

CONSPIRACY

G.L. c. 274, § 7¹

The defendant is charged with conspiracy. A conspiracy is an agreement of two or more people to do something that is unlawful

If raised by the evidence (or to do something by unlawful means).

The crime is the *agreement* to do something unlawful

If raised by the evidence (or to use unlawful means).

It does not matter whether the plan was successful or not, or whether any steps were taken to carry out the plan.

To prove the defendant guilty of the crime of conspiracy, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That the defendant joined in an agreement or plan with one or more other persons;**

Second: That the purpose of the agreement was to do something unlawful

¹ This instruction may be adapted for use in cases where the defendant is charged with Conspiracy to Violate the Drug Law, in violation of G.L. c. 94C, § 40. See endnote 10, *infra*.

If raised by the evidence (or to do something that was itself lawful,
but by unlawful means);

and *Third*: That the defendant joined the conspiracy knowing of the unlawful plan and intending to help carry it out.

It is not necessary that the conspirators made a formal agreement among themselves, or that they agreed on every detail of the conspiracy, or even that they met together. But the Commonwealth must prove that there was a joint plan among them, and that the defendant joined in that plan.

It is not always possible to prove a conspiracy by direct evidence. The law allows you, where it seems reasonable, to infer that there was a conspiracy from all of the circumstances. For example, if people who know each other or have been in communication with each other are shown to have been involved in coordinated actions which all seem designed to accomplish a specific purpose, then it may be reasonable to conclude that those actions were not coincidental but were taken pursuant to a joint plan.

However, remember that it is not enough that the defendant knew about the conspiracy or associated with conspirators. To be

found guilty as a conspirator, the defendant must have actually joined in the conspiracy as something that the defendant wished to bring about.

G.L. c. 274, § 7 (punishment for conspiracy); *Commonwealth v. Benson*, 389 Mass. 473, 479-480, cert. denied, 464 U.S. 915 (1983) (elements of conspiracy; acquittal on substantive charge does not preclude prosecution for conspiracy); *Commonwealth v. Pero*, 402 Mass. 476, 477-479 (1988) (same); *Commonwealth v. Cerveney*, 387 Mass. 280, 288 (1982) (conviction does not require proof of overt act); *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 249, 303 (1971), cert. denied sub nom. *Farrell v. Massachusetts* and sub nom. *Beneficial Fin. Co. v. Massachusetts*, 407 U.S. 910 (1972) (same; proof of participation is required since knowledge alone is insufficient; conspiracy provable by circumstantial evidence and “silent acquiescence” can suffice); *Commonwealth v. Beckett*, 373 Mass. 329, 341-342 (1977) (whether knowledge of illegality required where act is only malum prohibitum); *Commonwealth v. Nelson*, 370 Mass. 192, 196-201 (1976) (conspiracy provable by circumstantial evidence; conspirator must be aware of unlawful objective, but not necessarily the detailed means, of conspiracy); *Commonwealth v. Stasiun*, 349 Mass. 38, 47 (1965) (co-conspirator cannot be convicted of substantive offense unless he participated or aided in it); *Commonwealth v. Ries*, 337 Mass. 565, 581-582 (1958) (Commonwealth need not prove every detail of conspiracy plan set out in complaint or bill of particulars, but only “sufficient details of the general plan that makes out a conspiracy”); *Commonwealth v. Beal*, 314 Mass. 210, 221-222 (1943) (knowledge alone is insufficient); *Commonwealth v. Farese*, 265 Mass. 377, 380 (1928) (conspiracy may be shown by conduct and reasonable inferences therefrom); *Attorney General v. Tufts*, 239 Mass. 458, 494 (1921) (common purpose may be inferred from concerted action converging to a definite end); *Commonwealth v. Saia*, 18 Mass. App. Ct. 762, 764- 765 (1984) (defendant may be convicted of lesser included conspiracy than charged); *Commonwealth v. Nighelli*, 13 Mass. App. Ct. 590, 593-597 (1982) (no overt act required under Massachusetts law; subsequent withdrawal not a defense); *Commonwealth v. Cook*, 10 Mass. App. Ct. 668, 673-677 (1980) (joint venture requires conscious sharing in criminal act but not necessarily an agreement, while conspiracy requires an agreement to work in concert); *Commonwealth v. Dellinger*, 10 Mass. App. Ct. 549, 555- 559 (1980), rev’d on other grounds, 383 Mass. 780 (1981) (unlawful purpose need not be proved precisely as alleged unless defendant prejudiced; imminence is not required; conspiracy can be complete even if details of precise target, time or manner still to be worked out).

