U. S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION	DISCRETIONARY GRANT PROGRESS REPORT MAY 20 1976		
GRANTEE Wisconsin Council on Criminal Justice	LEAA GRANT NO. 74-DF-05-0029 ~~74-12-01-01~~	DATE OF REPORT 3/12/76	REPORT NO. Final
IMPLEMENTING SUBGRANTEE Wisconsin Department of Justice	TYPE OF REPORT ☐ REGULAR QUARTERLY ☐ SPECIAL REQUEST ☒ FINAL REPORT		
SHORT TITLE OF PROJECT Public Corruption Control Unit - Statewide	GRANT AMOUNT $190,613		
REPORT IS SUBMITTED FOR THE PERIOD September, 1974	THROUGH February, 1976		
SIGNATURE OF PROJECT DIRECTOR Bronson La Follette	TYPED NAME & TITLE OF PROJECT DIRECTOR Bronson C. La Follette Attorney General		

COMMENCE REPORT HERE (Add continuation pages as required.)

This is the final report of the project entitled Public Corruption Control Unit-Statewide.

From July of 1974 when the Public Corruption Unit was created to February of 1976 with the termination of this grant, a total of 216 complaints were received and processed by this Unit. Each of these complaints was evaluated to a point where it could be determined that the complaint alleged a violation of the Wisconsin Criminal Statutes and, further, that the complaint did involve allegation(s) of Corruption. As the result of this screening process, 145 complaints were not investigated further; either referrals were made to other governmental agencies, etc. and/or the complainant was informed of the results of their inquiry.

Of the 216 complaints received, 108 emanated from citizens; 30 from state sources; 25 from county level agencies; 18 from municipal government agencies; 29 from sources within the Wisconsin Department of Justice; 3 from federal agencies; and, 3 from confidential sources.

Of the remaining 71 complaints received, 34 were further screened by a preliminary investigation; 19 of those preliminary investigations were subsequently opened for full investigation while the remaining 15 were either referred to another governmental agency or were returned to the complainant. The remaining 37 complaints were fully investigated by the PCU and are, at this time, either still in the investigative stages, awaiting prosecution, discontinued because of lack of prosecution by a district attorney, etc., or in one of the prosecutive stages.

Some of the most significant corruption investigations conducted by the PCU include:

1. A five-month investigation into alleged Misuse of Public Funds and Falsification of Records, resulting in 4 public employees of the State of Wisconsin being charged with some 17 counts of Misconduct in Public Office and Theft.

2. A one-year investigation of alleged Misuse of Public Funds, Bribery, Campaign Finance Violations, Private Interest in Public Contracts, and Misconduct in Public Office. This investigation, still pending, has resulted in indictments against three individuals (2 public employees, 1 citizen) on counts of Bribery, Misconduct in Public Office, and Failure to Report Campaign Contributions.

RECEIVED BY GRANTEE STATE PLANNING AGENCY (Official)	DATE

3. The investigation of the theft of approximately $47,000 from a State University, which has resulted in a university employee being charged with Theft.

4. A six-month long investigation into the theft and counterfeiting of State of Wisconsin checks. It is estimated at this point that in excess of $40,000 worth of State of Wisconsin counterfeit checks have been passed in the metropolitan areas of Wisconsin. Special Agents assigned to the PCU in furtherance of this investigation have just recently begun to collect, evaluate, and organize information collected by numerous local law enforcement agencies.

In conjunction with these investigative accomplishments, the Public Corruption Control Unit was evaluated on three separate occasions in terms of its progression in achieving established objectives for this project. The most current evaluation was completed in October, 1975 by an ad-hoc review team. As this evaluation was conducted in such close proximity to the termination of the grant, the results of that final evaluation are included in this report as follows:

(10/75)

INTRODUCTION

The Wisconsin Department of Justice has established an ad hoc three-member review staff composed of: William D. Miller, Chief of Budget and Management; Cletus Hansen, Training Officer; and, Patrick Riopelle, Research Analyst. The main objective of this review staff was to assess, evaluate, and make recommendations as to the efficacy and performance of the Public Corruption Unit (PCU) as it was established by way of the Public Corruption Unit Grant. In this review of the Public Corruption Unit, special attention was given to the following elements: (a) Comparative assessment of pre-project conditions to conditions obtained throughout the project implementation period; (b) Impact of the project in terms of avowed, attained, or revised goals with a view towards upgrading specific capabilities; (c) The review staff making criticisms and recommendations where the need arises in this report; and (d) A final evaluation in terms of refunding the Public Corruption Unit Grant.

ESTABLISHMENT OF A PUBLIC CORRUPTION UNIT

Prior to the funding by LEAA, the Wisconsin Department of Justice lacked the manpower and resources to concentrate its investigative efforts on a full-time basis to the problem of public corruption. The real need for a separate investigative unit devoted exclusively to the investigation and prosecution of public corruption became evident as the department, through its prescribed duties, unearthed a large number of incidents involving organized public corruption. The Wisconsin Department of Justice satisfactorily showed that, as a result of previous investigations, Wisconsin does, indeed, have an organized crime problem as it relates to price-fixing, kickbacks to public officials, bribery of public officials and employees, and serious public conflicts of interest. As a direct result of this need for a separate investigative unit aimed at public corruption,

in the *Kort* case had been reimbursed for lost wages, he was not liable as he could not have had notice of conduct which the Wisconsin Supreme Court had only, in the course of the *Kort* opinion, made criminal. The court opined that the officer must have adequate notice or knowledge that the activity in which he engaged was prohibited in order to satisfy due process. The court cited *U.S. v. Harriss* (1954), 347 U.S. 612, 617, 618, 74 S.Ct. 808, 98 L.Ed. 989, for a discussion of constitutional requirements as to notice:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

In *State v. Zwicker* (1969), 41 Wis. 2d 497, 507, 164 N.W. 2d 512, 517, the Wisconsin Supreme Court similarly defined the concept of void for vagueness in terms of indefiniteness of statutory language:

> "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional."

This test is virtually identical to the one offered in the leading U.S. Supreme Court case on the subject, *Connally v. General Construction Company* (1925), 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. It is there said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 269 U.S. at 391.

To the same effect see *Lanzetta v. State* (1939), 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, and *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed. 2d 222.

Counter arguments to an attack on the vagueness on any term in 946.12 would, of course, involve arguing that the terms were clear. [For definitions of terms in question, see the discussion of the particular elements of the various subsections of 946.12, supra]. In the subsections which proscribe conduct forbidden or not authorized by law, reference may be had to the statutes, rules, codes, etc., which describe the scope of the duties of the officer. It can be argued that the "person of ordinary intelligence" referred to in the test for vagueness is not a person ignorant of the law. Even if there is no clear statutory mandate as to the scope of an officer's or employe's misconduct, it can be argued that one who chooses to walk the line between legality and illegality can reasonably be expected to bear the risk, should he go too far. The Wisconsin Supreme Court in *State v. Givens* (1965), 28 Wis. 2d 109, 135 N.W. 2d 780, cited the following passage from Justice Holmes in *U.S. v. Wurzbach* (1930), 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508:

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to criminal law to make him take the risk." 135 N.W. 2d at 785.

In *State v. Alfonsi, supra,* the Wisconsin Supreme Court cited *Boyce Motor Lines v. U.S.* (1952), 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367:

> ". . . [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limits the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

existing LEAA funding enabled the Wisconsin Department of Justice to establish a five-member investigative unit with counsel and clerical assistants for the investigation of public corruption in the state of Wisconsin.

The PCU was officially created on July 30, 1974 with an Assistant Attorney General designated as Chief Counsel. In September, 1974, the Division of Criminal Investigation assigned four experienced Special Agents to the PCU. As noted in an earlier quarterly report, this was done to make the newly-created unit immediately operational. Thereafter, through standard personnel selection procedures, a Chief Special Agent was selected for the Unit.

MISSION STATEMENT

The Public Corruption Unit has established as its ultimate mission to be "to expose and minimize public corruption in the state of Wisconsin".[1] The report is worth quoting at length in its evaluation of its success to date.

> Since its inception, the Unit has received a total of 96 referrals from governmental authorities and citizens of the state of Wisconsin. It has opened 29 cases for full investigation and conducted a total of 21 "preliminary" investigations, which are an administrative tool to determine the validity of complaints prior to committing total effort to an investigation.
>
> The 29 cases opened for full investigation are broken down by governmental entities as follows:

County	City	State	Town	Village
15	2	6	4	2

> The Unit has been responsible for the arrest of seven persons on felony counts of theft and misconduct in public office and misdemeanor counts of theft. It has used the inquisitorial hearing (John Doe) on three occasions.
>
> The most significant investigation involves the arrest of four persons for 13 felony counts of theft and misconduct in public office. Also, the four were charged with a total of four misdemeanor counts of theft. One of the four persons charged was a district supervisor of high standing in the organization.
>
> In many instances, however, investigation of many complaints alleging bribery, etc., have revealed mismanagement/non-management on the part of a governmental official. These types of investigations have been referred to the proper agency directors along with the Unit's recommendations for corrective action, keeping in mind the goal of better management.

[1] March-June, 1975 Quarterly Report

In a review such as this, special attention was given to the ultimate goal of the Public Corruption Unit. Originally, the ultimate mission of the Unit was to "operate within the Department of Justice as an investigative-prosecution strike force which is charged with the singular responsibility of investigating and prosecuting public corruption in the state of Wisconsin." Over the intervening months, the Department of Justice reviewed the ultimate goal and came, to its credit, to the realization that, as stated above, it was not really accurate in its description of the ultimate goal of the Public Corruption Unit. The review staff concurs with the present ultimate goal "to expose and minimize public corruption in the state of Wisconsin." This current ultimate goal is commensurate with the real purpose of the unit.

Also of important note is the Public Corruption Unit's own evaluation to date. In its own review, the Unit points out that many complaints alleging bribery, etc., have in fact revealed mismanagement/non-management on the part of government officials. The investigations were subsequently referred to the proper agency with recommendations for corrective action.

While pleased with the initial thrust of the Unit into areas of public corruption, the review staff feels that concentrated attention should be given in the future towards the minimizing and prosecution of public corruption on a very high level within the state. Such anticipated actions would result in upgrading the program to its most efficient level. The review staff feels that the Unit will better serve the state of Wisconsin by concentrating on well-organized, large-scale corruption activities. Such a recommendation has been incorporated in the Department of Justice's refunding application.

OBJECTIVES

Since its inception, the Public Corruption Unit, through its quarterly reports, has consistently stressed certain objectives which it felt would best serve the overall goal of minimizing public corruption. Listed below are those objectives most consistently stressed with appropriate comments and criticisms, both by the Unit and the review staff.

1. To support the adoption of a State Gift & Gratuity Statute which would basically forbid public officials from receiving anything of value from individuals with whom they have had contact in their official capacity. It would also be recommended that all local units of government ADOPT such a governing rule for the purpose of educating their respective public employees and officials regarding public corruption.

In evaluating this objective, the PCU has reported the fact that staff members of the Unit have been available to explain or to lecture to any individual or group desiring an explanation of the necessity of adopting a Gift & Gratuity regulation. The PCU has also stated that the Assistant Attorney General in the PCU has lectured to various state agencies to stress the need for a state statute. The Unit's support for active legislative reform has occurred, however, no introduction or passage has occurred in the Wisconsin legislature. The objective to support such adoption should be continued to be addressed, however, the reality of legislative passage must be realized as well as the priorities for investigative accomplishments realized.

2. To prepare and distribute to all local district attorneys a Misconduct in Public Office Trial Manual. This trial manual would focus on Chapter 946 of the Wisconsin Statutes, with particular emphasis on 946.10 to and through 946.18 of the Wisconsin Statutes. In addition to 946.12, the trial manual will also discuss the Ethics Statute and other statutes and ordinances affecting public officials and public employees in Wisconsin.

This objective has been achieved as the trial manual has been completed and has been distributed to all attorneys and prosecutors in the state of Wisconsin. The review staff feels that there is no need to re-state this objective in future refunding, as it has been accomplished. However, if the need for updating the trial manual arrives in the future, it should be done. (A copy is included.)

3. To train and assist local prosecutors with the initial handling and prosecutions of public corruption cases.

The review staff has observed that the Unit has conducted investigative proceedings and has been actively involved with various district attorneys' offices. It has used those opportunities to train and assist the involved prosecutors. It has also come to the attention of the review staff that the Training and Standards Board has approved the inclusion of a 2-hour mandatory training program on Misconduct in Office in the certified basic course for new law enforcement officers. The course has already been taught and undoubtedly future PCU quarterly reports will accurately reflect the total number of hours spent on instruction. The review staff feels that such progress reflects favorably on the PCU in this area.

4. To serve as a clearinghouse for other state and federal investigations involving public corruption and to insure that the subject matter of those investigations is not occurring in the state of Wisconsin.

Lines of communication have been opened by the PCU in its dealings and contacts with other state law enforcement agencies, and law enforcement agencies of other states. While the idea of acting as a clearinghouse involving public corruption is an admirable idea, the review staff feels that in order to make this more structured, a schedule of conferences and discussions with various local, state, and federal agencies should be devised and adhered to. In this way, it will become known to these other agencies that the PCU is firmly committed to this principle and it is hoped that these other agencies will respond accordingly.

5. To establish lines of communication with various state auditors for the purpose of receiving information regarding possible government corruption and to educate those auditors in the recognition of various indicators of public corruption.

The Unit has, during its investigations of state agencies, made recommendations to administrators of those agencies and initiated new investigations so that purchasing procedures are conducted to meet this objective. It has been observed that the Unit has worked side-by-side with various audit groups. While there is nothing inherently wrong with such a procedure, the staff feels that such procedures in the future might possibly be toned down--especially if such actions detract the Unit from major investigations of organized public corruption. However, where there is a definite need to educate those auditors and vice versa, it should be done--especially if it involves public corruption on a high level.

6. To lower the public tolerance of illegal activities committed by public employees and public officials. This objective can be achieved through an aggressive campaign focused on the cost of public corruption to the average citizen of Wisconsin.

The Public Corruption Unit has received coverage in the newspapers and other media. It is felt by the review staff that these news accounts illustrate to the public the burdensome cost of public corruption to them, both as citizens and as taxpayers. However, the review staff disagrees with the PCU quarterly report which stated that such coverage "lowered the public tolerance of corruption". The review staff differs with such an interpretation largely because there are no accurate measuring tools available to determine if, indeed, the public has lessened its tolerations of corruption. Yet, it is the view of the staff that the uncovering and prosecuting of public corruption may diminish public tolerance but, because the idea of lowering public tolerance may be too nebulous to ever really be known, it should not have a high priority as an objective. Also, the review staff is of the opinion that the idea of an "aggressive campaign focused on the cost of public corruption" is not really within the scope of the Public Corruption Grant. Therefore, the objective should be re-written with a view towards stating the objective in such a manner that it is more in keeping with these recommendations.

EVALUATION

Past quarterly reports of the Public Corruption Control Unit have more than adequately described the impact and results of this project. These quarterly reports have indicated that the formal evaluations of the Unit have revealed that Division of Criminal Investigation cases alleging corruption have increased, as predicted, during the initial funding. The revised goal, as opposed to the initial goal of the Unit, is to expose and minimize public corruption in the state of Wisconsin.

The review staff has noted in this report that one of the inherent problems of this project to date has been that the investigators, acting on a complaint, have utilized extensive manhours only to determine that the original complaint is not one of misconduct or a criminal nature but one of mismanagement or non-management by government officials, with no results in criminal prosecution.

