

## CONSPIRACY

The defendant is charged with the offense of 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

*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 formulated 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 concerted 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 liable as a conspirator, the defendant must have actually joined in the conspiracy as something that he (she) wished to bring about.**

476, 477-479, 524 N.E.2d 63, 65-66 (1988) (same); *Commonwealth v. Cerveny*, 387 Mass. 280, 288, 439 N.E.2d 754, 759 (1982) (conviction does not require proof of overt act); *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 249, 303, 275 N.E.2d 33, 69, 99 (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, 366 N.E.2d 1252, 1260 (1977) (whether knowledge of illegality required where act is only malum prohibitum); *Commonwealth v. Nelson*, 370 Mass. 192, 196-201, 346 N.E.2d 839, 842-845 (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, 206 N.E.2d 672, 678-679 (1965) (co-conspirator cannot be convicted of substantive offense unless he participated or aided in it); *Commonwealth v. Ries*, 337 Mass. 565, 581-582, 150 N.E.2d 527, 539 (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, 50 N.E.2d 14, 21 (1943) (knowledge alone is insufficient); *Commonwealth v. Farese*, 265 Mass. 377, 380, 164 N.E. 239, 240 (1928) (conspiracy may be shown by conduct and reasonable inferences therefrom); *Attorney General v. Tufts*, 239 Mass. 458, 494, 132 N.E. 322, 328 (1921) (common purpose may be inferred from concerted action converging to a definite end); *Commonwealth v. Saia*, 18 Mass. App. Ct. 762, 764-765, 470 N.E.2d 807, 809-810 (1984) (defendant may be convicted of lesser included conspiracy than charged); *Commonwealth v. Nighelli*, 13 Mass. App. Ct. 590, 593-597, 435 N.E.2d 1058, 1061-1062 (1982) (no overt act required under Massachusetts law; subsequent withdrawal not a defense); *Commonwealth v. Cook*, 10 Mass. App. Ct. 668, 673-677, 411 N.E.2d 1326, 1330 (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, 409 N.E.2d 1337, 1343-1345 (1980), rev’d on other grounds, 383 Mass. 780, 422 N.E.2d 1346 (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, 268 N.E.2d 132, 139-140 (1971) (violation of non-criminal public bidding law); *Commonwealth v. Gill*, 5 Mass. App. Ct. 337, 340-344, 363 N.E.2d 267, 270-273 (1977) (same); *Commonwealth v. Benesch*, 290 Mass. 125, 134-135, 194 N.E. 905, 910 (1935) (violation of non-criminal securities law). See *Commonwealth v. Beckett*, 373 Mass. 329, 341-342 & n.7, 366 N.E.2d 1252, 1260 & 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

***Co-conspirator hearsay exception.*** You may consider against an individual defendant any statement made by another (defendant) (participant in the alleged conspiracy) only if three things have been proved to you about that statement: *First*, that other evidence apart from that statement shows that there was a conspiracy between the speaker and the 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 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 he (she) is entitled to have his (her) case determined solely from the evidence about his (her) own acts and statements.

The statement of one co-conspirator during and in furtherance of the conspiracy is admissible against other co-conspirators. Such cases are normally tried by admitting such evidence only as to the speaker. When the judge determines, based on evidence other than the statement, that there is a fair inference that the conspiracy existed, the limitation is removed and the statement becomes subject to “humane practice.” The jury should be instructed that they may consider the evidence against a defendant other than the speaker only if they find sufficient evidence apart from the statement to support a fair inference that the conspiracy existed, that the defendant had joined in it, and that the statement was uttered in the course of, and in furtherance of it. *Commonwealth v. Soares*, 384 Mass. 149, 159-160, 424 N.E.2d 221, 227 (1981); *Beckett*, 373 Mass. at 335-341, 366 N.E.2d at 1256-1259; *Commonwealth v. White*, 370 Mass. 703, 709, 352 N.E.2d 904, 909 (1976) (discussing whether conspiracy to commit crime necessarily includes conspiracy to escape, if necessary); *Commonwealth v. Pleasant*, 366 Mass. 100, 103-104, 315 N.E.2d 874, 876-877 (1974); *Beneficial Fin. Co.*, 360 Mass. at 231 n.12, 364-365, 275 N.E.2d at 59 n.12, 132 (statement may be written rather than oral); *Id.*, 360 Mass. at 222-223, 275 N.E.2d at 54 (presence of such evidence does not automatically require severance); *Kelley*, 359 Mass. at 85-86, 268 N.E.2d at 138. The rule applies even in severed trials. *Commonwealth v. Florentino*, 381 Mass. 193, 194, 408 N.E.2d 847, 849 (1980).

