

**2668 OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT / OPERATING A MOTOR VEHICLE WITH A PROHIBITED ALCOHOL CONCENTRATION OF 0.08 GRAMS OR MORE — CIVIL FORFEITURE — §§ 346.63(1)(a) and 346.63(1)(b)**

**Description of the Charges**

The first citation in this case charges that the defendant drove or operated a motor vehicle on a highway while under the influence of an intoxicant in violation of § 346.63(1)(a) of the Wisconsin Statutes.

The second citation in this case charges that the defendant drove or operated a motor vehicle on a highway while the defendant had a prohibited alcohol concentration in violation of § 346.63(1)(b) of the Wisconsin Statutes.

To these charges, the defendant has entered pleas of not guilty which means the (identify prosecuting agency)<sup>1</sup> must prove every element of each offense charged to a reasonable certainty by evidence which is clear, satisfactory, and convincing.<sup>2</sup>

It is for you to determine whether the defendant is guilty of one, both, or neither of the offenses charged. You must make a finding of guilty or not guilty for each offense charged.<sup>3</sup>

Each citation charges a separate offense, and you must consider each one separately.

**Definition of Citation 1 – Operating Under The Influence**

Section 346.63(1)(a) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway while under the influence of an intoxicant.<sup>4</sup>

**Burden of Proof**

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

### **Elements of Citation 1 – Operating Under The Influence**

1. The defendant (drove) (operated) a motor vehicle<sup>5</sup> on a highway.<sup>6</sup>

["Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]<sup>7</sup>

["Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]<sup>8</sup>

2. The defendant was under the influence of an intoxicant at the time the defendant (drove) (operated) a motor vehicle.

### **Definition of "Under the Influence of an Intoxicant"**

"Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.<sup>9</sup>

Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.

It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.

### **Definition of Citation 2 – Operating With A Prohibited Alcohol Concentration**

Section 346.63(1)(b) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway with a prohibited alcohol concentration.

### **Burden of Proof**

Before you may find the defendant guilty of this offense, the (identify prosecuting agency) must satisfy you to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the following two elements were present.

### **Elements of Citation 2 – Prohibited Alcohol Concentration**

1. The defendant (drove) (operated) a motor vehicle on a highway.
2. The defendant had a prohibited alcohol concentration at the time the defendant (drove) (operated) a motor vehicle.

"Prohibited alcohol concentration" means<sup>10</sup>

[.08 grams or more of alcohol in 210 liters of the person's breath].

[.08 grams or more of alcohol in 100 milliliters of the person's blood].

### **How to Use the Test Result Evidence**

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED<sup>11</sup> AND THERE IS NO ISSUE RELATING TO THE

DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"<sup>12</sup> THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of (driving) (operating) a motor vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating). If you are satisfied that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), unless you are satisfied of that fact to a reasonable certainty by evidence which is clear, satisfactory, and convincing.

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:<sup>13</sup>

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The (identify prosecuting agency) is not required to prove the underlying scientific reliability of the method used by the testing device. However, the (identify prosecuting agency) is

required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

### **Jury's Decision**

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while under the influence of an intoxicant, you should find the defendant guilty of the offense charged in Citation 1.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 1.

If you are satisfied to a reasonable certainty by evidence which is clear, satisfactory, and convincing that the defendant (drove) (operated) a motor vehicle on a highway while the defendant had a prohibited alcohol concentration, you should find the defendant guilty of the offense charged in Citation 2.

If you are not so satisfied, you must find the defendant not guilty of the offense charged in Citation 2.

### **COMMENT**

Wis JI-Criminal 2668 was originally published in 1986 and revised in 1993, 2003 and 2005. This revision was approved by the Committee in December 2014; it deleted material relating to finding that the alcohol concentration was more than 0.10, a fact that formerly made a difference in applicable fees and costs.

The 2003 revision reflected the change in the prohibited alcohol concentration [PAC] level for persons with 2 or fewer priors from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003.

This instruction is drafted for the case where two counts based on the same incident are submitted to the jury: one alleging operating while under the influence in violation of 346.63(1)(a); and, one alleging operating with a prohibited alcohol concentration of 0.08 or more. It is a combination of Wis JI-Criminal 2660A and 2663A and is intended to implement the procedure set forth in § 346.63(1)(c). It attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. This instruction is for a first offense under § 346.63(1)(a) and (b), which are punished as forfeitures. For a combined instruction for criminal violations, see Wis JI-Criminal 2669.

The constitutionality of the two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation in § 346.63(1)(c) that there be only one conviction. Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

This revision adopts a new format for footnotes. Footnotes common to several instructions are collected in Wis JI-Criminal 2600 Introductory Comment. The applicable sections of Wis JI-Criminal 2600 are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

2. This statement is the equivalent of Wis JI-Criminal 115, One Defendant: Two Counts, adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 115 is also given, the statement need not be repeated here.

3. This statement is the equivalent of Wis JI-Criminal 484, . . . One Defendant: Two Counts . . . , adapted for a forfeiture case. If the equivalent of Wis JI-Criminal 484 is also given, the statement need not be repeated here.

4. This instruction is drafted for cases involving the influence of an intoxicant. For a model tailored to the influence of a controlled substance, see Wis JI-Criminal 2664. For a model tailored to the combined influence of an intoxicant and a controlled substance, see Wis JI-Criminal 2664A. For a model tailored to the influence of a drug, see Wis JI-Criminal 2666.

5. Regarding the definition of "motor vehicle," see Wis JI-Criminal 2600 Introductory Comment, Sec. II.

6. Regarding the "on a highway" requirement, see Wis JI-Criminal 2600 Introductory Comment, Sec. I., and Wis JI-Criminal 2605.

7. This is the definition of "drive" provided in § 346.63(3)(a).

8. Regarding the definition of "operate," see Wis JI-Criminal 2600 Introductory Comment,

Sec. III.

9. The instruction is drafted for cases involving the influence of an intoxicant. See note 4, *supra*. For a discussion of issues relating to the definition of "under the influence," see Wis JI-Criminal 2600 Introductory Comment, Sec. VIII.

10. The definitions are provided in § 340.01(46m) and (1v). See Wis JI-Criminal 2600 Introductory Comment, Sec. V.

11. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

12. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

13. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, sec. VII.