The review staff has taken note of the fact, however, that when the Unit has uncovered this type of activity, it has not assumed a passive role but has brought the problem to the attention of the particular segment of government and has made recommendations to correct and resolve that issue. Despite this commendable action by the Unit, it is the expressed position of the review staff that, as opposed to these types of activity, future attention should be given towards the minimizing and prosecuting of public corruption on a very high level within the state. This is not stated in such a way as to denigrate the past achievements of the Unit, for they are notable. Instead, it is said in such a way as to bring attention to the need for a more concentrated effort against public corruption of an organized criminal nature. Such a recommendation now a part of the refunding request.

The review staff has also noted a decline in attorney workload because of the professional expertise possessed by the Unit's investigators, the training of prosecutors throughout Wisconsin, and the distribution of a handbook for investigating and prosecuting corruption and bribery cases. Because of this less than full time utilization of an experienced criminal lawyer, it is recommended that the state start to assume full financial responsibility for this position and that the counsel position be funded by the state and not incorporated into the actual grant, with the commitment of the Justice Department to provide full counsel support to the PCU.

The Public Corruption Unit has already achieved some of the intermediate objectives that were established in the original grant proposal. The more consistent objectives that the Unit stressed have already been assessed in this report by the review staff. Those comments speak for themselves. The review staff does feel, however, that the Unit is moving towards achieving objectives it has added or revised to look into new areas of corruption.

After review of the initial Public Corruption Control Unit Grant and operations of that Unit, the review staff recommends to the Wisconsin Department of Justice that it fully support the refunding of the Public Corruption Control Unit to allow this Unit to continue with emphasis placed on high level investigative activities in the area of organized crime as it relates to public corruption.

The Wisconsin Department of Justice is quite pleased with the results that have been achieved through this project.

U. S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION	REGION V WORKSHEET DETAILED SCHEDULES, FINAL REPORT OF EXPENDITURES AND STATUS OF DISCRETIONARY GRANT FUNDS

Project Title: Statewide Public Corruption Control Unit Grant No. 74-DF-05-0029

Subgrantee: Wisconsin Department of Justice Starting: 06-15-74

Grantee and State: Council on Criminal Justice-Wisconsin Ending: 02-15-76

Schedule A--Expenditures for Personnel

A. Salaries and Wages

	Name	Project Position	Months Employed on Project	Percentage of time on Project	LEAA Support	Grantee Contribution	Total Salaries & Wages Paid
1.	JOHNSON, G.	Attorney	11	100	14,267.82		14,267.82
2.	MCKAY, J.	Attorney	3	35	1,530.67		1,530.67
3.	JENKINS, J.	Special Agent	16	100	17,667.03		17,667.03
4.	LAINE, D.*	Special Agent	4½	100	5,593.67		5,593.67
5.	NINNEMAN, R.	Special Agent	13	100	16,620.70		16,620.70
6.	PAGE, R.	Special Agent	15½	100	17,095.04		17,095.04
7.	SUHR, A.*	Special Agent	5	100	6,869.21		6,869.21
8.	ZEILER, J.	Special Agent	10	100	11,614.61		11,614.61
9.	ZWANK, D.	Special Agent	16	100	17,638.03		17,638.03
10.	STEINGASS, S.	Research Assistant	14	100	4,054.15		4,054.15
11.	BIANCARDI, L.	Clerk 3	14	100	7,051.49		7,051.49
A.	Total Expenditures for Personnel----------				$_____	$_____	$_____

B. Schedule B--Fringe Benefits

	Nature of the Benefit	LEAA Support	Grantee Contribution	Total Cost of Benefits
1.				
2.				
3.				
4.				
5.				
6.				
B.	Total Expenditures for Fringe Benefits----------	$_____	$_____	$_____

* LAINE and SUHR replace NINNEMAN and ZEILER

U. S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION	REGION V WORKSHEET DETAILED SCHEDULES, FINAL REPORT OF EXPENDITURES AND STATUS OF DISCRETIONARY GRANT FUNDS

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Subgrantee: Wisconsin Department of Justice Starting: 06-15-74

Grantee and State: Council on Criminal Justice-Wisconsin Ending: 02-15-76

Schedule A--Expenditures for Personnel

A. Salaries and Wages

	Name	Project Position	Months Employed on Project	Percentage of time on Project	LEAA Support	Grantee Contribution	Total Salaries & Wages Paid
1.	DENT, J.	Typist 3	2½	100	1,694.25		1,694.25
2.	HEMING, D.	Administrative Sec. 1	16	100	11,073.23		11,073.23
3.	HOFMAN, H.	Clerk	1	100	234.95		234.95
4.							
5.							
6.							
7.							
8.							
9.							
10.							
11.							
A.	Total Expenditures for Personnel----------				$ 133,004.85	$	$133.004.85

B. Schedule B--Fringe Benefits

	Nature of the Benefit	LEAA Support	Grantee Contribution	Total Cost of Benefits
1.	Income Continuation Insurance	374.06		374.06
2.	Social Security Tax	6,404.75		6,404.75
3.	Health Insurance	3,983.44	229.13	4,212.57
4.	Life Insurance	378.72		378.72
5.	Retirement	16,897.67		16,897.67
6.				
B.	Total Expenditures for Fringe Benefits----------	$ 28,038.64	$ 229.13	$ 28,267.77

Travel Expenditures

Ref. No.		Individual Traveler's Last Name	Dates of Travel	No. Days	Origin and Destination	Transport Charges	Other Travel[1] Allowances	LEAA Support	Grantee Contribution	Total Expenses
1987	1.	Ninneman	10-74	1	Statewide	81.27			81.27	81.27
2092	2.	Johnson	10-74	9	"		66.94	66.94		66.94
2724	3.	Ninneman	11-74	12		142.08	62.10		204.18	204.18
2726	4.	Zeiler	11-74	16	"	226.14	210.52		436.66	436.66
2727	5.	Zwank	11-74	17	"	131.28	42.07		173.35	173.35
2728	6.	Jenkins	11-74	17	"	107.25	26.95		134.20	134.20
2893	7.	Johnson	11-74	6	"	23.76	12.45		36.21	36.21
3274	8.	Johnson	12-74	4	"	35.20	9.95	45.15		45.15
3301-87	9.	Zeiler	12-74	15	"	826.75	172.62		998.87	998.87
3337	10.	Ninneman	12-74	7	"	102.48	133.77		236.25	236.25
3480	11.	Zwank	12-74	12	"	78.99	90.59	169.58		169.58
3866	12.	Jenkins	1-75	22	"	149.64	25.79	175.43		175.43
3888	13.	Johnson	1-75	8	"	7.20	139.55	146.75		146.75
3915	14.	Ninneman	1-75	5	"	13.39	5.80	19.19		19.19
3962	15.	Page	1-75	24	" & Minn.	314.88	294.67	609.55		609.55
4048	16.	Zwank	1-75	20	"	78.09	101.34	179.43		179.43
4061	17.	Zeiler	1-75	22	" ,Minn.& Ill.	231.27	138.17	369.44		369.44
4396 4511	18.	Johnson	2-75	1	"		49.83	49.83		49.83
4444	19.	Ninneman	2-75	6	" & Ill.	52.65	12.85	65.50		65.50

Travel Expenditures

	Individual Traveler's Last Name	Dates of Travel	No. Days	Origin and Destination	Transport Charges	Other Travel[1] Allowances	LEAA Support	Grantee Contribution	Total Expenses
44841.	Zwank	2-74	21	Statewide	100.23	54.58	154.81		154.81
44992.	Jenkins	2-75	19	"	138.84	38.70	177.54		177.54
45003.	Zeiler	2-75	20	"	200.13	181.04	381.17		381.17
45284.	Page	2-75	19	"	47.84	19.00	66.84		66.84
50645.	Johnson	3-75	9	"		79.90	79.90		79.90
50706.	Ninneman	3-75	4	"	11.83	4.60	16.43		16.43
51377.	Zwank	3-75	18	"	85.74	19.55	105.29		105.29
51548.	Page	3-75	17	"	178.08	27.15	205.23		205.23
51559.	Jenkins	3-75	21	"	84.30	20.30	104.60		104.60
51820.	Zeiler	3-75	18	"	173.13	91.27	264.40		264.40
57481.	Zeiler	4-75	10	"	170.52	93.70	264.22		264.22
57642.	Ninneman	4-75	6	"	26.13	6.80	32.93		32.93
57833.	Page	4-75	22	"	193.83	70.27	264.10		264.10
58814.	Jenkins	4-75	22	"	84.75	63.26	148.01		148.01
58845.	Johnson	4-75	6	"	42.72	66.33	109.05		109.05
6024									
58936.	Zwank	4-75	20	"	199.95	144.48	344.43		344.43
63247.	Ninneman	5-75	13	"	158.73	75.62	234.35		234.35
63718.	Johnson	5-75	3	"		10.15	10.15		10.15
63749.	Jenkins	5-75	13	"	110.31	43.67	153.98		153.98

Travel Expenditures

	Individual Traveler's Last Name	Dates of Travel	No. Days	Origin and Destination	Transport Charges	Other Travel Allowances[1]	LEAA Support	Grantee Contribution	Total Expenses
3821.	Zwank	5-75	17	Statewide	122.28	144.99	267.27		267.27
3832.	Page	5-75	18	"	170.16	122.39	292.55		292.55
4013.	Zeiler	5-75	12	"	175.47	95.25	270.72		270.72
0844.	Ninneman	6-75	14	"	215.43	174.95	390.38		390.38
1075.	Zwank	6-75	15	"	113.73	65.43	179.16		179.16
1926.	Johnson	6-75	11	"		169.90		169.90	169.90
2217.	Jenkins	6-75	19	"	190.50	98.19	288.69		288.69
2228.	Page	6-75	21	"	185.55	116.18	301.73		301.73
1529.	Ninneman	7-75	3	"	9.24	6.70	15.94		15.94
2041.	Jenkins	7-75	22	"	105.52	25.65	131.17		131.17
2251.	Zwank	7-75	22	"	167.28	128.98	296.26		296.26
2262.	Page	7-75	19	"	123.44	94.59	218.03		218.03
2753.	Zeiler	7-75	16	"	130.80	55.06	185.86		185.86
4074.	Johnson	7-75	6	"		77.87		77.87	77.87
6285.	Zeiler	8-75	7	"	12.96	6.20	19.16		19.16
8256.	Page	8-75	13	"	44.04	15.35	59.39		59.39
8377.	Zwank	8-75	20	" & Ill.	153.84	59.74	213.58		213.58
8358.	Jenkins	8-75	20	"	85.52	60.79	146.31		146.31
8539.	Ninneman	8-75	2	"	65.64	8.20	73.84		73.84

Travel Expenditures

	Individual Traveler's Last Name	Dates of Travel	No. Days	Origin and Destination	Transport Charges	Other Travel Allowances[1]	LEAA Support	Grantee Contribution	Total Expenses
1536 1.	Page	9-75	21	Statewide	180.48	44.80	225.28		225.28
1538 2.	Ninneman	9-75	2	"	8.40	3.60	12.00		12.00
1589 3.	Zwank	9-75	20	"	151.60	91.23	242.83		242.83
1648 4.	Laine	9-75	17	"	135.44	38.45	173.89		173.89
1649 5.	Suhr	9-75	21	"	197.76	94.41	292.17		292.17
1655 6.	Jenkins	9-75	22	"	76.56	26.95	103.51		103.51
2129 7.	McKay	10-75	2	"	88.35		88.35		88.35
2188 8.	Page	10-75	23	"	208.00	37.10	245.10		245.10
2189 9.	Zwank	10-75	21	"	173.60	72.32	245.92		245.92
2190 10.	Jenkins	10-75	17	"	77.44	72.15	149.59		149.59
2306 11.	Suhr	10-75	22	"	131.68	42.10	173.78		173.78
2307 12.	Laine	10-75	18	" & Indiana	157.28	66.51	223.79		223.79
2770 13.	Zwank	11-75	20	"	222.48	75.16	297.64		297.64
2772 14.	Page	11-75	18	"	138.64	74.69	213.33		213.33
2774 15.	Jenkins	11-75	20	"	121.44	83.60	205.04		205.04
2865 16.	Suhr	11-75	18	"	100.08	1.65	101.73		101.73
2867 17.	Laine	12-75	17	" (partial)	1.18		1.18		1.18
3421 18.	Suhr	12-75	19	"	124.80	11.65	136.45		136.45
				"					
19.					8,975.49	$5,069.11	$11,495.84	$2,548.76	$14,044.60

Schedule C--Travel Expenditures

C2. Group Travel Training Institute or Conference	Number of Participants [2]	Transport Charges	Other Travel Allowances [1]	LEAA Support	Grantee Contribution	Total Group Expenses
1.						
2.						
3.						
4.						
5.						
6.						

C3. Total Travel Expenditures---------- $_____ $_____ $_____

Schedule D--Expenditures for Equipment

D1. Itemized Expenditures Description of Items Purchased	Purchase Method	LEAA Support	Grantee Contribution	Total Expended
1. Costomer (1)			16.45	16.45
2. IBM Dictators (5)			1,975.00	1,975.00
3. IBM (Model 171) Transcriber (1)			430.00	430.00
4. IBM Dictator (1)			395.00	395.00
5. Sony BM-25 Transcriber (1)			389.50	389.50
6. Micadak - 3 Rechargeable Batteries (5)			139.80	139.80
7. Steelcase Desk (1)			249.00	249.00
8. Steelcase File, 5 Door (6)			751.80	751.80
9. Steelcase Swivel Chair (6)			351.00	351.00
10. Steelcase Side Chair (7)		221.25	88.50	309.75
11. Burroughs 42" Bookshelf (1)			34.25	34.25
12. Steelcase 70 x 36 Table (1)			162.00	162.00

D2. Total Expenditures for Equipment---------- $_____ $_____ $_____

Schedule C--Travel Expenditures

C2. Group Travel Training Institute or Conference	Number of Participants [2]	Transport Charges	Other Travel Allowances [1]	LEAA Support	Grantee Contribution	Total Group Expenses
1.						
2.						
3.						
4.						
5.						
6.						
C3. Total Travel Expenditures				$ 11,495.84	$ 2,548.76	$ 14,044.60

Schedule D--Expenditures for Equipment

D1. Itemized Expenditures Description of Items Purchased	Purchase Method	LEAA Support	Grantee Contribution	Total Expended
1. Steelcase 60 x 30 Table (2)		108.00	108.00	216.00
2. Steelcase Steno Chair (2)		46.10	46.10	92.20
3. Steelcase Letter Files, 5 Door (5)			542.50	542.50
4. Sony TC-55 Cassette Recorders (5)			679.80	679.80
5. RCA Portable Radios, UHF (5)		1,080.00	4,320.00	5,400.00
6. Bushnell Binoculars (5)		200.42		200.42
7. Secretary Work Station (2)		451.80		451.80
8. Steelcase Desk, 30 x 60 (5)		965.00		965.00
9. RCA 2-way Mobile Radios (5)		5,200.00		5,200.00
10. IBM Selectric Typewriters (2)		1,008.00		1,008.00
11. Victor Electric Calculators (5)		649.75		649.75
12.				
D2. Total Expenditures for Equipment		$9,930.32	$10,678.70	$ 20,609.02

Schedule E

Expenditures for Supplies [3]

	Description of Items	LEAA Support	Grantee Contribution	Total Expended
1.				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				

Schedule F--Expenditures for Professional Services

Individual Consultants

	Name	Type	Fee Basis	Days on Project	LEAA Support	Grantee Contribution	Total Individual Fees Paid
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							

Contracting or Service Organizations

	Name of Organization	Type	Fee Basis	Days on Project	LEAA Support	Grantee Contribution	Total Organization Fees Paid
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							

F. Total Expenditures for Contractual ---------- $_____ $_____ $_____

Schedule G--Expenditures for Construction

	Name of Constructor/Nature of Work	Contract Number	Purchase Method	LEAA Support	Grantee Contribution	Total Expended
1.						
2.						
3.						
4.						