A criminal conspiracy may be found where neither its purpose nor intended means was criminal, if the Commonwealth proves beyond a reasonable doubt that: (1) either its purpose or intended means was illegal (as distinguished from criminal); (2) the illegality was seriously contrary to the public interest because it caused a strong probability of significant harm to an individual or the public interest; and (3) if the illegality was not malum in se but only malum prohibitum, the defendant knew that the act was illegal. *Commonwealth v. Kelley*, 359 Mass. 77, 87-88 (1971) (violation of non-criminal public bidding law); *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 340-344 (1977) (same); *Commonwealth v. Benesch*, 290 Mass. 125, 134-135 (1935) (violation of non-criminal securities law). See *Commonwealth v. Beckett*, 373 Mass. 329, 341-342 & n.7 (1977). An act “malum in se” is one that is by “its very nature wrongful and detrimental to the public interest,” *Id.*, and includes “in addition to felonies, all breaches of public order, injuries to person or property,

outrages upon public decency or good morals, and breaches of official duty, when done wilfully or corruptly," *Commonwealth v. Adams*, 114 Mass. 323, 324 (1873). By contrast, an act that is "malum prohibitum" is "any matter forbidden or commanded by statute, but not otherwise wrong." *Id.* The model instruction, which is phrased in terms of an intended crime, may be modified as appropriate if the intended object or means is illegal but non-criminal.

SUPPLEMENTAL INSTRUCTION

1. Co-conspirator hearsay exception. **You may consider against an individual defendant any statements made by another (defendant) (participant in the alleged conspiracy) only if three things about that statement have been proved to be more likely than not: *First*, that other evidence apart from that statement shows that there was a conspiracy between the speaker and this defendant; *Second*, that the statement was made during the conspiracy; and *Third*, that the statement was made in order to further or help along the conspiracy.**

Only if those three things have been proved to be more likely than not are you allowed to consider the statement of another (defendant) (alleged conspirator) when you are considering the charges against (a defendant other than the speaker) (the defendant).

If those three things have not been proved, then you may not consider the alleged statement in any way when you consider the evidence against _____ [defendant], and they are entitled to have this case determined solely from the evidence about their own acts and statements.

The statement of one co-conspirator during and in furtherance of the crime is admissible against other participants. See *Commonwealth v. Winkist*, 474 Mass. 517, 520-521 (2016); *Commonwealth v. Carriere*, 470 Mass. 1, 8 (2014); *Commonwealth v. Burton*, 450 Mass. 55, 63 (2007); *Commonwealth v. Bonzargone*, 390 Mass. 326, 340 (1983). See also Mass. G. Evid. § 801 (d)(2)(E) and notes (2024). Upon establishing a proper foundation, the statement of one coconspirator made during the course of the conspiracy and in furtherance of it is admissible against other conspirators despite their absence at the time of the statement. *Commonwealth v. Soares*, 384 Mass. 149, 159 (1981), citing *Commonwealth v. Beckett*, 373 Mass. 329, 338-339 (1977). *Commonwealth v. White*, 370 Mass. 703, 708-709 (1976). "The threshold determination of this question is for the trial judge; ultimately, however, the jury "must make definite findings on the same questions which the judge must pass on before he may permit the jury to consider whether that evidence may be used against all." *Soares*, 384 Mass. at 159-160, quoting *Beckett*, 373 Mass. at 340. The trial judge and the jury are to apply a preponderance of the evidence standard. See *Commonwealth v. Steadman*, 489 Mass. 372, 380 n. 9 (2022), quoting *Commonwealth v. Bright*, 463 Mass. 421, 430, 434 (2012). The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194 (1980).

The judge should not inform the jury of their preliminary ruling admitting such evidence against the defendant. *Commonwealth v. Beckett*, 373 Mass. 329, 337 n.3 (1977); *Commonwealth v. Lima*, 29 Mass. App. Ct. 490, 492 & n.3 (1990).

