TABLE OF CONTENTS

23.00 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES 1
23.01 STATUTORY LANGUAGE: 18 U.S.C. § 371 1
23.02 GENERALLY 1
23.03 ELEMENTS 3
23.04 AGREEMENT 4
23.04[1] Proof of Agreement 4
23.04[2] Two or More Persons 5
23.04[2][a] Limitation on Naming Unindicted Coconspirators 6
23.04[2][b] Conspiring With Government Agents 6
23.04[2][c] Corporations as Conspirators 7
23.04[3] Scope of the Agreement -- Single or Multiple Objects 7
23.05 MEMBERSHIP 8
23.05[1] Intent Requirement 8
23.05[2] Proof of Membership 9
23.05[3] Pinkerton Liability 10
23.06 OVERT ACT 11
23.06[1] Definition 11
23.06[2] Acts of Concealment 13
23.07 CONSPIRACY TO DEFRAUD THE UNITED STATES 14
23.07[1] Generally 14
23.07[1][a] Sec. 371: Two Forms of Conspiracy 14
23.07[1][b] Scope of Defraud Clause 15
23.07[1][c] Pleading Requirements 16
23.07[2] Klein Conspiracy 18
23.07[2][a] Generally 18
23.07[2][b] Examples: Klein fact patterns 19
23.07[2][c] The Ninth Circuit's Caldwell Decision 30
23.07[3] Overlapping Conspiracies 31

23.07[4] Scope of Intent ... 36
23.07[4][a] Generally ... 36
23.07[4][b] Klein Conspiracy Coupled With a Narcotics or Money Laundering Prosecution ... 36
23.08 STATUTE OF LIMITATIONS ... 41
23.08[1] Generally ... 41
23.08[2] Beginning of Limitations Period ... 42
23.08[3] Withdrawal Defense ... 42
23.09 VENUE ... 45

23.00 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

23.01 STATUTORY LANGUAGE: 18 U.S.C. § 371

§371. ***Conspiracy to commit offense or to defraud United States***

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Under 18 U.S.C. § 3571, the maximum fine under Section 371 for felony offenses is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

23.02 GENERALLY

The criminal tax statutes in Title 26 of the United States Code do not include a statute for the crime of conspiracy.[1] As a result, tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371, the general conspiracy statute. Section 371 sets out two types of conspiracies: (1) conspiracies to commit a specific offense against the United States and (2) conspiracies to defraud the United States. ***United States v. Whiteford*****,** 676 F.3d 348, 356 (3d Cir. 2012); ***United States v. Kraig***, 99 F.3d 1361, 1366 (6th Cir. 1996); ***United States v. Hitt***, 249 F.3d 1010, 1015 (D.C. Cir. 2001); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1091 (4th Cir. 1993); ***United States v.***

[1] 26 U.S.C. § 7214(a)(4) contains a provision prohibiting conspiracy to defraud the United States. However, this statute only applies to officers and employees of the United States acting in connection with any revenue law of the United States.

Murphy, 957 F.2d 550, 552 (8th Cir.1992); ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991).

A person may violate Section 371 by conspiring or agreeing to engage in conduct that is prohibited by a substantive criminal statute. In criminal tax prosecutions, this conduct typically involves agreements to commit substantive Title 26 offenses, such as attempted income tax evasion (26 U.S.C. § 7201) or filing false income tax returns (26 U.S.C. § 7206). *See*, *e.g.*, ***United States v. Searan***, 259 F.3d 434, 441-42 (6th Cir. 2001); ***United States v. Helmsley***, 941 F.2d at 90.

Section 371 may also be violated by a conspiracy or agreement to defraud the United States. "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924); *see also* ***United States v. Collins***, 78 F.3d 1021, 1037 (6th Cir. 1996); ***United States v. Caldwell***, 989 F.2d 1056, 1058 (9th Cir. 1993). In criminal tax prosecutions, this conduct is typically charged as a "*Klein* conspiracy": the government alleges that the defendant conspired to defraud the United States for the purpose of "impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes." ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957); *see also* ***United States v. Cohen***, 510 F.3d 1114, 1117 n.2 (9th Cir. 2007); ***United States v. Fletcher***, 322 F.3d 508, 513 (8th Cir. 2003); ***United States v. Gricco***, 277 F.3d 339, 348 (3d Cir. 2002); ***United States v. Furkin***, 119 F.3d 1276, 1280-81 (7th Cir. 1996); ***United States v. Sturman***, 951 F.2d 1466, 1472 (6th Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1202-03 (4th Cir. 1990).

