

**1754 FALSE SWEARING: FALSE STATEMENT UNDER OATH: FELONY
— § 946.32(1)(a)**

Statutory Definition of the Crime

False swearing, as defined in § 946.32(1)(a) of the Criminal Code of Wisconsin, is committed by one who under (oath) (affirmation) makes or subscribes a false statement which (he) (she) does not believe is true, when such (oath) (affirmation) is (authorized or required by law)¹ (required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action).

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. The defendant (made) (subscribed)² a false statement.
2. The defendant did not believe the statement to be true³ when (made) (subscribed).
3. The statement was (made) (subscribed) under (oath) (affirmation).⁴

USE THE FOLLOWING IF WRITTEN STATEMENTS ARE INVOLVED.⁵

[The meaning of being under (oath) (affirmation) is usually well understood, as when the witnesses in this case were put under oath before you. A written

statement is under (oath) (affirmation) when it is subscribed or signed by a person, who swears that it is the truth, before some person authorized⁶ to administer an (oath) (affirmation).]

4. The (oath) (affirmation) was (authorized or required by law) (required by any public officer or governmental agency as a prerequisite to the officer or agency taking some official action).

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 1754 was originally published in 1994. This revision was approved by the Committee in June 2003 and involved adoption of a new format.

This instruction is for a violation of § 946.32(1)(a); violations of sub. (1)(b) are addressed in Wis JI Criminal 1755. Violations of sub. (1) are felonies. The misdemeanor offense defined in sub. (2) is addressed by Wis JI Criminal 1756.

1. One alternative is that the sworn statement must be "authorized or required" by law. An affidavit made for no reason or for a purpose for which the law does not specifically authorize or require an oath, *e.g.*, endorsement of a product, is not within the statute. See *State v. Zisch*, 243 Wis. 175, 9 N.W.2d 625 (1943). The unauthorized affidavit, if false, is covered by § 946.32(2), the misdemeanor false swearing offense.

In *State v. Devitt*, 82 Wis.2d 262, 270, 262 N.W.2d 73 (1978), the court concluded that "authorized by law" must "be narrowly construed in light of a penal statute, the definition of 'permitted' [urged by the state] is inappropriate." The court cited the definition provided in *Black's Law Dictionary*, 4th ed., p. 169, as indicating "that 'authorize' means more than consistent with the general scheme. Among its definitions: 'To empower; to give a right or authority to act . . . It has a mandatory effect or meaning, implying a direction to act. Authorized is sometimes construed as equivalent to directed.'" The court found that the filing of the statements in question were not "authorized" by the state Corrupt Practices Act (§ 12.09(5)(b), 1971 Wis. Stats.). The court also noted that the alleged misconduct was "not a wrong

without a remedy. The misdemeanor false swearing statute, see § 946.32(2), would clearly apply in this case because it has no requirement that the false statement be made under oath or affirmation required or authorized by law." 82 Wis.2d 262, 270-71.

2. The meanings of "make" and "subscribe" were discussed in State v. Devitt, 82 Wis.2d 262, 262, N.W.2d 73 (1978). Both parties and, apparently, the Wisconsin Supreme Court, agreed that "subscribes" refers to signing a written document. The defendant argued that "makes" is limited to preparing or drawing up a writing. The court rejected this narrow definition, favoring a more general concept that includes making an oral statement in a judicial proceeding. 82 Wis.2d 262, 271-75.

3. As with perjury, if the defendant does not know whether the statement is true or false, it is false swearing if the statement turns out to be false, i.e., the statute does not require that the defendant know the statement to be false.

4. "Oath" is defined to include "affirmation" in § 990.01(24). The form of the testimonial oath is described in §§ 906.03(2) and 990.01(24). Section 887.01 identifies those who may administer oaths.

Section 906.03(3) provides for taking a statement under affirmation where a person has conscientious scruples against taking an oath and sets forth the form.

5. The bracketed material is provided for possible use where one or more written statements is involved. Jurors are familiar with testimony made under oath but may be less clear about how written statements are sworn to or affirmed.

6. Section 887.01 identifies those who may administer oaths.