G. Total Expenditures for Professional Services---------- $_____ $_____ $_____

Schedule H--Other Expenses

H. Communications and Reproduction Expenditures [5]

	Description of Communications or Reproduction Expense	LEAA Support	Grantee Contribution	Total Expended
1.	Telephone Services	1,649.02		1,649.02
2.	Telephone Tolls	1,217.16		1,217.16
3.				
4.				
5.				
6.				

Miscellaneous Expenditures

	Description of Expenditure	LEAA Support	Grantee Contribution	Total Expended
1.	Rent Expense	5,193.67		5,193.67
2.	Postage	10.14	.80	10.94
3.	Notary Seals and Bonding	32.00		32.00
4.	Municipal Financial Admin. Manuals (5)	15.00		15.00
5.				
6.				
7.				
8.				

H. Expenditures for Services [4]

Description of Services	LEAA Support	Grantee Contribution	Total Expended
1. Witness Fees		194.49	194.49
2. Transcripts by R. Askwith, Reporter		43.55	43.55
3. Consultant Fees, Agent Job Interviews	26.60	117.00	143.60
4.			
5.			
6.			
7.			
8.			
9. Total Other Expenses----------	$ 8,143.59	$ 355.84	$ 8,499.43

I. Schedule J--Indirect Costs

Claimed indirect costs	LEAA Support	Grantee Contribution	Total Expended
Administrative, Personnel, Purchasing, Payroll, etc.		7,366.33	7,366.33
I. Total Indirect Costs----------	$	$ 7,366.33	$ 7,366.33

Final Report

Schedule J--Total Project Costs

Object Class Categories	LEAA Support	Grantee Contribution	Total Expended
a. Personnel	$ 133,004.85	$	$ 133,004.85
b. Fringe Benefits	$ 28,038.64	$ 229.13	$ 28,267.77
c. Travel	$ 11,495.84	$ 2,548.76	$ 14,044.60
d. Equipment	$ 9,930.32	$ 10,678.70	$ 20,609.02
e. Supplies	$	$	$
f. Contractual	$	$	$
g. Construction	$	$	$
h. Other	$ 8,143.59	$ 355.84	$ 8,499.43
i. Total Direct Charges	$	$	$
j. Indirect Charges	$	$ 7,366.33	$ 7,366.33
k. TOTALS	$ 190,613.24	$ 21,178.76	$ 211,792.00
Program Income	$	$	$

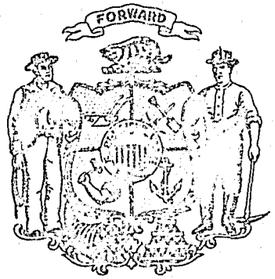
Notes

1 Includes all lodging, meals and miscellaneous charges, or per diem.
2 Exclusive of staff, faculty and paid consultants listed in F.
3 Including paper and other office supplies. Office Equipment is listed with other equipment in Schedule D.
4 Including non-communication utilities, space rental, insurance, and maintenance contracts.
5 Including telephone, postage and shipping charges, printing, Xeroxing, photocopying and duplicating costs.

Use additional sheets where necessary to provide the required detail regarding expenditures.

Correlate these sheets with the Schedule/section designations for rapid reference.

TRIAL MANUAL
ON
MISCONDUCT IN
PUBLIC OFFICE



Wisconsin Department of Justice

Bronson C. LaFollette, Attorney General

1975

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20 OAG 883 (1931).
21 OAG 626 (1932).
21 OAG 1141 (1932).
39 OAG 114 (1949).
40 OAG 416 (1951).
40 OAG 488 (1951).
47 OAG 168 (1958).
48 OAG 257 (1959).
49 OAG 171 (1960).
50 OAG 354 (1961).
54 OAG 195 (1965).
58 OAG 158 (1969).
60 OAG 21 (1971).
61 OAG 256 (1972).

STATUTE INVOLVED

The Wisconsin Misconduct in Public Office statute is sec. 946.12, Wis. Stats.

"946.12 Misconduct in public office. Any public officer or public employe who does any of the following may be fined not more than $500 or imprisoned not more than one year or both:

"(1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of his office or employment within the time or in the manner required by law; or

"(2) In his capacity as such officer or employe, does an act which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity; or

"(3) Whether by act of commission or omission, in his capacity as such officer or employe exercises a discretionary power in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another; or

"(4) In his capacity as such officer or employe, makes an entry in an account or record book or return, certificate, report or statement which in a material respect he intentionally falsifies; or

"(5) Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law."

HISTORY

Wis. Stats. 946.12, covering misconduct in public office, is a compilation of eleven separate statutory offenses, which in their turn codified the old common law offenses of malfeasance, misfeasance, non-feasance, and misconduct in public office. Thus 946.12 is essentially a substantial restatement of old law, with one important distinction. Prior to the 1955 revision of the Criminal Code, which resulted in passage of 946.12, there had been strict liability for many crimes committed while in public office. In 1955 the revision committee made clear that it intended that criminal intent be required for all violations. As the Comment stated in relation to sub (1), but applicable to all other subsections, if any officer is merely mistaken as to his duty, "he is not guilty, for such a mistake negatives the existence of the mental element required for the crime."

The specific prior crimes codified in 946.12 illustrate the intended breadth of the statute. 348.209 of the Laws of 1931, malfeasance, was divided into three subsections: 1) making a contract not authorized or required by law, covered in 946.13 and 946.12 (2); 2) making a false certification or report, covered in 946.12 (4) and (2); and 3) charging higher fees than authorized by law, covered in 946.12 (2) and (5). 348.29, neglect of duty, was divided into discounting of claims, covered by 946.12 (2); discretionary duties, covered by 946.12 (1); and, extortion or oppression, covered by 946.12 (3) and (5). 346.36 and 346.37 had to do with willful refusal to accept a prisoner or make an arrest, respectively, and were covered by 946.12 (1) if involving a mandatory duty and 946.12 (3) if involving a discretionary duty. 348.281, grafting by acceptance of compensation not authorized by law, was incorporated into 946.12 (5) as was 348.301, discounting of fees. 348.33 as to making a false certificate, was consolidated into 946.12 (4). 348.291, as to misuse of loans from trust funds, was covered in 946.12 (2). 348.219, 348.22 and 348.232 all had to do with official neglect of duty at local elections and were consolidated into 946.12 (1) and (4).

The committee made it clear that 946.12 (1), (2) and (3) were meant to be general in nature, and that (4) and (5) covered conduct probably within the more general prohibition of the first three subsections. However, such specific prohibitions were felt to be of sufficient practical importance to merit specific mention.

It is to be remembered that as 946.12 is most decidedly a penal statute, it is to be strictly construed in spite of its broad intent. *Musback v. Schaefer* (1902), 115 Wis. 357, 91 N.W. 966. Thus the words and elements must be carefully held to their actual, and sometimes narrow, meaning.

Also certain presumptions should be kept in mind. It is true that a public official may be presumed to know the law. *Rogers v. The Marshall* (1863), 68 U.S. 644, 1 Wall. 644, 17 L.Ed. 714. But as the intent element is clearly required to establish violation of 946.12, good faith mistakes or misunderstanding of what the duty imposed under law is can serve as successful defenses. There is, as well, a presumption that the duties were properly discharged, which must be rebutted by clear proof of all elements of the offense which convinces the jury beyond a reasonable doubt. As stated in *Boles v. Indistrial Commission* (1958), 5 Wis. 2d 382, 387, 92 N.W. 2d 873, and 43 Am. Jur., Public Officers, sec. 511, 254:

> "In the absence of any proof to the contrary, there is a presumption that public officers have properly discharged the duties of their office and have faithfully performed those matters with which they are charged."

The court also quoted *Hannon v. Madden* (1931), 214 Cal. 251, 267, 5 P. 2d 4:

> ". . . If official acts may be explained on any reasonable theory of duty honestly, even though mistakenly performed, it must be resolved in favor of the presumption, which may not be lightly ignored."

As the above section in Am. Jur. is cited with approval in *Georgiades v. Glickman* (1956), 272 Wis. 257, 75 N.W. 2d 573, *State ex rel. Nelson v. Rock County* (1955), 271 Wis. 312, 73 N.W. 2d 564, and *Bohn v. Sauk County* (1954), 268 Wis. 213, 67 N.W. 2d 288, it seems beyond serious dispute in Wisconsin.

GENERAL INTRODUCTION

In discussing charging and proof of alleged violations of 946.12, this manual will attempt to approach problems in the order in which a prosecuting attorney is liable to encounter them. Though there will be a brief discussion of charging under 946.12, the substance of the discussion will dwell on the elements of violations of 946.12 itself. The statute is frequently oblique, and elements overlap between the subsections. What may define an element for the purpose of one section may not serve in another, and such discrepancies will be noted where they occur. For example, an essential element in all alleged violations of 946.12 is that the defendant was acting as a public officer or employe as defined by Wis. Stat. 939.22 (30). In addition, for an alleged violation of 946.12 (2), (3) and (4), he must be acting in his official capacity. For an alleged violation of 946.12 (5), he must be acting under color of his office. Similarly, an essential element for all alleged violations of 946.12 is criminal intent, as defined by Wis. Stat. 939.23. Though this apparently does not mean corrupt and evil intent, intent to obtain dishonest advantage does seem required for violation of 946.12 (3).

An attempt has been made to use, whenever possible, only Wisconsin cases, and discussion by example of specific charges has been preferred to speculative and theoretical discussions from cases arising in other jurisdictions. In short, an attempt has been made to make this a functional prosecutors' manual, of use primarily in the State of Wisconsin.

In as complete a manner as possible, defenses have been anticipated. Defenses arising out of the interpretation of terms within the statute itself have been discussed as they arise in the context of the discussion of the elements. The anticipated constitutional attacks on the statute as a whole, as well as due process attacks on the sufficiency of complaints, have been discussed in more abstract terms at the end. 946.12 (1), Introduction.

Wis. Stat. 946.12 (1) codifies the common law crimes of non-feasance and misfeasance, and provides that any public officer or employe who,

> "(1) Intentionally fails or refuses to perform a known, mandatory, non-discretionary, ministerial duty of his office or employment within the time or in the manner required by law . . ."

may be fined $500, imprisoned for not more than a year, or both.

946.12 (1) contains three essential elements which the prosecutor must establish beyond a reasonable doubt: 1) that the defendant was, at the time of the offense, a public officer or employe within the meaning of the Criminal Code, and Wis. Stat. 939.22 (30); 2) that said officer knew what his duty was, by law; and 3) that said officer or employe intentionally failed or refused to perform that duty.

In issuing a complaint, it is essential to allege that the defendant had a position as a public officer or employe, that he knew or should have known what his duties were by law, and that he willfully and intentionally neglected to perform them. However, as stated in *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d 829, it is not necessary to charge corrupt motive under 946.12 (1) [see discussion on intent, element 3, infra]. It is sufficient to charge in the language of the statute as long as the basic requirement is met that in stating a statutory offense, enough is stated to so "individuate the offense that the offender has proper notice . . . of what the offense he is to be held for really is." [See *Liskowitz v. State* (1939), 229 Wis. 636, 282 N.W. 103.] The general Wisconsin rule, as stated in *Rosenberg v. State* (1933), 212 Wis. 434, 249 N.W. 541, is that "a statement of an offense in the language of the statute is sufficient whenever enough is stated in connection with the use of the statutory language to inform the accused of the particular act or violation claimed." [See discussion of due process defenses to alleged violations of 946.12, infra, for a full discussion of this matter.]

Defenses which might be attempted in response to prosecutions under 946.12 (1) are: 1) that defendant did not possess corrupt intent, 2) that the duty was not prescribed "by law," 3) that defendant was not a de jure public officer, or 4) that defendant made a good faith mistake as to the nature of his duty.

Element No. 1, that the defendant was, at the time of the offense, a public officer or employe.

By Wisconsin Criminal Code 939.22 (30), a public officer is "any person appointed or elected according to law to discharge a public duty for the State or one of its subordinate governmental units." A "public employe" is defined in terms of one not a public officer who "performs any official function on behalf of the State or one of its subordinate governmental units" who is paid from the public treasury. No Wisconsin cases were found directly differentiating between an officer and an employe, though for purposes of charging and prosecution, the distinction seems immaterial as the charge would be made, in the language of the statute, in the disjunctive.

In *Martin v. Smith* (1941), 239 Wis. 314, 1 N.W. 2d 163, cited with approval in *Burton v. State Appeal Board* (1968), 38 Wis. 2d 294, 156 N.W. 2d 386, the Wisconsin Supreme Court accepted the description of a "public officer" as one holding an office 1) created by a constitution or a legislative act; 2) possessing a delegation of a portion of the sovereign power of the government to be exercised for the benefit of the public; 3) one holding a position with some permanancy and continuity; 4) one having powers and duties devolved from legislative authority; 5) one with powers and duties to be performed independently and without control of the superior power other than the law, except in the case of an inferior officer specifically under control of a superior officer or body; 6) one holding a position entered into by official oaths or bond; or 7) one holding a position by virtue of a commission or other written authority.

It is beyond question in Wisconsin that though a defense to a prosecution under 946.12 could be made that defendant was not an officer or employe, no defense that he was not actually empowered to take the office would lie. Wis. Criminal Code 946.18 provides specifically that 946.12 applies to de facto as well as de jure officers. For the purpose of the criminal law, there is no reason to distinguish between the two [see Vol. V, 1953, Judiciary Committee Report On The Criminal Code, Wisconsin Legislative Council, page 184 (1953)].

As stated in *U.S. v. Royer* (1924), 268 U.S. 394, 45 S.Ct. 519, 69 L.Ed. 1011, an officer de facto is one who is surrounded with the *insignia* of office and seems to act with authority. In that case respondent occupied the office in question and discharged his duties in good faith and with every appearance of acting with authority. Similarly, in *State ex rel. Sisson v. Kalk* (1929), 197 Wis. 573, 223 N.W. 83, even though the defendant was actually ineligible for the office of Deputy City Clerk, due to his age, once he had assumed the functions of the office, he became a de facto officer and his acts could bind the city. In *People ex rel. Rush v. Wortman* (1929), 334 Ill. 298, 165 N.E. 788, 64 ALR 530, the court stated that in proceedings against people acting as officers who aren't eligible, "neither their eligibility to appointment nor the validity of their official acts can be inquired into, . . ." (At 789)

The definitive Wisconsin case, mentioned in the footnotes to the Wisconsin Jury Instructions, Criminal 1730, on 946.12 (2), is *State ex rel. Stock v. Kubiak* (1952), 262 Wis 613, 55 N.W. 2d 905, in which the court stated that, generally, the term "officer" should be broadly construed for purposes of prosecution under 348.28 (1), the predecessor to 946.12 (1). In that case the court upheld the allegation that one

appointed by the Town Board to act as a financial agent and to issue municipal bonds, was at least a de facto agent and thus could be assumed to be, for the purposes of the statute, an official performing a public or official service. The conclusion would seem to be that a prosecution for misconduct cannot be defended against by the defendant's claim that, because of some technicality, at the time of the alleged misconduct, he was not a public officer or employe.

