, boarding or lodging house, restaurant or recreational attraction and intentionally absconds without paying for it.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant obtained _____¹ at a _____.²
2. The defendant knew (he) (she) was obligated to pay for the _____.³
3. The defendant intentionally absconded without paying.

"Intentionally absconded" requires that the defendant left with the mental purpose⁴ to avoid paying⁵ for the _____.⁶

GIVE THE FOLLOWING WHEN SUPPORTED BY THE EVIDENCE.⁷

[One who absentmindedly leaves without paying or who leaves temporarily without intending to terminate the relationship with the restaurant is not guilty of fraud on a restaurant keeper.]

[If the person who provided the food consented to the defendant's leaving without paying or extended credit, the defendant is not guilty of fraud on a restaurant keeper.]

Deciding About Knowledge and Intent

You cannot look into a person's mind to find knowledge or intent. Knowledge and 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 knowledge and intent.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three 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.

IF THE FELONY OFFENSE IS CHARGED, A JURY DETERMINATION OF VALUE MUST BE MADE. ADD THE FOLLOWING IF THE EVIDENCE WOULD SUPPORT A FINDING THAT THE VALUE OF THE FOOD OR SERVICES WAS MORE THAN \$2,500.⁸

[Finding the Value of the (Food) (Services)]

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

"Was the value of (food) (services) more than \$2,500?"

Answer: "yes" or "no."

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the value was more than \$2,500.]

COMMENT

Wis JI-Criminal 1461 was originally published in 1969 and revised in 1989, 1992, 1996, 2002, and 2005. The 2005 revision reflected changes made in § 943.21 by 2003 Wisconsin Act 252. This revision was approved by the Committee in February 2010.

This instruction is for violations of § 943.21(1m)(a). Related offenses are defined in subs. (1m)(b), (c), and (d), for which there are no suggested uniform instructions. The basic offense is a Class A misdemeanor. The penalty increases to a Class I felony if the value of the beverage, food, etc., exceeds \$2,500. This amount was increased to \$2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001.

2003 Wisconsin Act 80 created sub. (1m)(d) which prohibits absconding without paying for gasoline, etc. However, that offense is classified as a Class D forfeiture and thus is not addressed by the uniform jury instructions.

2003 Wisconsin Act 252 amended the statute to apply to tickets or other means of admission to a recreational attraction. Effective date: April 28, 2004.

1. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

2. Insert the term describing the place where the food, etc., was obtained: campground, hotel, motel, boarding or lodging house, restaurant, or recreational attraction. "Recreational attraction" is defined in § 943.21(1c).

3. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

4. "Intentionally" also is satisfied if the person "is aware that his or her conduct is practically certain to cause [the] result." In the context of this offense, it is unlikely that the "practically certain" alternative will apply so it has been left out of the text of the instruction. See Wis JI-Criminal 923B for an instruction that includes that alternative.

Subsections (2) and (2g) of § 943.21 provide that certain facts are prima facie evidence of an intent to defraud and of an intent to abscond without payment. Wis JI-Criminal 225 provides a suggested framework for implementing statutory "prima facie" provisions.

5. The 2010 revision changed the definition of "intentionally absconded" from "the mental purpose not to pay" to "the mental purpose to avoid paying." The Committee concluded that this captures the sense of "absconds" most applicable to this offense.

"Abscond" was defined as "to depart clandestinely" in State v. Croy, 32 Wis.2d 118, 121-22, 145 N.W.2d 118 (1966). The Committee has concluded that "departing clandestinely" without paying is one way to commit this offense, but that the statute is also violated, for example, by one who leaves openly without paying by deceiving the proprietor about his having paid for what was received. In the latter case, it is the intent to avoid paying that constitutes the offense, notwithstanding the fact that the actor did not clandestinely depart the premises. This interpretation is consistent with other provisions in § 943.21.

For example, subsec. (2)(a) provides that "the refusal of payment upon presentation when due . . . constitute[s] prima facie evidence of an intent to abscond without payment." Also see subsecs. (2g), (2m), and (2r) which contain similar prima facie provisions. All relate to behavior that does not involve "departing clandestinely."

6. Insert the term describing what was obtained: beverage, food, lodging, ticket or other means of admission, or other service.

7. The statute is not violated if credit has been extended, if the actor simply forgets to pay before leaving, or if the actor leaves with intent to return immediately and pay the bill. See Comment to § 343.22, p. 117, 1953 Report on the Criminal Code.

8. This offense is like theft in that the jury must make a finding of the value of the stolen property if the felony offense is charged and if the evidence supports a finding that the required amount is involved. Heyroth v. State, 275 Wis. 104, 81 N.W.2d 56 (1957). The amount making the offense a felony was increased to \$2,500 by 2001 Wisconsin Act 16, effective date: September 1, 2001. While value may not, strictly speaking, be an element of the crime, it determines the range of permissible penalties and should be established "beyond a reasonable doubt." The Committee concluded that if the misdemeanor offense is charged, the jury need not make a finding as to value.