The body of law on conspiracy covers a large number of issues that have been thoroughly analyzed and summarized in various treatises and other sources. *See, e.g.,*

Paul Marcus, ***Prosecution and Defense of Criminal Conspiracy Cases*** (2008); 2 Kevin F. O'Malley, Jay E. Grenig, & William C. Lee, ***Federal Jury Practice and Instructions: Criminal***, ch. 31 (5th Ed. 2000) (successor to Devitt & Blackmar); Abraham S. Goldstein, ***Conspiracy to Defraud the United States***, 68 Yale L.J. 405 (1959). Accordingly, the following discussion is intended to highlight only those issues relevant to criminal tax prosecutions.

23.03 ELEMENTS

To establish a violation of 18 U.S.C. § 371, the following elements must be proved beyond a reasonable doubt:

> 1. The existence of an agreement by two or more persons to commit an offense against the United States or defraud the United States
>
> 2. The defendant's knowing and voluntary participation in the conspiracy; and
>
> 3. The commission of an overt act in furtherance of the conspiracy.[2]

United States v. Falcone, 311 U.S. 205, 210 (1940); ***United States v. Whiteford***, 676 F.3d at 357; ***United States v. Douglas***, 398 F.3d 407, 413 (6th Cir. 2005); ***United States v. Svoboda***, 347 F.3d 471, 476 (2d Cir. 2003); ***United States v. Hayes,*** 574 F.3d 460, 472 (8th Cir. 2009); ***United States v. Fleschner***, 98 F.3d 155, 159-60 (4th Cir. 1996); ***United States v. Hurley***, 957 F.2d 1, 4 (1st Cir. 1992); ***United States v. Nall***, 949 F.2d 301, 305 (10th Cir. 1991); ***United States v. Rankin***, 870 F.2d 109, 113 (3d Cir. 1989); ***United States v. Yamin***, 868 F.2d 130, 133 (5th Cir. 1989); ***United States v. Mealy***, 851 F.2d 890, 895-96 (7th Cir. 1988); ***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir.

[2] *See* discussion at Section 23.07[2][c] concerning the need to prove that a conspiracy to defraud the United States for the purpose of impeding, impairing, obstructing, or defeating the lawful functions of an agency of the government was accomplished by deceit, craft, trickery, or means that are dishonest.

1987); ***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986); ***United States v. Treadwell***, 760 F.2d 327, 333 (D.C. Cir. 1985).

23.04 AGREEMENT

23.04[1] Proof of Agreement

The essence of the crime of conspiracy is the agreement. ***United States v. Falcone***, 311 U.S. 205, 210 (1940); ***Iannelli v. United States***, 420 U.S. 770, 785 n.17 (1975). Indeed, without an agreement, there can be no conspiracy. ***Ingram v. United States***, 360 U.S. 672, 677-78 (1959). Because the agreement is the essence of the crime, success of the conspiracy is irrelevant. ***United States v. Jimenez Recio***, 537 U.S. 270, 274-75 (2003); *see also* **United States v. Nguyen**, 246 F.3d 52, 54 (1st Cir. 2001); ***United States v. Labat***, 905 F.2d 18, 21 (2d Cir. 1990); ***United States v. Jannotti***, 673 F.2d 578, 591 (3d Cir. 1982) (*en banc*); ***United States v. Nicoll***, 664 F.2d 1308, 1315 (5th Cir. 1982), *overruled on other grounds by* ***United States v. Henry***, 749 F.2d 203 (5th Cir. 1984); ***United States v. Littlefield***, 594 F.2d 682, 684 (8th Cir. 1979); ***United States v. Thompson***, 493 F.2d 305, 310 (9th Cir. 1974). The agreement to commit an unlawful act is "a distinct evil, dangerous to the public," which "may exist and be punished whether or not the substantive crime ensues." ***Salinas v. United States***, 522 U.S. 52, 65 (1997). A defendant may be charged with conspiracy as well as the substantive offense that served as the object of the conspiracy. *See* ***Iannelli v. United States***, 420 U.S. at 777-78, 790-91; ***Pinkerton v. United States***, 328 U.S. 640, 643 (1946).