In addition to city clerks and financial agents, the following are some persons who have been held to be public officers or employes within the meaning of 946.12. Though this list by no means pretends to be complete, it might give some indication of the broad manner in which the terms public officer and employe have been interpreted: 1) a University Regent is an employe, 58 OAG 158 (1969), *Martin v. Smith* (1940), 239 Wis. 314, 1 N.W. 2d 163; 2) a school board member is a public officer 12 OAG 290 (1923); 3) town supervisors are public officers, 10 OAG 877 (1921); 4) superintendents of schools are public officers, 1 OAG 503 (1913); 5) those with the duty to relieve and take care of indigent persons are public employes, 17 OAG 147 (1928); 6) sheriffs are public officers, *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d 834; 7) town supervisors are public officers, *State v. Kort* (1971), 54 Wis. 2d 129, 194 N.W. 2d 682; 8) members of the housing authority are public employes, *State ex rel. Arnold v. County Court* (1971), 51 Wis. 2d 434, 187 N.W. 2d 354; 9) judges and justices are public officers, 20 OAG 883 (1931); 10) justices of the peace are public officers, 49 OAG 171 (1960); 11) district attorneys are public officers, 60 OAG 21 (1971); *State ex rel. Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 166 N.W. 2d 255; 12) village presidents are public officers, 40 OAG 416 (1951); 13) notary publics are public officers, *Britton v. Niccolls* (1882), 104 U.S. 757, 26 L.Ed. 917; *Maxwell v. Hartmann* (1881), 50 Wis. 660, 664, 19 OAG 626 (1930), 50 OAG 354 (1916), 21 OAG 626 (1932).

Element No. 2, that said officer knew what his duty was, by law, and in terms of the time and manner in which it was to be performed.

Wis. Stat. 946.12 (1) directs that the defendant must fail or refuse to perform a known, mandatory, nondiscretionary, ministerial duty of his office within the time or manner required by law. Two problems immediately arise: 1) what are duties imposed "by law," and 2) what distinguishes a mandatory duty from a discretionary duty?

Even though an act is required "by law," a defense of impossibility of performance will lie. Similarly, if a defendant could establish that he made a mistake in interpreting his duty, or if that duty could be interpreted as discretionary, such a defense would lie. [See *State ex rel. Schwenker v. District Court* (1932), 206 Wis. 600, 240 N.W. 406.] If the duty was discretionary, the charge could be dismissed under 946.12 (1), Wis. Stats., though it could properly lie under 946.12 (3), Wis. Stats., in which the prosecution would have a much more onerous burden of establishing a higher degree of corrupt intent and dishonest advantage.

In a related case, *State v. Davis* (1974), 63 Wis. 2d 75, 216 N.W. 2d 31, the Wisconsin Supreme Court held that a public official prosecuted under Wis. Stat. 946.13 could successfully interpose the defense of good faith reliance on the opinion of counsel. The court emphasized that such a defense would lie only where action by the official was taken openly and in good faith, in reliance on an opinion which counsel rendered under statutory obligation. Although this case concerns a prosecution under Wis. Stat. 946.13, the defense presented in *Davis* would appear applicable under Wis. Stat. 946.12, as well.

In Wisconsin Jury Instructions, Criminal 1730, Note 2, the authors state that in the usual case the court will be able to decide, as a matter of law, whether the duty the defendant allegedly failed or refused to perform was mandatory. However, in the rare situation where no decision is made as a matter of law, the issue goes to the jury as a matter of fact. In instructing the jury as to how to decide whether the duty is mandatory or discretionary, recourse may be had to the civil statutes defining that duty. Also, in arguing before the court as to what defines the nature of the duty, the prosecuting attorney may make reference to the case law defining the terms "mandatory or discretionary" and "by law".

a. Mandatory and Discretionary Duties.

As mentioned above, the distinction between a mandatory and discretionary duty can be crucial in charging decisions under 946.12, as corrupt intent must be established in relation to discretionary duties, though not as to mandatory duties. Though it is usually possible to determine whether a duty is mandatory or discretionary as a matter of law, as stated in *Druecker v. Salomon* (1867), 21 Wis. 629, 94 A.D. 571,

> "It is sometimes difficult to draw the exact line of distinction between ministerial and discretionary or judicial authority." (At 637)

When the Wisconsin legislature added the criminal intent requirement to all violations of 946.12, and eliminated the old statutes which imposed strict liability for some misconduct in public office, it eliminated the following situation from *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 36, 150 N.W. 401, which stated the old rule that:

> "Every ministerial officer in the performance of purely ministerial acts is required, at his peril to interpret the statute, or the order made in pursuance thereof . . . His decision if erroneous does not exempt him from liability in an action [though] his decision if correct is sufficient to defeat an action against him."

In the Comment to 946.12, the revisors stated that:

> "If the officer believes in good faith that the law imposes no duty on him in a particular case, he is not guilty, for such a mistake negatives the existence of the mental element required for the crime."

By Wis. Stat. 939.43 (1), an honest error, whether of fact or law, other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime. Thus, though the misconduct statute is a penal statute, a matter of criminal law, the civil statutes or regulations which define the duties of a public officer, are not criminal in nature. Therefore, honest mistakes as to the duties they require would serve as defenses to prosecution under 946.12.

It would appear that the main point of distinction between a mandatory and discretionary duty is that a mandatory duty is described "by law" [see below], and the discretionary duty is judicial or quasi-judicial in nature and involves value judgments, the consequences of which the official or employe is not liable for under 946.12 (1), if he acted in good faith.

In *Lowe v. Conroy* (1904), 120 Wis. 151, 97 N.W. 942, the deputy health officer of the state, in good faith and on suspicion of anthrax, quarantined a citizen's meat market and ordered the destruction of accumulated hides therein. The steer originally suspected of being infected was found not to be so, and the officer's decision as to the steer was found to have been unjustified. However, in a civil suit for damages, the official claimed he was not liable as he was merely exercising the discretionary powers vested in him by the Board of Health. Though the court found him civilly liable under an exception to the general rule, it stated that:

> "It is the general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption."

Though this is a civil case, its definitions would seem applicable to criminal law.

As traced in detail in 21 OAG 1141 (1932), this seems a fairly accurate statement of the law today, as to discretionary powers. As reiterated in *Land, Log and Lumber Company v. McIntyre* (1898), 100 Wis. 258, 262, 75 N.W. 964, cited in *Wasserman v. Kenosha* (1935), 217 Wis. 223, 258 N.W. 857:

> ". . . such rule applies to all officers in the performance of judicial or quasi-judicial duties, to judges from the highest to the lowest, to jurors, and to all public officers whatever name they may bear. . ."

More recently in *State ex rel. Schwenker v. District Court*, (1932), 206 Wis. 600, 608, 240 N.W. 406, the court stated that non-corrupt exercise of a discretionary duty did not render an officer liable:

> "Where an official having discretion in a certain manner acts upon his judgment in good faith, although erroneously, such act is not corrupt within the meaning of the statute, and likewise if, in the exercise of his discretion, he takes no action although he errs, he is not guilty of neglect as that term is used in the [statutory] sections . . ."

Thus if an officer knows his allegedly mandatory duty, by law, but fails to perform said duty, he is guilty of violation of 946.12 (1) unless that duty is found by judge or jury to be actually discretionary, or unless he has made an honest mistake as to what the nature of that mandatory duty is. [For further discussion as to misconduct in performance of discretionary duties, see the discussion under 946.12 (3), infra.]

b. By Law.

It would appear clear that the authors of the statute meant "by law" to be interpreted as meaning more than merely those duties described in other statutes. In *State v. Bennett* (1934), 213 Wis. 456, 252 N.W. 298 the dissent stated that:

> "It was apparently the purpose of the revisors of 1878 and of the legislature that enacted the revision to frame a malfeasance statute that would cover every conceivable violation of law by municipal officers and every conceivable transaction by them . . . in municipal service with the municipality served in which they or any of them had any interest." (At 474)

In *State ex rel. Dinneen v. Larson* (1939), 231 Wis. 207, 284 N.W. 21, the court, though not directly defining the scope of "by law", cited the dissenting opinion in *State v. Bennett, supra*, with approval and stated that it covers "all specific prohibitions upon 'officers' contained in the session laws codified and any other violations of law by officers." *Dinneen* further states that the intent of 946.12 was to prohibit the wide range of common law crimes constituting malfeasance, and that it would therefore seem reasonable to assume that "by law" goes beyond written laws enacted by legislative bodies.

The Comment to 946.12 lends credence to this broad reading of "by law":

> "The duty may be imposed by common law, statute, municipal ordinance, administrative regulation, and *perhaps other sources . . .*" (emphasis added.)

Though no cases were found directly on point in Wisconsin, it is possible that a duty clearly defined as mandatory by custom and usage could fall within the definition of "by law." For a case stating that duties may arise out of the nature of the office itself, see *State v. Weleck* (1952), 10 N.J. 355, 91 A. 2d 751.

As "by law" does not seem to be clearly defined by case law as regards 946.12, a very cautious analogy to the "by law" requirement in 946.10, the bribery statute, might be made. That statute prohibits any public officer or employe from accepting a bribe "in relation to any matter which by law is pending or might come before him in his capacity as such an officer . . ." Though this statute seems to go to the scope of his duties, insofar as scope of duties could be, in a 946.12 prosecution, identical to a description of mandatory duties as to manner and time of performance, bribery cases may be of some limited usefulness.

In *U.S. v. Birdsall* (1914), 233 U.S. 223, in construing a federal bribery statute essentially similar to Wisconsin's, the United States Supreme Court held that:

> "To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting [cites omitted]. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities [cites omitted]. In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their

> performance must be regarded as within the provisions of the above-mentioned statutes against bribery [cites omitted]." (At 230-231)

Thus it appears clear that "by law" can go beyond legislative acts, though how far beyond is unclear.

Element No. 3, that said officer or employe intentionally failed or refused to perform said duty.

There is clear indication in Wisconsin that some sort of criminal intent is requisite for violation of Wis. Stat. 946.12. In fact, as the Comment clearly reveals, where public officials were formerly strictly liable at common law and under old Wisconsin statutes for their misconduct, under the new statute criminal intent is required. As it appears that the mental element required under 946.12 (3) is distinguishable from the mental element required under 946.12 (1), (2), (4) and (5), a brief reiteration of the statutory language would seem appropriate. Subsection (1), (4) and (5) specifically used the verb "intentionally" and subsection (2) used the verb "knows." Wis. Stat. 939.23 defines the language in which the criminal intent requirement is couched as follows:

> "(1) When criminal intent is an element of a crime in the Criminal Code, such intent is indicated by the term 'intentionally' the phrase 'with intent to', the phrase 'with intent that', or some form of the verb 'know' or 'believe.'"

Intentionally is defined by 939.23 (3) as meaning:

> ". . . that the actor has the purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word 'intentionally'."

Thus, in a prosecution under 946.12 (1), the actor would have to intend to fail or refuse to perform his duty.

It would appear that *State ex rel. Dinneen v. Larson* (1939), 231 Wis. 207, 284 N.W. 21, the definitive case on misconduct under the old statute, conclusively established that corrupt motive, as distinguished from general criminal intent, is not required. The court cited 46 CJS, page 1094, section 345, and stated:

> ". . . To constitute an indictable offense of misbehavior in office, it is not essential that pecuniary damage should have resulted to the public by reason of an officer's irregular conduct, or that the officer should have acted from corrupt motives." (At 219)

Thus, willful neglect of duty does not necessitate corrupt intent, as the neglect of duty statute was not one without any intent requirement, prior to the formulation of 946.12. Thus, there is no need to conclude that any additional mental element has been added subsequent to the *Dimeen* decision. Therefore, it appears that as regards 946.12 (1), (2), (4) and (5), no intent is required beyond intent to do the proscribed act, knowing the facts which make such act criminal.

Solely for purposes of clarification, a comparison of the higher level of corrupt intent required under 946.10, the bribery statute, and the general criminal intent for proof of 946.12, might be of use. *State v. Alfonsi* (1967), 33 Wis. 2d 469, 147 N.W. 2d 550, involved a bribery charge against a public official under Wis. Stat. 946.10, in which "corrupt intent" is not specifically mentioned. In reading the requirement of corrupt intent, or mens rea, into the statute, the court looked to the old bribery statute which did specify corrupt intent, and to the nature of the crime of bribery itself. Through an elaborate analysis of the statutory history of 946.10, the court found that:

> "The crime of bribery is not one that was meant to be malum prohibitum but, on the contrary, is one that requires an evil or corrupt motive to be proved." (At 476.)

Thus bribery is a crime, like embezzlement, which by its very nature evidences a corrupt and guilty mind. The very act by a public official of offering material benefit in exchange for an unfair advantage is inherently corrupt. If the gravamen of this crime is the "despicable act" of unlawfully and corruptly soliciting and accepting things of value in exchange for influencing acts, obviously no good faith mistake or confusion as to the exact nature of proper duties to be performed, would be possible.

However, in a prosecution for neglect of duty, corrupt intent is not required by statute and is not inherent in the act itself. For instance, in *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d 829, a sheriff was charged with violation of 946.12 (1) and (2), nonperformance of duties imposed on him by law. He was also charged under Wis. Stat. 348.28, a 1953 statute which, according to the Comment, was incorporated into the new statute, 946.12. Appellant submitted that the information failed to charge any crime and that the verdict did not find him guilty since there was no charge that he acted with corrupt motives. The court summarily dismissed this argument and proceeded to the merits of the case:

> "Corruption, that is, action or nonaction motivated by personal gain or advantage to the sheriff, is not an essential element * * * nonperformance of duties imposed on him by law by virtue of his office constitutes the offenses of which the sheriff is accused regardless of the presence or absence of a corrupt motive." (At 430)

State v. Kort (1972), 54 Wis. 2d 129, 194 N.W. 2d 682, is the most recent case speaking directly to the intent requirement for 946.12. There, a town supervisor was reimbursed for extra hours he worked to make up for hours he was out of town on municipal business. There was no statutory authority for such payment, and the conduct was not specifically prohibited until this decision at the trial level. The Supreme Court decided that the defendant did not have the requisite intent on the grounds that he could have had no advance notice that his conduct was prohibited. Thus, it was impossible for him to have the requisite intent to commit known criminal acts.

However, it would seem that if the defendant's conduct was illegal or his duty was clear under existing and clearly discernable law, and if this duty was neglected or refused, only intent to do the proscribed acts need be established. For example, in 21 OAG 626 (1932), a notary public took an acknowledgement of execution of an instrument over the telephone. By law he had to attest that this person appeared before him. Obviously, he signed the notarization without this condition having been met. He was held liable under 348.28, a statute consolidated into 946.12 (4), regardless of the fact that he acted in good faith, without knowledge that the person was perpetrating a fraud. It was sufficient that the defendant knowingly stated that the caller had come before him when in fact he had not. He intentionally signed the false notarization, and that was sufficient. Similarly, in *Johnson v. State* (1968), 251 Ind. 17, 238 N.E. 2d 651, guilty knowledge was held established when a notary public attested to an affidavit purportedly signed in the notary's presence by an affiant who defendant knew had been dead for five months. Guilty knowledge without corrupt intent was held sufficient. Additionally, a justice of the peace was held criminally liable for charging for services not performed or known to be not necessary to the fulfillment of his duties. 49 OAG 171 (1960). Similarly in 47 OAG 168, (1958), a sheriff who was charging unauthorized fees for his services, mileage, and court appearances in traffic cases, was held liable. The opinion held that if the sheriff was authorized by law to perform these duties, he might collect fees. If he was not, he could not collect fees and could be held criminally liable under 946.12.

a. Motions To Dismiss And Defenses.