NOTES:

1. **District Court jurisdiction.** The general conspiracy statute (G.L. 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. Under G.L. c. 218, § 26, it appears that the District Court has final jurisdiction over any conspiracy charged under the third and fourth clauses of § 7, i.e., any conspiracy to commit an offense that is not itself punishable by more than 10 years in state prison.

The specialized drug conspiracy statute (G. L. c. 94C, § 40) does not group intended offenses for penalty purposes, but instead provides that the conspiracy penalty is identical to that for the particular crime which was the object of the conspiracy. Under G.L. c. 218, § 16, 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.

*Commonwealth v. Grace*, 43 Mass. App. Ct. 905, 907, 681 N.E.2d 1265, 1268 (1997), created confusion about the District Court’s jurisdiction over conspiracy charges. *Grace* held that the District Court lacked final jurisdiction over a charge of conspiracy to distribute heroin (G.L. c. 94C, § 32[a]) brought under the drug conspiracy statute. On appeal the defense argued that heroin distribution is a 10-year felony and therefore outside the District Court’s final jurisdiction. (That argument is erroneous since first-offense heroin distribution [§ 32(a)] is within the District Court’s final jurisdiction because it is listed in G.L. c. 218, § 26, as amended by St. 1987, c. 266.) In the Appeals Court the Commonwealth confessed error, apparently adopting a broader view that the District Court lacks final jurisdiction over all conspiracies, and citing *Berlandi v. Commonwealth*, 314 Mass. 424, 441, 50 N.E.2d 210, 221 (1943), *Commonwealth v. Garcia*, 34 Mass. App. Ct. 386, 388 n.3, 612 N.E.2d 674, 676 n.3 (1993), and *Commonwealth v. New York Cent. & H. R. R.*, 206 Mass. 417, 418, 92 N.E. 766, 767 (1910). However, *Berlandi* and *New York Cent.* were both premised on a statutory exclusion in G.L. c. 218, § 26 (“all misdemeanors, except conspiracies and libels”) that was subsequently repealed by St. 1958, c. 138 and replaced with the current wording (“all misdemeanors, except libels”). The one-sentence reference to the issue in the *Garcia* footnote was dicta, since in that case the conspiracy charge had been dismissed and was not before the Appeals Court. The Appeals Court’s opinion in *Grace* cited the *Berlandi* and *Garcia* cases and thus appeared to cast doubt on the District Court’s jurisdiction over any conspiracy charge.

The confusion was partly resolved by *Commonwealth v. Stoico*, 45 Mass. App. Ct. 559, 565-566, 699 N.E.2d 1249, 1254 (1998), which held that the District Court does have final jurisdiction over a charge under the drug

conspiracy statute of conspiring to distribute marihuana (G.L. c. 94C, § 32C[a]), which has a 2-year maximum sentence, noting that “[n]othing in [*Garcia*] is to the contrary.” See also *Commonwealth v. John R. Kuhn*, 48 Mass. App. Ct. 1106, 718 N.E.2d 896 (No. 98-P-489, October 29, 1999) (unpublished opinion under Appeals Court Rule 1:28) (District Court has jurisdiction over conspiracy to distribute marihuana because it has a maximum penalty of two years).

2. **Acquittal of all other conspirators.** The acquittal of all other co-conspirators at the same trial bars conviction of the defendant, *Benesch*, 290 Mass. at 135-136, 194 N.E. at 911; *Nighelli*, 13 Mass. App. Ct. at 595, 435 N.E.2d at 1062, but the rule does not apply if the co-conspirators were tried separately, *Cerverny*, 387 Mass. at 285-286, 439 N.E.2d at 758-757.

3. **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 disavowing conspirator intended to join the conspiracy. *Commonwealth v. Abdul-Kareem*, 56 Mass. App. Ct. 78, 80 n.3, 775 N.E.2d 454, 456 n.3 (2002) (police informant); *Commonwealth v. Themelis*, 22 Mass. App. Ct. 754, 757-761, 498 N.E.2d 136, 138-140 (1986) (claim of intent to “rip off” proffered fee without carrying out murder-for-hire).

4. **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, 402 N.E.2d 1372, 1378-1381 (1980). The Commonwealth has the burden of proving multiple conspiracies. *Cerverny*, 387 Mass. at 287-289, 439 N.E.2d at 758-759.

5. **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, 540 N.E.2d 149, 150-151 (1989) (allegation of conspiracy to violate the Controlled Substances Act was adequate identification of object of conspiracy).

6. **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). *Angiulo v. Commonwealth*, 401 Mass. 71, 80 n.10, 514 N.E.2d 669, 674 n.10 (1987).

7. **Venue.** Venue for a conspiracy prosecution lies anywhere an overt act is committed by any one of the conspirators in execution of the plan. *Stasiun*, 349 Mass. at 54, 206 N.E.2d at 682.

8. **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. *Cantres*, *supra*.