

## UTTERING

The defendant is charged with the offense of uttering a false, forged or altered (check) (promissory note) (order for other property). “Uttering” means attempting to pass in circulation a worthless document as genuine.

Section 5 of chapter 267 of our General Laws provides:

“Whoever,  
with intent to injure or defraud,  
utters and publishes as true  
a false, forged or altered  
[order for money, which is commonly called a “check”]  
[or] [promissory note]  
[or] [order for other property],  
knowing the same to be false, forged or altered,  
shall be punished . . . .”

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

*First:* That the defendant passed or attempted to pass as true and genuine (a check or other order for money) (a promissory note) (an order

for other property);

***Second:*** That the (check) (promissory note) (order for property) was (falsely made) (forged) (altered);

***Third:*** That the defendant knew it was (falsely made) (forged) (altered); and

***Fourth:*** That the defendant passed or attempted to pass it with the specific intent to injure or defraud someone.

To prove the first element, the Commonwealth need not prove that the (check) (promissory note) (order for property) was successfully passed to someone. It is sufficient if the Commonwealth proves beyond a reasonable doubt that the defendant attempted to pass it to someone, even if (he) (she) was unsuccessful in doing so.

To establish the second element, the Commonwealth need not prove that the whole (check) (promissory note) (order for property) was (falsified) (forged) (altered), but only that one or more significant parts of it were (falsified) (forged) (altered).

To prove the fourth element — that the defendant intended to defraud someone — the Commonwealth need not prove the identity of the person whom the defendant intended to defraud, but it must prove that the

## defendant intended to defraud someone.

See Instructions 3.120 (Intent), 3.140 (Knowledge) and 8.160 (Forgery).

*Commonwealth v. O'Connell*, 438 Mass. 658, 664 n.9, 783 N.E.2d 417, 424 n.9 (2003) (elements of uttering); *Commonwealth v. Analetto*, 326 Mass. 115, 118, 93 N.E.2d 390 (1950) (defendant must have intended to defraud someone, but not necessarily any particular person); *Commonwealth v. Segee*, 218 Mass. 501, 504, 106 N.E. 173, 174 (1914) (forgery requires only some material change in document); *Commonwealth v. Bond*, 188 Mass. 91, 74 N.E. 293 (1905) (not necessary that intended victim have been misled by forgery). See *Commonwealth v. Crocker*, 384 Mass. 353, 358, 424 N.E.2d 524, 528 (1981) (uttering not a lesser included offense of larceny by false pretenses); *Commonwealth v. Russell*, 156 Mass. 196, 196-197 (1861) (prior acts of uttering admissible as to knowledge and intent); *Commonwealth v. Hill*, 11 Mass. 136, 136-137 (1814) (uttering may be accomplished through innocent agent).

### NOTE:

1. **District Court jurisdiction over uttering offenses.** General Laws c. 267, § 5 is a 10-year felony that punishes anyone who “with intent to injure or defraud, utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in [G.L. c. 267, §§ 1-4], knowing the same to be false, forged or altered.” The District Court does not have final jurisdiction over uttering most of the items referenced in § 5 and listed in §§ 1-4, but only over “uttering as true . . . a forged [promissory] note or order [for money or other property], knowing the same to be forged.” G.L. c. 218, § 26. The District Court also has final jurisdiction over the 3-year felony of uttering a false “railroad ticket, railroad mileage book or railroad pass, or a ticket, badge, pass or any written or printed license purporting to entitle the holder or owner thereof to admission to any exhibition, entertainment, performance, match or contest” (G.L. c. 271, § 6) and the 5-year felony of uttering a false “bank bill or promissory note payable to the bearer thereof or to the order of any person” or a traveler’s check (G.L. c. 267, § 10). The instruction may be adapted appropriately to cover such items.

2. **Checks.** Uttering a false, forged or altered check may be prosecuted under G.L. c. 267, § 5 because a check is “an order . . . for money” (G.L. c. 267, § 1). See *O'Connell, supra, passim*; *Bond, supra*; G.L. c. 106, § 3-104 (a check is “a draft, other than a documentary draft, payable on demand and drawn on a bank” and is an order if, among other things, it is “an unconditional promise or order to pay a fixed amount of money”). Uttering a false check is not within the scope of G.L. c. 267, § 10 (uttering a false note) or 12 (possession with intent to utter a false note) because a check is not a “note,” “promissory note,” “bank bill” or “bank note” within the meaning of those sections. An attempt to negotiate a false check will support a conviction for attempted larceny (G.L. c. 266, § 30). *Commonwealth v. Green*, 66 Mass. App. Ct. 901, 845 N.E.2d 392 (2006).

3. **Claim of authority.** Lack of authority is not an element of the offense of uttering, but if a claim of authority is properly raised, the Commonwealth must prove the absence of authority beyond a reasonable doubt in order to prove the element of fraudulent intent. Such a claim must be raised by timely written notice pursuant to Mass. R. Crim. P. 14(b)(3) or is waived. Lack of authority and fraudulent intent may be proved by circumstantial evidence as well as by testimony from the purported maker. *O'Connell*, 438 Mass. at 664-665, 783 N.E.2d at 423-424. See Instruction 3.160 (License or Authority).