Defenses can be made that the defendant did not have the requisite intent. As discussed under Element 2, supra, good faith mistake as to what constituted the duty to be performed is a defense to a charge under 946.12 (1), (2), (4) and (5), as this eliminates the requisite intent. However, a motion to dismiss for failure to charge corrupt motive should fail on the proposition that only intent to do the proscribed acts is required. Similarly, lack of proof as to corruption is not a defense as stated in *State v. Lombardi, supra,*

> "Corruption, that is, action or nonaction motivated by personal gain or advantage to the sheriff, is not an essential element of the misdemeanors with which the sheriff is charged. His willful refusal or nonperformance of duties imposed on him by law by virtue of his office constitute the offenses of which the sheriff is accused regardless of the presence or absence of the corrupt motive." (At 430)

A closely related defense that no charge will lie under 946.12 (1), (2), (4) and (5) unless unjust enrichment, personal gain, or public injury is charged or proven, is also not valid. In *Ellefson v. Smith* (1924), 182 Wis. 2d 398, 196 N.W. 834, a contract was let by the town board without advertising for bids, as required by law. Though the officers acted in good faith and without intent to defraud the public, they did intentionally ignore the statute which required them to advertise for bids. Thus, even though the officers did not profit themselves and the city suffered no direct loss, a civil action to rescind the contract did lie. More recently, in *Dinneen v. Larson, supra,* a criminal action for neglect of duty was lodged under 348.29, the predecessor to 946.12 (1). The court said that at common law no proof was required of selfish motive or hope of private gain, and similarly under statute no pecuniary damage need have resulted from the official's neglect of duty. Similarly, *United States Fidelity and Guaranty Company v. Hooper* (1935), 219 Wis. 373, 263 N.W. 184, involved a defendant who had falsely certified that a woman was employed by the state long after she had in fact resigned. Her salary was received by the defendant, and used to pay various expenses of the state agency he superintended. It appeared that the expenses were in themselves valid, and that neither the defendant nor anyone else had been improperly enriched by the monies obtained. Nevertheless, the court stated that this conduct violated the criminal law. The statute cited was sec. 348.33, one of the sections consolidated into the present statute 946.12.

Parenthetically, it might be noted that the attitude of the Wisconsin Supreme Court to this defense is congruent with the attitude of the federal courts and a majority of the courts of other states. For example, in *Crawford v. U.S.* (1908), 212 U.S. 183, 187, appellant defended against a charge of conspiracy to defraud the government by offering to prove that the United States had not suffered any material loss as the result of his behavior. The Court held it immaterial to the charge whether the government had *actually* been defrauded or not. For similar holdings on the state level, see 67 CJS, Officers, sec. 33, 430-435. [For a discussion of when the defense of the lack of unjust enrichment will lie, see the discussion of dishonest advantage under 946.12 (3), infra].

b. Proof of Intent.

Proof of intent in prosecutions under 946.12 (1), (2), (4) and (5) is by its very nature illusive. Intent, a subjective mental state, is only provable by circumstantial evidence which objectifies that intent. (1 Wharton, Criminal Evidence, section 6, 13th Ed. 1973). Thus, declarations by defendant (Id., sec. 200) and subsequent conduct (Id., sec. 209) are the tools at the prosecutor's disposal. The prosecutor must constantly ask the jury to infer criminal intent from acts frequently ambiguous in their nature. As stated in *State v. Davidson* (1943), 242 Wis. 406, 8 N.W. 2d 275:

> ". . . [I]ntent is a state of mind which can be evidenced only by the words or conduct of the person who is claimed to have entertained it. The jury was under no obligation to accept the direct evidence of intent furnished by the defendant, and must be permitted to infer intent from such of defendant's acts as objectively evidence his state of mind. It seems clear to us that the deposit and subsequent use of the funds by defendant for his own benefit may properly form the basis for an inference of felonious intent." (At 413)

Introducing evidence as to knowledge of what constitutes the official duty and what constitutes willful neglect of that duty, the courts have evinced a willingness to infer knowledge of what constitutes duty. For example, in *State v. Lombardi, supra,* evidence that defendant had been sheriff for 24 years was held to allow the reasonable inference that he could not have been unaware that a suspect establishment was a bawdy house.

In introducing evidence as to intent at trial, recourse may be had to a variety of devices. Admissions against interest may be introduced [See Wis. Stat. 908.01 (4)(b) of the new Wisconsin Rules of Evidence] as may declarations against interest by

witnesses not parties in the criminal action [see Wis. Stat. 908.045 (4) of the new Rules of Evidence]. Rebuttal evidence may be offered as to bad character, once an accused has raised the issue of his good character, as absence of honesty and integrity are of the essence in prosecution for misconduct in public office [see Wis. Stat. 908.03 (21) of the New Rules of Evidence]. Also, evidence of prior misconduct, either through prior bad acts or prior convictions, is admissable to show the general disposition to commit the offense charged [see Wis. Stat. 908.03 (22), (23) of the New Rules of Evidence]. For example, in *Smith v. State*, 195 Wis. 555, 218 N.W. 822, in a prosecution for adultery, other adulterous acts between the same parties could be shown to establish an adulterous disposition. Though the general rule is that prior commission of offenses is not admissible, a well recognized exception is made as to evidence tending to establish some ingredient of the offense charged, such as knowledge or intent. (1 Wigmore, Evidence, Sec. 15). See also sec. 904.04 (2), Wis. Stats., and *State v. Meating* (1930), 202 Wis. 47, 231 N.W. 263.

In *Whitty v. State* (1967), 34 Wis. 2d 278, 149 N.W. 2d 557, the Wisconsin Supreme Court discussed in detail the admission of evidence of prior misconduct to show identity and pattern, as well as disposition to commit crime. The court adopted rule 303 of the American Law Institute Model Code of Evidence:

> "RULE 303 DISCRETION OF JUDGE TO EXCLUDE ADMISSIBLE EVIDENCE.
>
> (1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will
>
> (a) necessitate undue consumption of time, or
>
> (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or
>
> (c) unfairly surprise a party who has had reasonable ground to anticipate that such evidence would be offered."

The court also reiterated that the admission of such evidence should not be conditioned on whether the evidence is in the form of a conviction; evidence of the incident, crime or occurrence is sufficient (at 293).

More specifically, in *State v. Lombardi, supra,* at 439, the court cited *Herde v. State* (1941), 236 Wis. 408, 413, 295 N.W. 684:

> "In proof of criminal intent, the conduct of a defendant on other occasions closely connected in point of time and plan may at times be relevant to throw light on the defendant's motives and intentions while doing the act complained of. *Smith v. State*, 195 Wis. 555, 560, 218 N.W. 822; *State v. Meating*, 202 Wis. 47, 50, 231 N.W. 263. 'The intention with which a particular act is done often constitutes the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon trial. For the purpose, therefore, of proving intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from like mental conditions.' 2 Jones, Evidence (2d Ed.), p. 1161, sec. 624. See also 1 Bishop, Criminal Procedure, sec. 1067." (Id. at 439)

It is to be further noted that in *Lombardi, supra,* evidence was allowed in as to defendant's knowledge of a house of prostitution subsequent to the date of the offense charged.

946.12 (2), Introduction.

Wis. Stat. 946.12 (2) codifies the common law crime of malfeasance, and the statutory crimes of making a contract not authorized by law, discounting of claims, and misuse of loans from trust funds. As stated in the Comment to 946.12, subsections (4) and (5) are specific prohibitions of practices probably covered by the more general subsections (1), (2) and (3). Thus the statutory crime of making a false certificate or report could be simultaneously covered by (2) and (4); charging higher fees than authorized by law could be simultaneously covered under (2) and (5).

Wis. Stat. 946.12 (2) specifically penalizes one who is a public officer or employe who:

> "In his capacity as such officer or employee, does an act which he knows is in excess of his lawful authority or which he knows is forbidden by law to do in his official capacity."

946.12 (2) contains three elements: 1) that the defendant was, at the time of the offense, a public officer or employe; 2) that the defendant was acting in his official capacity; and 3) that the defendant knew or believed that he was acting in a manner not authorized or forbidden by law.

Element 1 is discussed in detail under 946.12 (1). Element 2 is peculiar to 946.12 (2) and (3), and will be discussed in detail herein. It is to be noted that the concept of acting in an official capacity at some points overlaps with the concepts of acting

under color of office, an element to be discussed under 946.12 (5). Element 3 includes aspects of the "by law" requirement discussed in 946.12 (1), element 2. Element 3 under 946.12 (2) also includes the verb "know" and relates to the intent as discussed in 946.12 (1), element 3.

Defenses in addition to those previously noted which might be attempted in response to prosecutions under 946.12 (2) are 1) that defendant, even if a public officer, was not acting in his official capacity; 2) that he did not possess corrupt intent; or 3) that his actions were not beyond his authority as prescribed by law. For defense 2), see the discussion under 946.12 (1), element 3, supra. For defense 3), see the discussion under 946.12 (1), element 2, (b), supra. For defense 1), see the discussion herein under element 2.

Element No. 1, that the defendant was, at the time of the offense, a public officer or employe.

For a detailed discussion of the requirements for this element, see 946.12 (1), element 1, supra.

Element No. 2, that the defendant was acting in his official capacity.

Though at first glance it would appear that the "acting in an official capacity" element merely duplicates the "public officer or employe" element, such is not always the case. One can be a public officer or employe whose misconduct occurs solely in a private capacity. The concept of "acting in an official capacity" is also closely aligned with acting "under color of office". [See discussion of 946.12 (5), infra.] Though these two elements are sometimes treated as identical [see 61 OAG 256 (1972)], loose use of this terminology can lead to definitional difficulties.

State v. Bennett (1934), 213 Wis. 456, 252 N.W. 298 remains the leading case in Wisconsin discussing the necessity that a public officer or employe be acting within his official capacity. The charge was brought under 348.28, malfeasance in public office, parts of which were later codified into 946.13, taking private interest in a public contract, and 946.12 (2), performance of unauthorized or forbidden acts. Many charges could be made simultaneously under 946.13 and 946.12 (2), (4) and (5). If a public officer or employe keeps a private interest in a public contract, he is performing an act forbidden by law under 946.13, and is thus chargeable under 946.12 (2) as well. For both 946.12 (2) and 946.13, it is requisite that defendant have acted in his official capacity.

Thus though *Bennett* involves a charge that a city planning engineer had a pecuniary interest in a municipal transaction, its discussion of "official capacity" would be relevant to that element as it was later codified in 946.12 (2). In that case a city planning engineer was charged with having a pecuniary interest in the purchase or sale of municipal property. Defendant raised the affirmative defense that the land sale was not made to or by him in his official capacity or employment, and that he was therefore not guilty of violation of 348.28, Stats., although he did receive part of the commission paid to the broker for negotiating the sale. Defendant pointed out that to hold him liable when he was not acting in his official capacity would lead to the absurd result that any one employed in any branch of government in any capacity whatsoever could render his employer liable for any misconduct on his part at any time. The court upheld the defendant's contention:

> "It certainly was not intended by that statute that any officer, agent or clerk of the state or a governmental unit 'who shall have any interest, directly or indirectly, . . . in any way or manner in any sale of real property . . . shall be punished.' That manifestly would be absurd." (At 463)

These facts were held not sufficient to support a charge. However, the court concluded that:

> ". . . [I]f the purchase in question had been 'made . . . in his official capacity or employment, . . . it would have been wholly immaterial, . . . insofar as the establishment of the essential elements of the offense is concerned, whether Bennett did or did not also participate or act on his own behalf in relation to the transaction." (At 464, 465)

If the defendant had made a sale of property in which he had a pecuniary interest, on *behalf of the city*, he would be liable.

Similarly in *Quayle v. Bayfield County* (1902), 114 Wis. 108, 89 N.W. 892, a judge was given the official duty to rent a courtroom on behalf of the municipality. Acting in this official capacity, he rented a courtroom in a building he owned, and thus was held guilty of malfeasance. Presumably, he could have had a pecuniary interest in a building which the city could have rented from him. However, in his official capacity, he could not profit from his own official actions.

More recently in *State ex rel. Stock v. Kubiak, supra,* the court held acting in an official capacity to be an essential element for violation of 348.28, but seemed to view this term as meaning simply that the official was acting in the course of his

employment. The court responded to defendant's contention that he was not acting in his official capacity in purchasing securities in which he held an interest as follows:

> "As we have pointed out, the relator was acting at least as a de facto servant of the town - he was in the town's employ and his violations occurred in such employment." (At 619)

Thus the court defined official capacity in a straightforward and simple manner, and stated that:

> "The word 'official' characterizing the employment should not be construed in the limited sense of pertaining only to the acts of those technically known as officers."

Thus, de facto and de jure officers, as well as employes, can act in an "official capacity" even if they are without authority to hold the office. [For a detailed consideration of this point, see the discussion of de facto and de jure officers under 946.12 (1), element 1, supra.]

In 61 OAG 256 (1972), a local sheriff was compensated for guard duty at an all night restaurant, during his off-duty hours. A charge was proposed under 946.12 (5), which provides that one acting under color of office may not accept fees in excess of those authorized by law. However, the opinion discusses "color of office" as "acting in an official capacity." The opinion states that the sheriff can be employed in another private capacity, if his private duties are not in irreconcilable conflict with his official duties. In that working as a guard in an all night restaurant was seen as not being at irreconcilable odds with his official duties, he was not operating improperly in his official capacity.

However, the opinion stated that a deputy cannot, in his official capacity, make a charge to private individuals for official services. This opinion seems to equate acting in a public or private capacity with being on duty or off duty. Thus it would appear to be consistent with the treatment in *Kubiak, supra,* of official capacity as being in the course of employment, a fairly simple and straightforward definition. [For discussion of an officer who represents or implies that he is acting with official authority or capacity, see the discussions of "public officer or employe" and "color of office", supra.]

Element No. 3, that the defendant knew or believed that he was either acting in excess of his lawful authority or that he was acting in a way forbidden by law.

a. Intent.

The Comment on 946.12 (2) describes the scope of the subsection as broad, but specifies that it, as the other subsections, is limited by the requirement of criminal intent. Wisconsin Jury Instruction Criminal 1731, Note 3, refers to the mental element required for violation of 946.12 (2), doing that which the defendant "knows" is in excess of his lawful authority or forbidden by law, by reference to Wis. Stat. 939.23 (2). That statute defines "know" as requiring only that the actor believes the specified fact exists. Thus defendant would only have to *believe* that his acts were either in excess of his lawful duty or forbidden by law. As 939.23 (1), the general statutory statement on intent, specifies that "intentionally" and forms of the verb "know" are equivalent in expressing the criminal intent element of a crime, the general intent requirement under 946.12 (2) would seem the same as that under 946.12 (1). [See the discussion of general criminal intent under 946.12 (1), element 3, supra.]

b. In Excess Of Lawful Authority Or In A Manner Forbidden By Law.

See the discussion of "by law" under 946.12 (1), element 2, (b), supra.

946.12 (3), General Introduction.

Wis. Stat. 946.12 (3) codifies the common law crimes of malfeasance and non-feasance as regards discretionary duties, and penalizes one who is a public officer or employe who:

> ". . . By act of commission or omission, in his capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another . . ."

946.12 (3) contains four elements: 1) that the defendant was, at the time of the offense, a public officer or employe; 2) that he was acting in his official capacity; 3) that he was performing a discretionary duty in a manner inconsistent with the duties of his office or employment, or in a manner inconsistent with the rights of others; and 4) that he was so acting with intent to obtain a dishonest advantage for himself or others.

Element 1 is discussed in detail under 946.12 (1). Element 2 is common to subsection (2) and (3) and is discussed in detail under 946.12 (2). Element 3 is peculiar to 946.12 (3), and is described in detail herein. However, for a comparison of mandatory and discretionary duties, reference should be made to the discussion under 946.12 (1), element 4. Element 4 involves corrupt, as opposed to general criminal, intent. As this is the only subsection requiring a "corrupt" intent to obtain a dishonest advantage,

it is discussed herein. However, better understanding is achieved by comparison with the discussions of intent under 946.12 (1) and (2), supra.

It is to be noted parenthetically that it is clear from the statement in 946.12 (3) that an official may abuse his discretion "by act of commission or omission." Thus in *State ex rel. Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 166 N.W. 2d 255, a decision not to investigate or charge in the alleged shooting death of a black man by a police officer could be an omission to act which abused the discretion of the district attorney, if not based on sound professional judgment.

