
Wisconsin Legislative Council

INFORMATION MEMORANDUM



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CIVIL AND CRIMINAL PENALTIES FOR INVASIONS OF PRIVACY

Wisconsin law recognizes an individual's right to privacy. To protect this right, there are a number of privacy laws that are either enforced privately by the individual whose right was violated in the case of a civil violation, or by local district attorneys in the case of a criminal violation.

This information memorandum discusses the various civil and criminal penalties that may be imposed when a person's right to privacy has been violated.

CIVIL PENALTY FOR INVASION OF PRIVACY

Under the statutes and case law, a person may bring a civil action for damages resulting from an invasion of privacy. For purposes of civil relief, an invasion of privacy is defined as any of the following:

- **Highly Offensive Intrusion on Privacy.** An intrusion upon another's privacy that is highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner that is actionable for trespass.
- **Using a Person's Name or Likeness.** The use, for advertising purposes or for purposes of trade, of the name, portrait, or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
- **Publicity About Private Life Events.** Publicity of a matter concerning the private life of another that is highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy, however, to communicate any information available to the public as a matter of public record.
- **Depictions of Nudity.** Conduct involving a representation that depicts nudity without the knowledge and consent of the person who is depicted nude in a circumstance in which the person has a reasonable expectation of privacy, regardless of whether there has been a criminal action related to the conduct or regardless of the outcome of such a criminal action.

[s. 995.50 (2), Stats.]

The statutes specify that a person whose privacy has been invaded is entitled to all of the following remedies:

- Equitable relief to prevent and restrain an invasion of privacy.¹
- Compensatory damages based on the plaintiff's loss or the defendant's unjust enrichment, if proven.
- Reasonable attorney fees.

[s. 995.50 (1), Stats.]

If the court determines that an action for invasion of privacy is frivolous, the court must award the defendant reasonable fees and costs relating to the defense. A frivolous action is an action that was commenced in bad faith or for harassment purposes or an action that was commenced without an arguable basis. [s. 995.50 (6), Stats.]

CRIMINAL PENALTIES FOR INVASIONS OF PRIVACY

Crime of Invasion of Privacy

Wisconsin law criminalizes the use of a surveillance device in a private place if the person using the device has the intent to observe a nude or partially nude individual and does not have the consent of that individual. Some such actions are penalized as a misdemeanor and others are penalized as a felony.

Specifically, the following invasions of privacy are punishable as a Class A misdemeanor²:

- Installing or using a surveillance device in a private place with the intent to observe a nude or partially nude person without the consent of the person observed.
- Looking into, for the purpose of sexual arousal or gratification, a private place that is or is part of a public accommodation (e.g., a public restroom) in which a person may be nude or partially nude, regardless of whether an individual is present.
- Entering another person's private property without consent or entering an enclosed or unenclosed common area of a multi-unit dwelling or condominium and viewing an individual who has a reasonable expectation of privacy in that part of the dwelling, without consent, for the purposes of sexual gratification or arousal and with the intent to intrude upon or interfere with the individual's privacy.

A violation of the crime of invasion of privacy is punishable as a Class I felony³ in the following circumstances:

- One of the aforementioned misdemeanor invasion of privacy crimes is perpetrated against a person who has not attained the age of 18 at the time of the violation.

¹ The equitable relief, however, cannot include the prior restraint) of constitutionally protected speech before it is expressed. [s. 995.50 (1) (a), Stats.]

² The penalty for a Class A misdemeanor is a fine of up to \$10,000, imprisonment of nine months, or both. [s. 939.51 (3) (a), Stats.]

³ The penalty for a Class I felony is a fine of up to \$10,000, imprisonment of up to three years and six months, or both. [s. 939.50 (3) (i), Stats.]

- Knowingly installing or using any device, instrument, mechanism, or contrivance to intentionally view, broadcast, or record under the outer clothing of an individual that individual's genitals, pubic area, breast, or buttocks, including genitals, pubic area, breasts, or buttocks that are covered by undergarments, or to intentionally view, broadcast, or record a body part of an individual that is not otherwise visible, without that individual's consent.

[s. 942.08, Stats.]

In addition to imposing criminal penalties, a court may order an individual convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect of invasion of privacy to register with the Department of Corrections (DOC) as a sex offender if the court determines that the underlying conduct was sexually motivated and that requiring the person to report as a sex offender is in the interest of public protection. [s. 973.048 (1m) (a), Stats.]

Various Crimes Involving Representations Depicting Nudity

A "representation" is a photograph, exposed film, motion picture, videotape, recording or other audio or visual representation, or data that represents a visual image or audio recording.

[s. 942.09 (1) (c), Stats.]

