

## HARASSING OR OBSCENE TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS

### I. HARASSING TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS

The defendant is charged with making harassing (telephone calls) (or) (electronic communications). Section 14A of chapter 269 of our General Laws provides as follows:

**“Whoever**

**(telephones another person . . .**

**or causes a person to be telephoned,)**

**(contacts another person by electronic communication,**

**or causes a person to be contacted by electronic**

**communication)**

**repeatedly,**

**for the sole purpose of harassing, annoying, or molesting the**

**person or the person’s family,**

**whether or not conversation ensues . . .**

**shall be punished.”**

In order to prove the defendant guilty of this offense, the

**Commonwealth must prove two things beyond a reasonable doubt:**

***First:* That the defendant (made telephone calls to) (caused telephone calls to be made to) (contacted by electronic communication) (caused to be contacted by electronic communication) [name of person] repeatedly, which means three or more times; and**

***Second:* That the defendant's sole purpose in (making the telephone calls) (having the telephone calls made) (making the contacts by electronic communication) (causing the contacts by electronic communication to be made) was either to harass, annoy or molest [name of person] or his (her) family.**

**The Commonwealth is not required to show that the defendant had a conversation or actual contact with [name of person], but only that he (she) (made the telephone calls) (had the telephone calls made) (made the contacts by electronic communication) (had the contacts made by electronic communication).**

**As I indicated, the Commonwealth must prove that the defendant's *only* purpose was to annoy, harass or molest [name of person] or his (her) family. For example, your favorite charity might call you repeatedly to ask for donations and that might annoy or even harass you, but it would not**

**violate the law if the intent was not to annoy, harass or molest. If the defendant called repeatedly but not for the sole purpose of harassment, he (she) is entitled to be acquitted.**

**The defendant's intent or purpose cannot be proved directly because there is no way to look into the human mind. But you may determine the defendant's purpose from the surrounding circumstances. You may consider any of the defendant's statements and acts, and any other facts and circumstances shown by the evidence, which help to indicate his (her) state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts that he (she) does knowingly. For example, if a person makes repeated telephone calls in a short period of time, or in the middle of the night, and hangs up when someone answers the phone, it might be reasonable to infer that the calls were made for the purpose of harassment. However, you should consider all the circumstances in evidence that you deem relevant in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant acted with the required intent.**

*Commonwealth v. Roberts*, 442 Mass. 1034, 816 N.E.2d 112, 113 (2004) ("The jury could infer the requisite intent from the number of calls, the tenor of the calls, their sequence and timing, and the defendant's persistence in placing the calls despite repeatedly being asked to cease . . . .");

*Commonwealth v. Wotan*, 37 Mass. App. Ct. 727, 728-730, 643 N.E.2d 62, 63-64 (1994), rev'd on other grounds, 422 Mass. 740 (1996) (hundreds of calls are "so obviously vexatious to the receiver that the requisite sole purpose of harassing, annoying and molesting may be inferred, even if getting the receiver's goat is at bottom stimulated by an obsessive desire to get the receiver's attention"). Compare *Commonwealth v. Strahan*, 30 Mass. App. Ct. 947, 949, 570 N.E.2d 1041, 1043 (1991) (calling 11 times in 7 minutes, while perhaps partially motivated by a desire to harass, does not support conviction of § 14A where evidence suggests at least a partial motive was to reestablish a prior relationship with victim), with *Roberts, supra* (holding that "certain statements made during some of the calls were, at least superficially, phrased as concern for the [victim] did not make it impermissible for the jury to infer that the actual and sole purpose of the calls was to annoy or harass). See *Commonwealth v. Voight*, 28 Mass. App. Ct. 769, 556 N.E.2d 115 (1990) (government unit cannot be a harassed "person," but calls "could take on a tone so directed at the recipient [employee] as an individual as to constitute harassment under the statute").

**SUPPLEMENTAL INSTRUCTIONS**

1. "Electronic communications."

**The term "electronic communications" includes but is not limited to any transfer of (signs) (signals) (writing) (images) (sounds) (data) (or) (intelligence of any nature), transmitted in whole or in part by a (wire) (radio) (electromagnetic) (photo-electronic) (or) (photo-optical) system.**

2. *When there was no conversation or the communication was not read.*

**The Commonwealth is not required to show that (the defendant had a telephone conversation with) (the defendant's electronic communication was received by)       [name]      , but only that the defendant (made the telephone calls or had them made) (sent the**

**electronic communications or had them sent) and that they could have been received by  [name] .**

*Commonwealth v. Roberts*, 426 Mass. 689 (1998) (“to telephone is to place a telephone call that might result in an oral communication”).

**II. OBSCENE TELEPHONE CALLS OR ELECTRONIC COMMUNICATIONS**

**The defendant is (also) charged with making repeated and obscene (telephone calls) (or) (electronic communications). Section 14A of chapter 269 of our General Laws (also) provides as follows:**

**“[W]hoever (telephones . . . a person repeatedly)**

**(or) (contacts a person repeatedly by electronic communication)**

**and uses indecent or obscene language to the person,**

**shall be punished . . . .”**

**In order to prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:**

***First:* That the defendant (made telephone calls to) (or) (contacted by**

electronic communication) \_\_\_\_\_ *[name]* \_\_\_\_\_ repeatedly, which means three or more times; and

**Second:** That in making those (calls) (electronic communications), the defendant used indecent or obscene language.

It is not necessary that the defendant specifically knew or believed that his (her) language was legally indecent or obscene. It is only necessary that such language was in fact indecent and obscene, and the defendant knew the general character of what he (she) was saying.

For a definition of “obscene,” see Instruction 7.180 (Disseminating Obscene Matter). For a definition of “indecent,” see Instruction 6.500 (Indecent Assault and Battery). See also *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 740, 98 S.Ct. 3026, 3035 (1978) (in statute banning “obscene, indecent or profane language” over the radio, the word “indecent” should be given its normal dictionary meaning of “nonconformance with accepted standards of morality”).

NOTES:

1. **“Repeatedly.”** The statutory term “repeatedly” in the first element of each of the above offenses requires three or more such telephone calls. *Commonwealth v. Wotan*, 422 Mass. 740, 665 N.E.2d 976 (1996).

2. **Anonymous telephone calls.** “[A]nonymous telephone calls and acts . . . are, by their nature, not perceptibly linked to a particular individual. They are anonymous. Yet connections may be inferred through timing, mode of communication, content of the communication, similarity to identified conduct, and interpersonal relationships, particularly those involving grievances against the recipient of the unwanted communication.” Where, in addition to evidence of specific calls traced to the defendant, there is evidence of other, anonymous telephone calls, the judge has discretion to permit the jury to consider such evidence as probative of the defendant’s intent to harass, annoy or molest if such evidence would permit (even if it would not compel) an inference that the defendant was the source of such anonymous calls. The judge should instruct the jury that they must first consider whether the anonymous calls were in fact made by the defendant and, if so, they are to consider that evidence only on the issue of whether the defendant’s sole purpose in making the calls traced to him was to harass, annoy or molest. *Wotan*, 37 Mass. App. Ct. at 730-734, 643 N.E.2d at 64-66.