In addition to the defenses discussed in previous sections, defendant could respond to prosecution under 946.12 (3) by contending: 1) that he did not possess the requisite corrupt intent; 2) that he achieved no personal gain or unjust enrichment; 3) that he did not perform in a manner inconsistent with his duties; or 4) that the statute is void for vagueness, and therefore denies due process. For a discussion of the distinct intent requirement in 946.12 (3), see the discussion herein. For a discussion of lack of personal gain and unjust enrichment, see the discussion herein and under 946.12 (1), element 3, (a), supra. For defense 3), see the discussion herein. For defense 4), see the discussion of constitutional defenses which follows.

Element No. 1, that the defendant was, at the time of the offense, a public officer or employe.

For a detailed discussion of the requirements for this element, see 946.12 (1), element 1, supra.

Element No. 2, that said public officer or employe was acting in his official capacity.

For a discussion of the requirements for this element, see 946.12 (2), element 2, supra.

Element No. 3, that said public officer or employe was performing a discretionary duty in the manner inconsistent with the duties of his office or employment or in a manner inconsistent with the rights of others.

As asserted in Note 2 to Wisconsin Jury Instruction, Criminal 1732, on 946.12 (3), whether a duty is discretionary or mandatory in nature can usually be decided as a matter of law. However, in specific instances this decision may be before the jury as a matter of fact. The decision as to whether it is discretionary is made with reference to the description of the duty "by law." Apparently, "by law" means more than "by statute." Thus in *State ex rel. Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 166 N.W. 2d 255, the court mentioned that a district attorney in Wisconsin is

a *Constitutional* officer endowed with discretion approaching the quasi-judicial. Also, in *State ex rel. Kuszewski v. Board of Fire and Police Commissioners* (1963), 22 Wis. 2d 19, 125 N.W. 335, the court looked to the duties of the police chief as set forth in the Milwaukee City Charter, in deciding what discretionary authority he had.

There is a long common law and statutory history in Wisconsin as to what constitutes a discretionary duty. In general it seems that discretionary duties are those quasi-judicial in nature, where the legislature has endowed the official with latitude for decision-making and exercising his own personal judgment. For example, in *Druecker v. Salomon* (1967), 21 Wis. 621, 629, 94 A.D. 571, the court commented that whenever an act is discretionary in nature, it takes on the character of a judicial decision. Similarly, in *Fath v. Koeppel* (1888), 72 Wis. 289, 39 N.W. 539, a fish inspector was held not liable in damages for an error in judgment. The court stated that he had:

> ". . . [H]igh and responsible judicial power, . . . and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages * * * This principle protects all officers exercising judicial powers, whatever they may be called * * * It is a *discretionary* authority, where the determination partakes of the character of a judicial decision." (At 293)

Though this case was civil, the statement would seem to be applicable to a criminal case as well.

More recently in *State ex rel. Schwenker v. District Court* (1932), 206 Wis. 600, 240 N.W. 406, the court found that an official who erroneously exercised his judgment as to a discretionary duty was not criminally liable. In that case a banking commissioner had the statutory authority to take over failing banks. The court found that he had wide discretion to exercise his judgment and expertise in these matters, and his decision not to put a particular bank into what amounted to a receivership, absent corrupt and felonious intent, did not render him liable under the predecessor of 946.12 (2). The court stated that:

> "Where an official having discretion in a certain matter acts upon his judgment in good faith, although erroneously, such act is not corrupt within the meaning of the statute, and likewise if, in the exercise of his discretion, he takes no action although he errs, he is not guilty of neglect as that term is used in the sections quoted." (At 608)

Thus a defense lies under 946.12 (2) that the exercise of discretion was not for dishonest advantage, and was merely an erroneous exercise of judgment. A charge can only lie if the public officer or employe acted outside the scope of his discretion and with corrupt intent, or if he acted within the scope of his discretion in a manner at odds with his own duties, at odds with the duties of his employment, or at odds with the rights of others.

a. Scope of Discretion.

Having characterized the duty as discretionary, examination must be made of the exact scope of that discretion. As stated in *State ex rel. Gill v. Common Council of Watertown* (1859), 9 Wis. 229, the mere fact that a duty is discretionary does not mean that it is outside the control of the people or the courts. Having stated that officers may act erroneously in the performance of a discretionary duty without being subject to a writ of mandamus, the court states that:

> ". . . this does not by any means make their action a case of discretion not to be controlled. Such discretion exists only where there is a decision on some subject which the law has given them power to decide on, with the intent that such decision should be final, unless changed by some direct appeal or review."

Specific cases have examined the scope of discretion and sometimes found abuse contrary to 946.12 (2) and its predecessors where this scope was exceeded. Thus, a bank comptroller was found to have the discretion to decide printing needs. *State ex rel. Carpenter v. Hastings* (1860), 10 Wis. 461. Similarly, in *State ex rel. Pierce v. Board of Trustees* (1914), 158 Wis. 417, 433, 149 N.W. 205, it was found to be within the scope of discretion of the board of trustees of an institution to make financial decisions, as the legislature had delegated a broad discretion to that board to decide what would be in the best interests of the institution. In *State ex rel. Kurkierewicz v. Cannon, supra,* the Constitution granted a broad scope of discretion to a district attorney to decide whom to prosecute and when to initiate inquiries. However, when the district attorney ignored specific mandatory duties, or exercised his discretion as to whether to perform them, he had abused that discretion:

> "Yet, where the legislature has spoken and directed the performance of duties under particular facts, the district attorney is obligated to comply with the legislative mandate." (At 379)

Finally, in *State ex rel. Kuszewski v. Board of Fire and Police Commissioners* (1963), 22 Wis. 2d 19, 125 N.W. 335, suspension of a police officer by the chief, though not a specifically delegated power, was within the scope of the chief's discretion. However, suspension without pay was held not to be within his discretion. Presumably such a decision as to financial matters was an abuse of discretion as it was punitive and beyond the scope of duties of the police chief to preserve the public peace, enforce laws, and supervise the department.

b. Inconsistency With The Duties Of His Office, Employment, Or The Rights Of Others.

Wis. Stat. 946.12 (2) specifically defines abuse of discretion as exercising power 1) in a manner inconsistent with the duties of officer employment, or 2) in a manner inconsistent with the rights of others. It would appear that this statutory language states specifically what, prior to 1955, was characterized as an arbitrary, capricious, or unreasonable exercise of discretionary powers, inconsistent with the rights of others or the duties of office.

For example, in *State ex rel. Pierce v. Board of Trustees* (1914), 158 Wis. 417, 149 N.W. 205, though the Board did have broad discretion to make decisions in the best interests of an institution, such discretion was not without bounds.

> "This discretion must of course be exercised reasonably. It cannot be exercised in a way which is an evasion of a positive duty, nor in an arbitrary or capricious manner which amounts to a refusal of exercising a reasonable discretion." (At 423)

Similarly in *State ex rel. Kurkierewicz v. Cannon, supra,* the district attorney, though he has wide discretion, may not make decisions resting upon prejudice or caprice. A decision by the district attorney not to open a coroner's inquest into the shooting death of a black man by a police officer, was within his discretion and based upon sound professional judgment that there was no criminal liability. But, presumably the district attorney, if he had decided not to open an inquest because the victim was black, or because he just didn't want to be bothered, would have been acting capriciously and/or on the basis of prejudice, and would have fallen within the conduct proscribed by 946.12 (3).

A certain type of case prosecuted under the predecessor to 946.12 (3) involved the exercise of an officer's or employe's discretionary power in a manner inconsistent

with the duties of another position, either private or official. Thus in 58 OAG 158 (1969), the opinion was rendered that an officer serving as a trustee on the Board of Regents of the University of Wisconsin could simultaneously work for a degree as a student. The rationale was that the exercise of discretionary power of a regent (i.e., voting on such matters as tuition increases) was not inconsistent with his duties as a student, and, at any rate was not done with the intent of obtaining a dishonest advantage, a prerequisite for violation of 946.12 (3). [See discussion of element 4, infra.]

Though many cases of conflict of interests, and conflicting exercise of discretionary powers over matters in which an official has a private interest, may be prosecuted under 946.12 (3), now that 946.13 specifically prohibits private interest in public contracts, prosecution would seem to lie largely within the scope of that statute. Thus cases which *were* brought under the old 348.28 [which was codified both into 946.12 (3) and 946.13] would now be appropriate under 946.13. An example is a suggested prosecution at 40 OAG 488 (1951) for an official holding an indirect personal interest in a contract made for the benefit of his wife and child. Similarly, in *State v. Bennett, supra,* discussed above, an official was charged with having a pecuniary interest in a contract made on behalf of the city, and such behavior was grounds for a criminal action for exercising discretion in a manner inconsistent with his duties. Similarly, at 39 OAG 114 (1949), an officer who had a pecuniary interest in a municipal airport construction contract was felt to be potentially guilty of malfeasance in public office.

State ex rel. Schwenker v. District Court, supra, opens one further possible definition of the terms "in a manner inconsistent with known duties." In Justice Fairchild's discussion as to section 348.28 and 348.29, he stated that "this legislation is calculated to prevent an abuse of public justice." It could be cautiously argued in light of the avowed legislative intent of 946.12, to insure conduct above reproach by public employes and officers, that when an officer or employe acts for a dishonest advantage, he is, per se, acting in a manner inconsistent with his known public duties or employment, or with the rights of others.

This is acknowledged to be the case in other jurisdictions. For example, in *State v. Weleck* (1952), 10 N.J. 355, 91 A. 2d 751, the the court stated that official duties may arise by law or may arise out of the very nature of the office itself. Those holding these offices have a duty to perform honestly:

> ". . . Public officers 'are under an inescapable obligation to serve the public with highest fideltiy' . . . 'they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty, and integrity,' * * * 'These obligations, . . . are not mere theoretical concepts or idealistic abstractions of no practical force and effect; *they are obligations imposed by the common law on public officers and assumed by them as a matter* of law upon their entering public office.'" (At 757-758)

Thus seeking dishonest advantage could be construed as, per se, acting in a manner inconsistent with the duties of a public officer or employe.

Element No. 4, that he acted with intent to obtain a dishonest advantage for himself or others.

The intent requirement necessary for violation of subsection (3) is stated as "with intent to obtain a dishonest advantage." By reference to Wis. Stat. 939.23, the terms "intentionally" and "with intent to" are identically defined. The actor must have,

> ". . . A purpose to do the thing or cause the result specified or believes that his act if successful, will cause that result."

However, 939.23 (3) goes on to state that in addition the actor must have knowledge of those facts making his conduct criminal, which are set forth following the word "intentionally" (or, by incorporation the words "with intent to"). Thus in 946.12 (3), the actor must have knowledge of the facts that compose his attempt to create a dishonest advantage for himself. Thus, he needs to have a "corrupt" intent, as counterdistinguished from the general criminal intent required for violations under the other four subsections [See discussion under 946.12 (1), intent, supra].

The discussion in *State ex rel. Schwenker v. District Court, supra,* clarifies the distinction. If an officer is performing a discretionary duty in good faith, even though erroneously, his conduct cannot be in violation of 946.12 (3), as he has no venality, no corrupt intent. The court stated:

> "It follows from the phraseology of the statute [348.29, a predecessor to 946.12 (3)] that unless evidence is offered of corrupt conduct the complaint cannot be sustained. Where an official having discretion in a certain matter acts upon his judgment in good faith, although erroneously, such act is not corrupt within the meaning of the statute, . . ." (At 608)

As to discretionary duties, an officer must exercise his judgment in implementing policies, and criminal liability will not be found to exist unless evidence of corruption, or acts of a selfish nature, are brought forth.

In an analagous situation, speaking in terms of fraud, in *Boles v. Industrial Commission* (1958), 5 Wis. 2d 382, 387, 92 N.W. 2d 873, the court cited with approval the following statement from *Hannon v. Madden,* (1931), 214 Cal. 251, 267, 5 P. 2d 4. In this case the court decided that where fraud was alleged to have been committed in the exercise of discretionary powers, absent proof of corruption, a charge would not lie,

> "Fraud, being a term which imputes venality and corruption to the person charged, should be clearly proved and satisfactorily established, especially where the persons charged are public officers vested with wide discretionary powers."

In *State ex rel. Dinneen v. Larson, supra,* the court specifically rejected the notion that corrupt intent is required for violation of Wis. Stat. 348.28 and 348.29. However, the court cited *Schwenker, supra,* quoting the statement above, and distinguished this case by stating that it went only to situations where a public officer or employe was exercising a discretionary power. In that situation only, corrupt intent was required. As to exercise of mandatory duties, corrupt intent was not required.

946.12 (4), Introduction.

Wis. Stat. 946.12 (4) specifically prohibits a public officer or employe from making, in his official capacity,

> ". . . an entry in an account or record book or return, certificate, report, or statement which in a material respect he intentionally falsifies."

Proof of violation of 946.12 (4) requires proof of five elements: 1) that defendant was, at the time of the offense, a public officer or employe; 2) that in his official capacity he made an entry in an account or record book, a certificate, a report, a statement, or a return; 3) that it was false; 4) that it was false in a material respect; and 5) that he intended to make said false entry.

In the Comment to 946.12 (4) it is stated that this subsection is probably a specific instance of conduct already prohibited by the first three subsections. Thus, if the duty is mandatory and prescribed "by law," such as requiring that certain reports and records be kept, it would seem that a charge would lie under 946.12 (1) or (4).

If the duty were discretionary, and an officer abused his discretion by making a false entry, report, or statement, a charge would lie under 946.12 (2) or (4). If an official was forbidden "by law" from working overtime hours, but he knowingly did so and submitted a payroll voucher, he would be chargeable under 946.12 (2) or (4).

Elements 3 and 4, relating to falsifying instruments in a material respect, are peculiar to 946.12 (4). Element No. 1 is identical to that discussed under 946.12 (1). Element 2, acting in an official capacity, is identical to that discussed under 946.12 (2). Element 5 is identical to that discussed under 946.12 (1).

In addition to the defenses discussed in previous sections, defendant could respond to prosecution under 946.12 (4) by contending that 1) he merely failed to make an entry, and that it did not constitute a false entry; 2) that he lacked corrupt intent; 3) that he was neither unjustly enriched nor was the public injured by his acts; 4) that even if his entry were false, it was not false in a material respect; or 5) that the subsection is void for vagueness as to the meaning of the term "material." For discussion of defense 1), see the discussion herein under 946.12 (4), element 3. For discussion of defense 2), see the discussions under 946.12 (1), element 3 and 946.12 (3), element 4. For discussion of defense 3), see the discussion under 946.12 (1), element 3, (a). For discussion of defense 4), see the discussion herein under 946.12 (4), element 4. For discussion of defense 5), see the discussion to follow on constitutional defenses.

Element No. 1, that defendant was at the time of the offense a public officer or employe.

For a detailed discussion of the requirements for this element, see 946.12 (1), element 1, supra.

Element No. 2, that the defendant was acting in his official capacity.

For a detailed discussion of the requirements for this element, see 946.12 (2), element 2, supra.

Elements Nos. 2 and 3, that the defendant made a false entry.

The exact definition of what constitutes a false entry in an account or record book, or return, certificate, report or statement, would seem to be a matter of first impression in Wisconsin. However, a functional definition can be gleaned from Wisconsin opinions pertaining to the statute subsection and some conceptual framework can be derived from 18 U.S.C. 1001, and the federal court cases interpreting it.

18 U.S.C. 1001 is a statute substantially similar in language to Wis. Stat. 946.12 (4), though it is in some respects broader and therefore subsumes this subsection:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent *statement* or *representation*, or makes use of any *false writing* or *document*, knowing the same to contain any *false*, fictitious or fraudulent *statement* or *entry* . . ." (Emphasis added.)