NOTES:

1. **Acquittal of all other conspirators.** The acquittal of all other co-conspirators at the same trial bars conviction of the defendant. See *Commonwealth v. Medeiros*, 456 Mass. 52, 58-59 (2010), citing *Commonwealth v. Cerveney*, 387 Mass. 280, 285- 286 (1982); *Commonwealth v. Benesch*, 290 Mass. 125, 135-136 (1935). See also *Commonwealth v. Nighelli*, 13 Mass. App. Ct. 590, 595 (1982). This rule does not apply if the co-conspirators were tried separately. See *id.*

2. **Feigned agreement.** Massachusetts probably subscribes to the "bilateral" theory of conspiracy, under which there is no conspiracy if one of two conspirators only feigns agreement but never intends to carry out the unlawful purpose. The jury must resolve any factual dispute about whether the

CONSPIRACY

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disavowing conspirator intended to join the conspiracy. *Commonwealth v. Abdul-Kareem*, 56 Mass. App. Ct. 78, 80 n.3 (2002) (police informant); *Commonwealth v. Themelis*, 22 Mass. App. Ct. 754, 757-761 (1986) (claim of intent to “rip off” proffered fee without carrying out murder-for-hire).

3. **Multiple conspiracies.** Sub-agreements in pursuit of a common illegal objective are not separate conspiracies. *Commonwealth v. Winter*, 9 Mass. App. Ct. 512, 522-528 (1980). The Commonwealth has the burden of proving multiple conspiracies. *Commonwealth v. Cervený*, 387 Mass. 280, 287-289 (1982).

4. **Specification of object of conspiracy.** The intended unlawful purpose, or lawful purpose by unlawful means, must be alleged in the complaint, but need not be described with great particularity. *Commonwealth v. Cantres*, 405 Mass. 238, 240-241 (1989) (allegation of conspiracy to violate the Controlled Substances Act was adequate identification of object of conspiracy).

5. **Trial with substantive offense prohibited.** A conspiracy charge may not be tried simultaneously with a charge for the substantive offense unless the defendant moves for such joinder. Mass. R. Crim. P. 9(e). See *Commonwealth v. Campagna*, 454 Mass. 1006, 1008 (2009); *Angiulo v. Commonwealth*, 401 Mass. 71, 80 n.10 (1987).

6. **Venue.** Venue for a conspiracy prosecution lies anywhere an overt act is committed by any one of the conspirators in execution of the plan. *Commonwealth v. Stasiun*, 349 Mass. 38, 54 (1965).

7. **Wharton’s rule.** It is undecided whether Wharton’s rule (holding that an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy if the substantive crime requires two persons to commit) applies generally in Massachusetts, but if it does, it is inapplicable to prosecutions for conspiracy to distribute controlled substances because G.L. c. 94C, § 40 indicates a legislative intent to permit such conspiracy prosecutions. *Commonwealth v. Cantres*, 405 Mass. 238, 242-243 (1989).

8. **Renunciation.** The affirmative defense of renunciation has not yet been recognized in the Commonwealth. It would arise “in circumstances where the defendant manifests a complete and voluntary renunciation of his criminal purpose. ... For the defendant to be entitled to the affirmative defense of renunciation, he must first have acknowledged that he conspired to commit a crime.” *Commonwealth v. Nee*, 458 Mass. 174, 183, n. 4 & 18 (2010).

9. **Sentencing.** General Law c. 274, § 7 provides different penalties for four groupings of conspiracies, depending on the maximum penalty of the crime which was the object of the conspiracy. While the District Court has jurisdiction under G.L. c. 218, § 26 over any conspiracy, the sentence that may be imposed in the District Court may not exceed two and one-half years in jail.

10. **Conspiracy to Violate the Drug Law – Jurisdiction and Sentencing.** Where the conspiracy is charged under G. L. c. 94C, § 40, the penalty is identical to the sentence for the particular crime which was the object of the conspiracy. Under G.L. c. 218, § 26, it appears that the District Court has final jurisdiction over any drug conspiracy charged under § 40 if the District Court would have final jurisdiction over the conspired offense. See *Commonwealth v. Stoico*, 45 Mass. App. Ct. 559, 566 (1998) (finding that the District Court had jurisdiction over the offense of conspiring to distribute marijuana in violation of G.L. c. 94C, § 40, as the underlying offense under G.L. c. 94C, § 32C[a], has a 2-year maximum sentence).