Wisconsin law prohibits certain representations depicting nudity without the express permission of the individual depicted in the representation. As summarized below, there are numerous ways a person may violate the crime of representations depicting nudity, depending upon whether the person captures, reproduces, or possesses the representation; solicits representations from a minor; distributes sexually explicit images; or captures representations while the other person is in a locker room.

In addition to being subject to criminal penalties as discussed below, a person may be subject to sex offender registry requirements. A court may order an individual convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect to register with DOC as a sex offender if the court determines that the underlying conduct was sexually motivated and that requiring the person to report as a sex offender is in the interest of public protection. However, if the person was under the age of 21 at the time of the violation, the court may provide that the person be released from these requirements upon successfully completing the sentence or probation imposed for the offense. [s. 973.048 (1m) (a) and (b), Stats.]

Criminal Capture, Reproduction, and Possession of Representations Depicting Nudity

State law provides that anyone who does any of the following may be found guilty of a Class I felony:

- Captures an intimate representation without the consent of the person depicted under circumstances in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted does not consent to the capture of the intimate representation.
- Makes a reproduction of an intimate representation that the person knows or has reason to know was captured in violation of the above provision and that depicts an intimate representation captured in violation of the above provision, if the person depicted in the reproduction did not consent to the making of the reproduction.

- Possesses, distributes, or exhibits an intimate representation that was captured in violation of the above provision or a reproduction made in violation of the above provision(s), if the person knows or has reason to know that the intimate representation was captured in violation of the above provision or the reproduction was made in violation of the above provision(s), and if the person who is depicted in the intimate representation or reproduction did not consent to the possession, distribution, or exhibition.

A person who violates these prohibitions faces higher penalties if the victim is under 18 years of age. However, there are exceptions for parents or guardians and for representations of public importance. If the person depicted in violation of these prohibitions had not, at the time of the violation, attained the age of 18 years, the person who commits a violation may be found guilty of a Class H felony.⁴

[s. 942.09 (2), Stats.]

Criminal Solicitation of Representations Depicting Nudity from a Minor

Another way a person may violate the crime of representations depicting nudity relates to the solicitation of sexually explicit representations from minors. State law prohibits a person from soliciting an intimate or private representation from a person who the actor believes or has reason to believe is less than 18 years of age.

This prohibition does not apply to a person who solicits such representations and is less than 18 years of age. If the person committing a violation of this crime is at least 18 years of age, the penalty is generally a Class I felony. The penalty is reduced, however, to a Class A misdemeanor if both of the following apply:

- The person who solicits the intimate or private representation is at least 18 years of age, but has not attained 21 years of age.
- The child solicited is not more than three years younger than the person who solicited the intimate or private representation.

[s. 942.09 (4), Stats.]

Criminal Distribution of Sexually Explicit Images

Wisconsin law prohibits the distribution of certain sexually explicit images without the consent of the person depicted. Commonly referred to as the state's "revenge porn" statute, it prohibits a person from doing the following:

- Posting, publishing, or causing to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.

An "intimate representation" is:

- A representation of a nude or partially nude person.
- A representation of clothed, covered, or partially clothed or covered genitalia or buttock that is not otherwise visible to the public.
- A representation of a person urinating, defecating, or using a feminine hygiene product.
- A representation of person engaged in sexual intercourse or sexual contact.

[s. 942.09 (1) (ag), Stats.]

⁴ The penalty for a Class H felony is a fine of up to \$10,000, imprisonment up to six years, or both. [s. 939.50 (3) (h), Stats.]

- Posting, publishing, or causing to be posted or published, a depiction of a person that he or she knows is a private representation without the consent of the person depicted.

“Posting or publishing” includes posting or publishing on a website, if the website may be viewed by the general public.

A violation of either of these provisions is a Class A misdemeanor. However, the penalty increases to a Class I felony if the person depicted or represented had not, at the time of the violation, attained the age of 18 years.

This prohibition does not apply to the following:

- The parent, guardian, or legal custodian of the person depicted if the private representation does not violate the crime of sexual exploitation of a child or possession of child pornography, and the posting or publication is not for the purpose of sexual arousal, gratification, humiliation, degradation, or monetary or commercial gain.
- A law enforcement officer or agent, acting in his or her official capacity in connection with the investigation or prosecution of a crime.
- A person who posts or publishes a private representation that is newsworthy or of public importance.
- A provider of an interactive computer service, as defined in 47 U.S.C. s. 230 (f) (2), or to an information service or telecommunications service, as defined in 47 U.S.C. s. 153, if the private representation is provided to the interactive computer service, information service, or telecommunications service by a third party.

“Private representation” is “a representation depicting a nude or partially nude person or depicting a person engaged in sexually explicit conduct that is intended by the person depicted to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.”

[s. 942.09 (1) (bn), Stats.]

[s. 942.09 (3m), Stats.]