In *U.S. v. Egenberg* (2nd Cir. 1971), 441 F. 2d 441, *cert. denied* 404 U.S. 494, defendant was charged under 18 U.S.C. 1001 with filing a false income tax statement. Defendant claimed that such statements were not intentionally false, as he didn't *know* they were false. The court held that to convict for filing a false statement, the jury need only find that the defendant acted with reckless disregard as to whether the statement was true or not, or acted with a conscious purpose to avoid learning the truth. Similarly, in *U.S. v. Clearfield* (E.D. Pa. 1973), 358 F. Supp. 564, defendant submitted allegedly false certifications of the conditions of certain properties to the Federal Housing Administration. The court found that a conviction could be based on reckless disregard for the truth of statements made regardless of actual knowledge of falsity. Thus, a false entry, at least by federal case law, would seem to include statements or certifications which falsified in a material manner, but were not made with direct corrupt intent. [See discussion, infra, on "materiality" in terms of 18 U.S.C. 1001].

In Wisconsin no case law was found directly defining false entry in light of 946.12 (4). However, a cautious analogy might be made to the term as it is used in Wis. Stat. 221.39, under the Banking Act, which holds criminally liable one who falsifies bank records and statements and who,

> ". . . makes any *false entry in any book, report, or statement* of the bank with intent . . . to injure or defraud . . . or deceive . . ." (Emphasis added.)

The use of this analogy must be, indeed, cautious, as the banking statutes do include elements of fraud and do make provisions for the liability of agents as well as principles. However, cases interpreting "false entry," regarded with caution, may be of use.

In *Lochner v. State* (1935), 218 Wis. 472, 261 N.W. 227, the court defined "false" in terms of 221.39 as that which is not true or does not exist. The "false entry" in the bank books was, in that case, an untrue list of the names of bank stockholders.

In *Rosenberg v. State* (1933), 212 Wis. 434, 249 N.W. 541, appeal dismissed 290 U.S. 680, 54 S.Ct. 230, 78 L.Ed. 2d 822, the court defined a "report" as false which was, simply, not true *in fact*.

Examples may be given of specific use of 946.12 (4), in its various aspects. In several cases where a public officer received fees to which he was not entitled, supposedly through submission of "false" payroll or account book claims, violation of 946.12 (4) was found. [As these cases overlap with the charges under 946.12 (5), see the discussion therein as well]. *St. Croix County v. Webster* (1901), 111 Wis. 270, 87 N.W. 302, specifically held that officers at common law and by statute, are entitled only to compensation authorized by law. Thus, if they submit additional charges, an action for recovery will lie. Citing this case, at 54 OAG 195 (1965), the Attorney General opined that supervisors who claimed pay above the maximum allowed are in potential violation of 946.12 (4) and/or (5), for submission of false pay claims. Similarly, at 49 OAG 171 (1960), a justice of the peace was said to be criminally liable under 946.12 (4) for charging for services not performed or known to be not necessary for performance of his duties. Also at 47 OAG 168 (1958), a sheriff who was charging unauthorized fees for his services, mileage, and court appearances in traffic cases, was said to be liable under subsection (4).

At 21 OAG 626 (1932), a Notary Public who took an acknowledgement of execution of a deed over the telephone, when he was required by law to attest that the person appeared before him, was said to be liable for making a false certificate under the predecessor of 946.12 (4). [It is to be noted that in that case he was held liable *in spite* of the fact that he didn't know the person was perpetrating a fraud, and therefore lacked corrupt intent himself]. It was sufficient to constitute a false entry on a certificate that the Notary attested that the caller had come before him when he, in fact, had not.

There is no conclusive way of knowing whether a failure to make an entry could constitute a false entry in Wisconsin. In *U.S. v. Herrig* (1913, D. Mont.), 204 F. 124, an unfilled blank in a bank's account book which should have had an entry, was held not to be a false entry. However, in *People v. Kingsbury* (1933), 353 Ill. 11, 186 N.E. 470, in light of a broader banking fraud statute which included false entries, reports, and verifications, the writing in of the word "none" in a blank, as it was false, was construed as a "false" entry. There is no "omission to act" language in (4) and a persuasive argument could be made that where in 946.12 (i.e., in (1) and (3)) the

legislature meant omission to act to allow liability, it so stated. However, by simple logic it would seem that falsely leaving a blank in such a document as an account book could make a false total sum, and could thus be argued to be a false entry, even though it involved an omission to act.

Element 4, that it was false in a material respect.

In note 2 to the Wisconsin Jury Instructions, Criminal 1733, it is stated that materiality is usually "a question of law which can be determined by the trial court." The note defines falsification in a material respect as "that which causes the instrument to speak differently in legal effect than it spoke originally."

This note to the jury instruction seems to adopt the definition of "material alteration" commonly used in civil cases. Thus, in *Ruwaldt v. W. C. McBride, Inc.* (1944), 388 Ill. 285, 57 N.E. 2d 863, 867, 868, 155 ALR 1209, the test was whether the alteration changed the legal effect of the document:

> ". . . any alteration of a written instrument is material which so changes its terms as to give it a different legal effect from what it originally had, and thus works some change in the rights, obligation, interests or relations of the parties." (At 867)

In this case striking a termination clause and thus invalidating a lease was held to be such a "material alteration." Similarly, in *Sneed v. Sabinal Mining and Milling Company* (7th Cir. 1896), 71 F. 493, 495, 18 C.C.A. 43, a defendant was held to have "materially altered" an instrument when he changed the name of the payee and thus completely changed the legal effect of the instrument.

The common meaning of the term "material" and the civil definition would seem in accord. *Black's Law Dictionary* defines the term as connoting real importance, influence or effect, matter as distinguished from form. In *U.S. v. Pope* (S.D. N.Y., 1966), 189 F. Supp. 12, it is stated that common usage of the term "material" is clear and will suffice for legal purposes.

Further guidance is found in a series of federal cases interpreting 18 U.S.C. 1001. Although of broader scope, this statute is similar to, and in fact would subsume, 946.12 (4). It states:

> "Whoever, in any manner within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined . . ."

The test for materiality under this statute is well established. In *U.S. v. Tzanstarmas* (9th Cir. 1968), 402 F. 2d 163, it was stated that, "A statement is material if it could affect or influence the exercise of a governmental function." To this same effect see *U.S. v. East* (9th Cir. 1969), 416 F. 2d 351, in which the test for materiality under 18 U.S.C. 1001 was held to be whether the falsification is calculated to induce action or reliance by an agency of the United States. See to the same effect, *U.S. v. Goldsmith* (7th Cir. 1940), 108 Fed. 2d 917, which stated the test for materiality in substantially the same terms. However, it is well settled that whether the government *did in fact* rely on the false statement is immaterial. *Blake v. United States* (8th Cir. 1963), 323 F. 2d 245.

Sec. 946.12 (5), Introduction.

Section 946.12 (5) penalizes any public officer or employe who,

> "Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law."

As discussed earlier, subsecs. (4) and (5) of sec. 946.12 cover acts that will in general also fall under the broader subsecs. (1) through (3). Thus an officer or employe accepting or soliciting improper compensation would probably be chargeable under sec. 946.12 (2) or (3) as well as under subsec. (5). See *State v. Kort* (1972), 54 Wis. 2d 129, 194 N.W. 2d 682, for an example of a case brought under subsec. (2) which may have been possible under subsec. (5) as well. Moreover, some cases chargeable under 946.12 (5) might also lie under provisions of the Criminal Code not specifically directed at public officers or employes. For a possible example, see *State v. Brown* (1910), 143 Wis. 405, 127 N.W. 956, where a sheriff was charged with obtaining money from the county by false pretenses.

The Official Comment to the 1955 Revision of the Criminal Code indicates that sec. 946.12 (5) was intended to supplant four prior provisions. Old sec. 348.28 punished, among others, a public officer or employe "who shall ask, demand, or exact for the performance of any service or duty imposed upon him by law any greater fee than is allowed by law. . . ." Section 348.281 provided that "Except as specifically authorized by statute, no officer or employe of the state shall, directly or indirectly, receive or accept any sum of money, or anything of value, for the furnishing of any information, or performance of any service whatever relating in any manner to the duties of such officer or employe," and made violation of the section a misdemeanor.

Section 348.29 punished an officer or employe who "shall be guilty of any wilful extortion." Finally, sec. 348.301 punished the allowance or offer of a rebate or discount on fees allowed by law to registers of deeds.

Section 946.12 (5) differs from its predecessors in several respects. For one thing, secs. 348.28, 348.281, and 348.301 may have imposed strict liability, while sec. 946.12 (5) requires *intent* to solicit or accept value *known* to be improper. Also, the inclusion in sec. 946.12 (5) of anything of value *less* than fixed by law differs from 348.28 and 348.281. Nor was the taking of less than an amount fixed by law within the crime of extortion. In *Hanley v. State* (1905), 125 Wis. 396, 104 N.W. 57, the court stated that sec. 348.29 punished the offense of extortion as it existed at common law, and adopted the standard common law definition:

> "The common-law offense of extortion is said 'to be an abuse of public justice, which consists in any officer's unlawfully taking by color of his office, from any man, any money or thing of value that is not due him, or more than is due him, or before it is due.' Bl. Comm. Book 4, 141." At 401)

(Note: Common law extortion under color of public office should not be confused with extortion and blackmail by a private individual as defined in sec. 943.30, Stats.)

Wisconsin Jury Instruction, Criminal 1734, states the elements of an offense under sec. 946.12 (5) as follows: 1) That the defendant was, at the time of the offense, a public officer or employe; 2) That the defendant intentionally solicited or accepted for the performance of any service or duty anything of value; 3) That the defendant knew the amount solicited or accepted to be greater or less than is fixed by law; and 4) That he intentionally solicited or accepted such value under color of office.

It should be noted at the outset that there is an almost complete lack of authority on the application of sec. 946.12 (5) and its antecedents. *Hanley, supra,* appears to be the only Wisconsin decision, and it dealt only with extortion. Otherwise, Wisconsin authority seems limited to several references in opinions of the Attorney General. There is, of course, ample law from other jurisdictions dealing with extortion, and some guidance may be taken from the words of the older Wisconsin statutes. However, sec. 946.12 (5) differs substantially from these other crimes, and the relevance of reasoning based upon them depends to some extent on the statements of intent in the Official Comment, which of course do not have the force of law.

Element 1, that the defendant was a public officer or employe.

See the discussion under sec. 946.12 (1), element 1, supra.

Element 2, that the defendant intentionally solicited or accepted for the performance of any service or duty anything of value.

a. Intent. See the discussion of intent under sec. 946.12 (1), supra. The statute appears to require general criminal intent as provided under sec. 939.23, Stats. Thus a defendant would possess the requisite intent if he had the purpose to solicit or accept for the performance of any service or duty anything of value, subject of course to the requirement of knowledge that the amount solicited or accepted was improper. (See element 3, infra).

The common law crime of extortion was generally said to require corrupt intent. 3 Wharton's Criminal Law and Procedure, sec. 1394, p. 791 (1st Ed. 1957); 35 C.J.S., *Extortion*, sec. 3, p. 359. From this, it might be argued that a requirement that the defendant be seeking unjust advantage or personal gain should be engrafted upon sec. 946.12 (5). This seems incorrect for several reasons. First, sec. 946.12 (5) makes no mention of any such requirement. Section 946.12 (3), addressing discretionary duties, specifically requires intent to obtain dishonest advantage, and presumably had the legislature contemplated it as to 946.12 (5), it would have so provided. Also, solicitation or acceptance of fees *less* than provided by law are within sec. 946.12 (5). This would seem inconsistent with a requirement for intent to obtain dishonest advantage.

Moreover, the corrupt intent required under common law extortion seems in fact to have been merely the intent to collect fees to which the officer was not entitled. The inquiry into motive looked no further. When the intent requirement of element 2 of sec. 946.12 (5) is considered along with the requirement of element 4, that the defendant *knew* the amount solicited or accepted to be improper, the corrupt intent requirement that applied to extortion at common law seems consistent with sec. 946.12 (5). Thus it would seem immaterial that a defendant ultimately enjoyed no benefit from his act, such as where he procured an excess fee for another person. In *Hanley, supra*, the court stated that it was immaterial whether or not the money received by defendant was received for his own use.

b. Solicits Or Accepts. These words appear to have their ordinary meanings. Unlike the crime of extortion or blackmail by private citizens, as in sec. 943.30, Stats., common law extortion under color of office required no circumstances amounting to actual duress. *State v. Matule* (1959), 154 N.J. Super. 326, 148 A. 2d 848, 851; 35 C.J.S., *Extortion*, sec. 4, p. 360, 3 Wharton's Criminal Law and Procedure, supra, at

793. The mere presentation of an account to a body authorized to pay it has been held a sufficient demand. *Id.* At least under some circumstances, solicitation of a bribe would constitute attempted extortion. *State v. Begrn* (1961), 34 N.J. 35, 167 A. 2d 161. Sec. 946.12 (5) would also overlap with bribery in many cases, and where difficulty is anticipated in proving a case under sec. 946.10 (2), Stats., charging an offence under sec. 946.12 (5), Stats., might be considered as an alternative.

While extortion at common law required both demand and receipt of the illegal item of value, either solicitation or acceptance suffices under sec. 946.12 (5). Thus it would seem that where something of value greater or less than allowed by law is offered to a public officer or employe voluntarily, whether out of ignorance, mistake, or otherwise, for performance of a service or duty, its acceptance would constitute violation of sec. 946.12 (5) if the requisite intent and knowledge were present.

c. Performance Of Any Service Or Duty. Section 946.12 (5) requires that value be solicited or accepted for the performance of any service or duty. This language raises several questions.

One question relates to whether *actual performance* of the service or duty is necessary. This might arise where solicitation and/or acceptance are made before the supposed performance, and the defendant subsequently fails to perform. Again, the question would be presented where improper value is solicited or accepted for performance supposedly complete, but in fact never rendered. In both cases the purpose of the statute would indicate that liability should exist. Since the wording of sec. 946.12 (5) is compatible with this result, even under the requisite strict construction, it is probable that actual performance would not be required. At common law, a public officer taking fees for services not rendered could be guilty of extortion. 35 C.J.S., *Extortion*, sec. 2, p. 359. The form of Wisconsin Jury Instructions, Criminal 1734 would have to be modified somewhat to accommodate this situation.

A more serious question relates to the scope of "any service or duty." These words taken alone seem broadly inclusive. However, several limiting arguments can be advanced based on the statute as a whole.

First, it might be argued that only services or duties committed to the officer or employe by law are covered. This seems incorrect for several reasons. First, the word "any" and the absence of explicit limitations within the statute suggest a broader applicability. Where narrower categories were intended in other sections of 946.12, they were clearly stated: "[M]andatory, nondiscretionary, ministerial duty of his office

or employment" in sub. (1), a limitation to acts done "in his capacity as such officer or employe" in subs. (3) and (4).

Also, certain of the prior statutes said to be replaced by sec. 946.12 (5) indicate a broader scope. (These statutes are excerpted above under the introduction to sec. 946.12 (5).) Sections 348.28 and 348.301 were of narrow scope, the former addressing duties "imposed by law," and the latter merely the registration of deeds. Section 348.281, however, covered "any service whatever relating in any manner to the duties of such officer or employe." Probably broadest of all was extortion, under sec. 348.29, where the breadth of activities covered was generally determined by the actor's claim of authority to do them and/or collect payment therefor. [See the discussion of "color of office or employment" under element 4, infra.] If the legislature intended sec. 946.12 (5) to cover all offenses within the prior statutes, it would seem reasonable that the broadest scope consistent with the words of the new statute should be given to "any service or duty." This would point to extortion, a conclusion supported by the use of the phrase "color of office or employment," a phrase of art commonly used in defining this crime. See, for example, *Hanley*, *supra*. Under this construction, "any service or duty" would be given its literal meaning, with the limitation on scope of the statute's coverage being provided by the requirement that a defendant made the solicitation or acceptance under color of his office or employment.

