

2663C ALCOHOL CONCENTRATION LEVEL — § 346.65(2)(g)

[ADD ONE OR MORE OF THE FOLLOWING QUESTIONS IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.]¹

If you find the defendant guilty, you must answer the following question² "yes" or "no":

["Did the defendant have an alcohol concentration of 0.25 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.20 or above?"]

[Answer the following question only if you answer the above question "no."]

["Did the defendant have an alcohol concentration of 0.17 or above?"]

Before you may answer "yes," you must be satisfied beyond a reasonable doubt that the alcohol concentration stated in the question was proved.

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2663C was originally published in 2001. This revision was approved by the Committee in December 2003.

1999 Wisconsin Act 109 created § 346.65(2)(g) which provides for increased fines for OWI offenders with three, four, or five or more priors. The increases will apply to offenses committed after the effective date: January 1, 2001. [Subsection (2)(g) was not affected by the changes made in laws relating to operating while intoxicated by 2003 Wisconsin Act 30.] The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled
- 0.20 to 0.249 minimum and maximum fines are tripled
- 0.25 or more minimum and maximum fines are quadrupled

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury.

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given.

The following form is suggested for the guilty verdict:

We, the jury, find the defendant guilty of (describe offense), as defined in § 346.63 ____, Wis. Stats., at the time and place charged in the complaint.

If you find the defendant guilty, answer the following question(s) "yes" or "no":

Did the defendant have an alcohol concentration of ____ or above?

[ADD QUESTIONS FOR ADDITIONAL LEVELS AS REQUIRED.]

1. The Committee recommends submitting the question in the form indicated, without the upper limit of the range in the second and third questions. For example, in place of the statute's "0.17 to 0.199," the third question uses "0.17 or above." The criminal charge should indicate the level of alcohol concentration involved and it should be sufficient to ask the jury whether the applicable level is exceeded.

2. The instruction is drafted to allow for submitting one, two, or all three of the questions regarding the level of alcohol concentration. More than one question would be appropriate when reasonable, though conflicting, views of the evidence would support findings of different alcohol concentration levels.