Criminal Representations of Nudity in a Locker Room

Capturing Representations of Nudity in a Locker Room. A person is generally prohibited under state law from intentionally capturing, while present in a locker room, a representation of another person who is nude or partially nude in the locker room without permission. This prohibition does not apply, however, if the person captured: (1) consents to this activity; and (2) is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent, or the person’s parent, guardian, or legal custodian consents to the capture of the representation.

The penalty for violating that prohibition depends upon the age of the person who is represented nude or partially nude while in the locker room. If the person represented is an adult, the penalty is a Class A misdemeanor. If the person represented in the violation was under 18 years at the time of the violation, the penalty is a Class I felony. [s. 942.09 (5) (a) and (am), Stats.]

Exhibiting, Distributing, Transmitting, or Broadcasting Nudity in a Locker Room. State law also prohibits various actions involving the exhibition, distribution, transmission, or broadcast of a representation of a nude or partially nude person that is in a locker room. In general, a person is prohibited from intentionally capturing and then exhibiting or distributing a representation of a nude or partially nude person, if the actor is present in, and the person is nude or partially nude in, the locker room. Similarly, a person is generally prohibited from

transmitting or broadcasting an image of a nude or partially nude person from a locker room while the person is nude or partially nude in the locker room.

These prohibitions involving the exhibition, distribution, transmission, or broadcast of a representation of a nude or partially nude person who is in a locker room do not apply if the person captured: (1) consents to this activity; and (2) is, or the actor reasonably believes that the person is, 18 years of age or over when the person gives his or her consent, or the person's parent, guardian, or legal custodian consents to the capture of the representation.

A violation of one of these provisions is a Class I felony. However, the penalty increases to a Class H felony if the person represented in the violation had not, at the time of the violation, attained the age of 18 years.

[s. 942.09 (5) (b) and (bn), Stats.]

Criminal Use of a Drone

Wisconsin law prohibits an individual from using a drone with the intent to photograph, record, or otherwise observe another individual in a place or location where the individual has a reasonable expectation of privacy. The penalty for a violation of this provision is a Class A misdemeanor. This prohibition does not apply to a law enforcement officer authorized to use a drone pursuant to a search warrant. [s. 942.10, Stats.]

Criminal Identity Theft

The unauthorized use of personal identifying information, commonly referred to as "identity theft," is prohibited in Wisconsin. Identity theft occurs when a person intentionally uses or attempts to use personal identifying information or personal identification documents of another to obtain anything of value, including credit or services.

A person who intentionally uses or attempts to use personal identifying information or personal identification documents (a birth certificate, PIN number, or financial transaction card) of another individual to obtain credit, money, goods, services, or anything of value, without that individual's authorization or consent, to avoid civil or criminal process or penalty, or to harm the reputation, property, person, or estate of an individual, is guilty of a Class H felony.

The crime of identity theft, defines **personal identifying information** to include an individual's:

- Name.
- Address.
- Telephone number.
- Driver's license number.
- Social Security number.
- Employer or place of employment.
- Employee identification number.
- Mother's maiden name.
- Financial account numbers.
- Taxpayer identification number.

- DNA profile.
- Any number or code that can be used alone or with an access device to obtain money, goods, services, or any other thing of value.
- Unique biometric data, including a fingerprint, voice print, retina or iris image, or any other unique physical representation.
- Any other information or data that is unique to, assigned to, or belongs to an individual and that is intended to be used to access services, funds, or benefits of any kind to which the individual is entitled.
- Any other information that can be associated with a particular individual through one or more identifiers or other information or circumstances.

In addition, the law provides that if any individual reports an identity theft violation to the law enforcement agency where the individual resides, but the violation occurs outside of that law enforcement agency's jurisdiction, the law enforcement agency receiving the complaint must prepare a report on the violation and forward it to the law enforcement agency in the appropriate jurisdiction. [s. 943.201, Stats.]

Criminal Prohibition on Wiretapping

Wisconsin's wiretapping law is considered a "one-party consent" law. As long as one party to the communication consents, a person who is not acting under color of law may record or eavesdrop (intercept) any wire, electronic, or oral communication if the person is a party to the communication or has obtained prior consent from one of the parties to the communications. [s. 968.31 (2) (b), Stats.]

If there is no consenting party, then unless there is a specific exception authorizing wiretapping, it is a Class H felony to intentionally intercept, use a device to intercept, alter, or disclose information obtained through the interception of wire, electronic, or oral communication. However, if a person performs any interception with the purpose of violating a law or committing any other injurious act it is a Class H felony regardless of whether or not there was consent from at least one party. In addition to criminal penalties, a person may also be subject to civil penalties for violating the state's wiretapping law. [s. 968.31 (1), (2) (c), and (2m), Stats.]

This information memorandum was prepared by Melissa Schmidt, Senior Staff Attorney, on March 3, 2021.