Another question - again one to which no conclusive answer can be given - is whether "any service or duty" should be limited to those for which some particular fee "is fixed by law." Use of the word "fixed," as opposed to "allowed" in the old secs. 348.28 and 348.301 might suggest such a construction. Moreover, a fixed fee would obviously be necessary where a defendant is being charged with acceptance of *less* than the proper amount for a service or duty, and a court might be disinclined to adopt a seemingly different construction where a defendant is charged with soliciting or accepting too much. Under this construction, sec. 946.12 (5) would be limited to situations like those of 49 OAG 171 (1960), dealing with a justice court's charging costs exceeding those provided by sec. 307.01, Stats., or 48 OAG 257 (1959), which suggested that a sheriff's charging fees less than provided by sec. 59.28, Stats., would violate sec. 946.12 (5).

However, persuasive arguments can be made for a broader scope. The basic premise is that unless some particular remuneration is specifically provided for the rendition of official services, the amount a public officer may receive therefore "is fixed by law"

at *nothing*. This proposition finds considerable support in the case law. In *Quaw v. Paff* (1898), 98 Wis. 586, 590, 74 N.W. 369, the Wisconsin Supreme Court stated:

> "Officers take their offices *cum onere*, and can acquire no right, legal or equitable, to a salary in excess of that provided and fixed by law before they enter upon their official duties. Whether the salary incident to an office be adequate or inadequate is entirely immaterial. The officer accepting an office has no right to demand more for the performance of its duties, or the performance of any duty, as such officer, not required by law, but which may be required of him by the governing body of the corporation and voluntarily performed. *All services performed, which are within the scope of his official duties, or which are voluntarily performed as such officer by request or otherwise, are, in contemplation of law, covered by his official salary. Kewaunee Co. v. Knipfer*, 37 Wis. 496." [Emphasis added]

This passage was quoted with approval in *St. Croix County v. Webster* (1901), 111 Wis. 270, 273, 87 N.W. 302. Moreover, a search of the statutes defining the duties and compensation of the position occupied by a particular defendant or those statutes defining the powers and duties of the governmental body employing him, may be of help. (Such a search should of course be a first step in any contemplated prosecution under sec. 946.12, Stats.)

Wisconsin law dealing with criminal misconduct also recognizes the principle stated in *Knipfer, supra*. As noted earlier, the official comment indicated an intent to incorporate extortion within sec. 946.12 (5). *Hanley v. State, supra*, specifically held that extortion was "a wrongful taking, by color of office . . . *when nothing is due*, as well as when more is demanded than is due. . . ." [emphasis added] 125 Wis. at 401. In 61 OAG 256 (1972), it was suggested that if a deputy sheriff took money from the owner of a bar for keeping order therein, he would be violating sec. 946.12 (5) unless done in his private capacity while off duty. (Incidentally, the opinion went on to state that the deputy might be allowed to wear his uniform under such circumstances.)

6 OAG 32 (1917), involved a district attorney who was charging fees for the prosecution of bastardy proceedings. This work was part of his official duties, and the opinion stated that his charging for it would violate sec. 4549g, Stats., which later became sec. 348.281, a predecessor of sec. 946.12 (5). See also 19 OAG 133 (1930), referring to old sec. 348.28, Stats., and 54 OAG 191 (1955), dealing with sec. 946.12 (5), both indicating liability where fees are taken for the performance of services for which no specific fee provision is made.

Thus, while the question is not free from doubt, it seems likely that "any service or duty," as the terms are used in sec. 946.12 (5), would not be limited to only those duties committed by law to the defendant, or to those for which some particular fee is specifically provided by law.

d. Anything Of Value. The broad term "anything of value" seems to be taken from the definition of extortion, as quoted from *Hanley, supra*, in the introduction to this section. There seems to be general agreement in the extortion context as to the following: Anything having value is sufficient, but it probably must be value expressible in monetary terms; checks are within the term, but promises to pay, being illegal and hence unenforceable, are not, unless the promise has been fulfilled; the amount by which the value differs from that which would be legal is immaterial to guilt. 3 Wharton's Criminal Law and Procedure, supra, sec. 1396, p. 793; 35 C.J.S., *Extortion*, sec. 6, p. 361.

At this point it should be noted that the formulation of element 2 in Wisconsin Jury Instructions, Criminal 1734 will prove inadequate in some cases where a defendant performs a service or duty for *less* than the fee fixed by law. As formulated, if a defendant solicited or accepted *nothing* for the performance of a service or duty for which a fee was prescribed by law, he would escape liability. This result seems clearly absurd, and could possibly be escaped by requesting when necessary an instruction phrasing element 2 as follows: That the defendant intentionally solicited or accepted for the performance of any service or duty anything of value *less* than is fixed by law. The other elements could remain unchanged.

Element 3, that the defendant knew the amount solicited or accepted to be greater or less than is fixed by law.

As to the meaning of "by law," see the discussion under sec. 946.12 (1), element 1. See also the discussion of "any service or duty" under element 2, immediately preceding. As there indicated, the approach to determining what value is in fact fixed by law is two-fold: A search of the statutes, ordinances and regulations applicable to the particular case; and if no specific provision is found, the use of the rule that in the absence of a specific provision for compensation, none is allowed.

This element requires that a defendant knew that the value solicited or accepted was improper. As to this, reference should be made to sec. 939.23, Stats., dealing with criminal intent, and the discussion of intent and proof of intent under sec. 946.12 (1), element 3, supra. *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d

829, would make relevant the length of time a defendant had held his position. Also relevant would be evidence that a defendant had in the past performed the same or similar services without soliciting or accepting improper value, as of course would be statements by defendant indicating knowledge, or statements made by others warning him of the impropriety of his actions.

A public officer is presumed to know the law. *Rogers v. The Marshall* (1868), 68 U.S. (1 Wall) 644, 17 L.Ed. 714. See also *State v. Kort* (1972), 54 Wis. 2d 129, 194 N.W. 2d 682, for inferential support, and sec. 903.03, Stats., concerning presumptions in criminal cases. However, a jury must be convinced beyond a reasonable doubt that the defendant actually had the requisite knowledge, so a good faith mistake as to the law defining proper value to be paid for performance of a service or duty would be a defense. This was true as to extortion at common law. While a custom or usage of charging improper fees was not in itself a defense to a charge of extortion, the existence of such a custom might be relevant on the issue of knowledge. 3 Wharton's Criminal Law and Procedure, supra, sec. 1394, p. 792; 35 C.J.S., *Extortion*, sec. 8, p. 362.

Element 4, that the defendant intentionally solicited or accepted such improper value under color of his office or employment.

The phrase "color of office" is a term of art associated with extortion, and the definition given in Wisconsin Jury Instructions, Criminal 1734 - a claim of assumption of right to do any act by virtue of an office or employment - is substantially that given by the common law. It implies a pretense of official right to act in a certain manner where in fact no such right exists. Thus in *Hanley, supra,* the taking by a constable of a sum of money for the discharge of a search warrant was an act done under color of office. Additional definitions of "color of office" are collected at 7A *Words and Phrases*, "Color of Office," p. 302, et seq.

Within the context of common law extortion, "color of office" seems to have had substantially the same scope as the phrase "in his official capacity," so the discussion of element 2 of sec. 946.12 (2) should be consulted. However, there seems to have been no general requirement that the service for which improper fees were taken be one the officer had a duty or discretionary power to perform. 35 C.J.S., *Extortion*, sec. 5, p. 361. It was enough that the defendant based his supposed right to act as he did upon his official position. Thus, while a defendant could defeat a charge under sec. 946.12 (5) by showing that the acts alleged were done in his private capacity,

he should not be able to interpose as a defense that his acts were not done under color of office or employment because they fell outside the activities properly assigned to such office or employment. The laying of claim to powers not actually possessed is implicit in the doing of a proscribed act under color of office.

Note that as formulated, element 4 seems to require that the defendant *intentionally* acted under color of office or employment. This suggests the possibility that a defendant might argue that whatever the appearance of the situation, he did not in fact *intend* to act under color. The usual problems of inferring intent from objective acts would be presented, and the discussion of intent and proof of intent under sec. 946.12 (1), element 3 applies. The question that would be presented to a jury would be whether the defendant intended that his solicitation or acceptance be taken as the act of a public officer or employe. Relevant to this determination would be the nature of the service or duty involved, the surroundings in which the acts were done, the defendant's knowledge that the person with whom he dealt was aware of his office or employment, and of course any statements made by the defendant designed to indicate that he possessed authority.

CONSTITUTIONAL DEFENSES TO 946.12

In addition to potential defenses which have been noted within the discussions of the various subsections of 946.12, several broader constitutional attacks and responses to charging in prosecution under this statute might be anticipated. Though it is, of course, impossible to anticipate all possible constitutional attacks or, indeed, to anticipate the exact form a specific constitutional attack might take, two broad categories would seem to emerge.

A. Constitutional Challenges To The Sufficiency Of The Charge.

As is true of other charges in Wisconsin, it is sufficient to guarantee due process and protect a defendant from the threat of double jeopardy, to charge a violation of 946.12 in the language of the statute. It is required that, in charging a statutory offense, enough must be stated to "individuate" the offense so the defendant has proper notice of the charge against him, and subsequently an opportunity to prepare a defense in response to this charge.

As stated in *Liskowitz v. State* (1939), 229 Wis. 636, 282 N.W. 103, in a prosecution under a predecessor to 946.12 the charge was held to be sufficient as it was in the language of the statute. However, some additional statement may be required to inform the accused of the exact nature of the particular crime with which he is charged. Thus, for example,

> "If a crime involving personal violence were charged in the language of the statute creating it without stating upon whom the act of violence was committed, or if burglary were charged without mention of the premises burglarized, it could hardly be claimed that the information or indictment notified the accused of the particular crime for which he was put upon trial." (At 641)

In *Holesome v. State* (1968), 40 Wis. 2d 95, 102, 161 N.W. 2d 283, the Wisconsin Supreme Court stressed that two factors are to be considered in determining whether a charge of a crime is legally sufficient: 1) whether the accusation is such that defendant can determine whether the charge states an offense to which he can plead and make a defense, and 2) whether conviction or acquittal is a bar to further prosecution for the same offense. Thus, in addition to charging in the language of the statute and charging all the elements, it would be essential to give sufficient underlying circumstances as to the charge so as to individuate the offense.

In *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d 829, a violation of 946.12 (1), (2), was charged in multiple counts, substantially in the following language:

> "That between the 31st day of August, 1954, and the 30th day of June, 1956, in the county of Waukesha, state of Wisconsin, the said defendant, Michael Lombardi, in his official capacity as such sheriff of said county, refused or willfully neglected to perform the duties of his office as required by law . . . (specifying the statute number)." (At 425)

The defendant did not directly attack the sufficiency of the complaint as to failure to state a specific time; however, the court upheld the sufficiency of the complaint as to time as well as to place and the specific acts the sheriff was alleged to have performed:

> "We consider that in form the informations and verdicts contain no reversible error. The language is that of the statute itself, and the statute is identified by its appropriate number. In content each information recites the action or failure to act whereby the sheriff violated the statute. The time, place, persons involved, the event and circumstances of the alleged offense requiring the sheriff's performance or non-performance of some act are described with certainty. The defendant seems to have had no difficulty in identifying the occurrences and events about which the state complains or in presenting his defense . . ." (At 430)

The court, in finding that the informations complied with good practice and due process, apparently stressed the fact that defendant had adequate notice of the charge against him.

However, if an information were so vague as to leave uncertain time and place of the alleged misdeed, due process problems might arise. Specifically as to charging of time, caution should be used. Though *Lombardi, supra,* does say that an information which stated that an offense occurred between two dates was generally in compliance with good practice and due process, presumably whether time was adequately alleged would depend on (1) the nature of the crime and (2) the right to alibi.

If time is a material element to a specific offense, it must be specifically charged to notify defendant and give him a chance to bring forth an alibi. However, as stated in *Butler v. U.S.* (10th Cir. 1952), 197 F. 2d 561:

> "Where time is not an essential element of the offense, it is sufficient to charge facts which show that the offense was committed within the statutory period of limitation and in such a case, even though there be a defect in the allegations as to time it is one of form only." (At 562).

Where time is not a material element, double jeopardy is not risked and due process is not violated by a charge that the alleged crime occurred between two dates:

> "The charge in each of the counts, while necessarily general in its terms, clearly defines the nature of the offense, the approximate time when it was committed, and the place where committed. If a second prosecution were attempted, the entire record, including all of the testimony as well as the pleadings, would be available to him [the defendant] to protect himself from such a prosecution." Id. (At 563.)

Thus approximate charging language as to time might be appropriate in the case of a continuing crime of misconduct, but might be insufficient if one particular violation was charged. In continuing crimes such as, hypothetically, repeated violation of 946.12 (3) by failure to perform a discretionary duty, which involved a pattern of conduct over an extended period of time, more approximate time language would probably be tolerated. As to what might constitute a continuing crime in which a time element would be meaningless and therefore not specifically necessary in the information, see *People v. Patrick* (1967), 38 Ill. 2d 255, 230 N.E. 2d 843. The charged crime was theft over a period of a month. The indictment specified only general dates between which continuing offenses took place. The court held that:

> ". . . if the single theft charged consists not of a single act, but a series of successive takings pursuant to single criminal intent and scheme, it may not be possible, and it is not necessary, to indicate with any more certainty than has already been done when the offense was committed." (At 846)

One test as to how material the element of time would be in a particular crime is how effective an alibi would be. Obviously, if a public official were charged with conspiracy or abuse of discretion over an extended period of time, no alibi for any specific time would serve to vindicate him of the charge. It would appear that courts protect the alibi defense only to the extent that such a defense would be sensible and appropriate under the circumstances. Thus the alibi defense as a matter of right would depend on whether concepts of being at the scene of the crime at the exact time of its commission were meaningful or not. If such concepts of time and place were meaningful within the context of the crime, obviously a defendant would need specific data in the information so as to prepare his alibi.

It should be added, parenthetically, that it appears clear that though it is necessary to charge intent for all violations of 946.12, it is not necessary to charge corrupt intent, with the possible exception of a charge under 946.12 (3) [See discussion of intent under 946.12 (1) and (3); also see *State v. Lombardi* (1959), 8 Wis. 2d 421, 99 N.W. 2d 829, in which the court specifically addressed itself to charging intent without charging corrupt motive, and found such a charge sufficient.]

B. Constitutional Challenges To The Statute Itself

It is conceivable that a defendant might claim that 946.12 was, in some of its terms, void for vagueness, and therefore, deprived him of due process of the law by not sufficiently clarifying the exact proscribed conduct and thereby depriving him of notice. Though by no means a complete list, some statutory phrases which might be opened to such attack are the terms "in the *manner* required by law," in 946.12 (1); "in a *manner inconsistent* with the duties of his office or employment or the *rights of others*," in 946.12 (3); and falsification "in a *material* respect," in 946.12 (4).

State v. Kort (1972), 54 Wis. 2d 129, though not speaking to a void-for-vagueness argument, is useful in the following discussion in that the decision spoke of notice as to proscribed conduct. Defendant was held not liable under 946.12 for accepting reimbursement for out-of-pocket expenses and the court overruled a 1915 case which had proscribed such reimbursement. However, the court did hold that public officers or employes could not be reimbursed for [illegible]. Though the particular defendant

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