

**1731 MISCONDUCT IN PUBLIC OFFICE (BY PERFORMANCE OF UNAUTHORIZED OR FORBIDDEN ACT) — § 946.12(2)****Statutory Definition of the Crime**

Misconduct in public office, as defined in § 946.12(2) of the Criminal Code of Wisconsin, is committed by a (public officer) (public employee) who, in (his) (her) capacity as an (officer) (employee), does an act which (he) (she) knows is in excess of (his) (her) lawful authority or which (he) (she) knows (he) (she) is forbidden by law to do in an official capacity.

**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 four elements were present.

**Elements of the Crime That the State Must Prove**

1. At the time of the alleged offense, the defendant was a (public officer) (public employee). A (position) is a (public officer) (public employee).<sup>1</sup>
2. The defendant, in (his) (her) capacity<sup>2</sup> as a public (officer) (employee) (describe conduct).
3. (Describe conduct) was (in excess of the defendant's lawful authority) (conduct in which the defendant was forbidden by law to engage in (his) (her) official capacity).<sup>3</sup>

4. The defendant knew (that the conduct was in excess of (his) (her) lawful authority) (that (he) (she) was forbidden by law to engage in the conduct in (his) (her) official capacity).

### **Deciding About Knowledge**

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

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four 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 1731 was originally published in 1966 and revised in 1990. This revision was approved by the Committee in February 2008 and involved adoption of a new format and nonsubstantive changes to the text.

1. The Committee believes that it is clearer to the members of the jury if they are simply instructed that, for example, "A member of the county board is a public officer."

"Public officer" and "public employee" are defined as follows in § 939.22(30):

"Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.

"Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

2. In *State v. Schmit*, 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983), the court of appeals addressed the connection between the conduct and the defendant's official capacity. The court concluded

that § 946.12(2) was not violated by a prison guard who engaged in consensual sexual relations with an inmate. The court emphasized that there must be a "material connection" between the forbidden act and the public office, that it must be "inherently related to the duties of the office." 115 Wis.2d 657, 665.

3. It may be helpful to refer to any statutes defining the particular officer's duties in instructing on whether the acts claimed to have been committed by the defendant violated a lawful duty or were in excess of lawful authority.