

## LEWD, WANTON AND LASCIVIOUS ACT

The defendant is charged with having committed a lewd, wanton and lascivious act. Section 53 of chapter 272 of our General Laws provides that:

“lewd, wanton and lascivious persons  
in speech or behavior . . .  
may be punished . . . .”

This provision of our law is intended to punish the performance or solicitation of a sexual touching which does not rise to the level of a completed sexual act, and which is performed or intended to be performed in a public place where others may be offended by it.

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

*First:* That the defendant (committed) (publicly solicited another person to commit) a sexual act;

*Second:* That the sexual act involved touching the genitals or buttocks, or the female breasts;

*Third:* That the defendant did this either for the purpose of sexual

**arousal or gratification, or for the purpose of offending other people; and**

***Fourth:* That the sexual act (was) (was to be) committed in a public place; that is, a place where the defendant either intended public exposure, or recklessly disregarded a substantial risk of public exposure at that time and under those circumstances, to others who might be offended by such conduct.**

**The defendant cannot be found guilty of this offense if he (she) desired privacy for a sexual act**

***If relevant to evidence:* with another consenting adult**

**and took reasonable measures in order to secure that privacy. Therefore the Commonwealth must prove that in choosing that particular locale, the defendant either intended public exposure or recklessly disregarded a substantial risk of public exposure at that place and time.**

*Commonwealth v. Roy*, 420 Mass. 1, 647 N.E.2d 1179 (1995) (statute cannot be applied to solicitation for sexual conduct where unclear whether it was to occur in a public or private place); *Commonwealth v. Beauchemin*, 410 Mass. 181, 183-184, 571 N.E.2d 395, 397 (1991) (statute cannot be applied to sexual conduct in location where little likelihood of being observed by casual passersby); *Commonwealth v. Sefranka*, 382 Mass. 108, 117-118, 414 N.E.2d 602, 608 (1980) (provision “prohibits only the commission of conduct in a public place, or the public solicitation of conduct to be performed in a public place. . . . involving the touching of the genitals, buttocks, or female breasts, for purposes of sexual arousal, gratification, or offense, by a person who knows or should know of

the presence of a person or persons who may be offended by the conduct,” and can be applied to speech only if it solicits particular public sexual conduct which is itself criminal); *Commonwealth v. Templeman*, 376 Mass. 533, 537-538, 381 N.E.2d 1300, 1303 (1978) (provision cannot be applied to protected speech or expressive conduct); *Commonwealth v. Kelley*, 25 Mass. App. Ct. 180, 516 N.E.2d 1188 (1987) (masturbation) (place need not be one “to which the public or a substantial group has access,” but “judges, in the interest of caution, would be well advised to charge that the offense requires either that the defendant ‘intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons’”); *Commonwealth v. A Juvenile (No. 2)*, 6 Mass. App. Ct. 194, 197 n.1, 374 N.E.2d 335, 337 n.1 (1978) (the terms “lewd, wanton and lascivious” appear “to be redundant rather than disjunctive”).

NOTE:

1. **Private acts of prostitution.** Prior to *Sefranka, supra*, evidence of prostitution in a non-public place would also support a conviction of this offense, and therefore dual prosecutions were duplicitous. *A Juvenile (No. 2)*, 6 Mass. App. Ct. at 196-197, 374 N.E.2d at 337. The *Sefranka* opinion notes that it addressed only noncommercial sexual acts or solicitation, 382 Mass. at 118 n.10, 414 N.E.2d at 608 n.10, and it is unclear to what extent the *Sefranka* redefinition of this offense is applicable to commercial but private sexual acts or solicitation.

2. **Single penalty for one act with multiple victims.** Where there is a single incident of open and gross lewdness resulting in shock and alarm to more than one person, the legislature intended that only a single penalty attach to the conduct. For double jeopardy purposes, the “unit of prosecution” is conduct-based, not victim-based. *Commonwealth v. Botev*, 79 Mass. App. Ct. 281, \_\_\_ N.E.2d \_\_\_ (2011).