The agreement need not be expressly stated, be in writing, or cover all the details of how it is to be carried out. *E.g.*, ***United States v. Aubin,*** 87 F.3d 141, 145 (5th Cir. 1996); ***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1992); ***United States v. DePew***, 932 F.2d 324, 326 (4th Cir. 1991); ***United States v. Pearce***, 912 F.2d 159, 161 (6th Cir. 1990); ***United States v. Powell***, 853 F.2d 601, 604 (8th Cir. 1988); ***United States v. Elledge***, 723 F.2d 864, 868 (11th Cir. 1984). The government is not required to prove

that the members of the conspiracy directly stated to each other the purpose of the agreement or all of the details of the agreement. *See* ***United States v. Gonzalez***, 940 F.2d 1413, 1426-27 (11th Cir. 1991); ***United States v. Schultz***, 855 F.2d 1217, 1221 (6th Cir. 1988). The existence of an agreement may be proven inferentially, from the actions and statements of the conspirators or from the circumstances surrounding the scheme. ***Glasser v. United States***, 315 U.S. 60, 80 (1942), *superseded on other grounds by statute, as recognized by* ***Bourjaily v. United States***, 483 U.S. 171, 177-78 (1987); ***United States v. McKee***, 506 F.3d 225, 238 (3d Cir. 2007); ***United States v. Onyiego***, 286 F.3d 249, 254-55 (5th Cir. 2002); ***United States v. Collins***, 78 F.3d 1021, 1037 (6th Cir. 1996); ***United States v. Cruz***, 981 F.2d 613, 616 (1st Cir. 1992); ***United States v. Young***, 954 F.2d 614, 618-19 (10th Cir. 1992); ***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir. 1987); ***United States v. Hoelscher***, 764 F.2d 491, 494 (8th Cir. 1985); ***United States v. Mariani***, 725 F.2d 862, 865-66 (2d Cir. 1984).

23.04[2] Two or More Persons

A defendant cannot conspire with himself or herself. ***Morrison v. California***, 291 U.S. 82, 92 (1934). In order to establish the existence of an agreement, the government must show that the defendant and at least one other person reached an understanding or agreement to carry out the objective of the conspiracy. *See* ***United States v. Barnes***, 604 F.2d 121, 161 (2d Cir. 1979); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir. 1967); ***Sears v. United States***, 343 F.2d 139, 141-42 (5th Cir. 1965). It makes no difference whether the other person is another defendant or even named in the indictment. ***Rogers v. United States***, 340 U.S. 367, 375 (1951) ("identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown"); *see also* ***United States v. Lopez***, 6 F.3d 1281, 1288 (7th Cir. 1993); ***United States v. Galvan***, 961 F.2d 738, 742 (8th Cir. 1992); ***United States v. Rey***, 923 F.2d 1217, 1222 (6th Cir. 1991); ***United States v. Lewis***, 902 F.2d 1176, 1181 n.4 (5th Cir. 1990); ***United States v. Indorato***, 628 F.2d 711, 717-18

(1st Cir. 1980); ***United States v. Allen***, 613 F.2d 1248, 1253 (3d Cir. 1980); ***United States v. Anderson***, 611 F.2d 504, 511 (4th Cir. 1979).

23.04[2][a] Limitation on Naming Unindicted Coconspirators

Prosecutors should be aware that it is the position of the Department of Justice that, in the absence of some sound reason, it is not desirable to identify unindicted coconspirators in conspiracy indictments. United States Attorneys' Manual (USAM) 9-11.130 (June 2008). The recommended practice in such cases is to merely allege that the defendant "conspired with another person or persons known" and supply the identity, if requested, in a bill of particulars. The above policy does not apply, however, where the person "has been officially charged with the misconduct at issue." USAM 9-27.760.

23.04[2][b] Conspiring With Government Agents

Because the government must prove that at least two culpable parties reached an agreement, proof of an agreement solely between a defendant and a government agent or informer will not support a conspiracy conviction. *See* ***United States v. Giry***, 818 F.2d 120, 125 (1st Cir. 1987); ***United States v. Barboa***, 777 F.2d 1420, 1422 & n.1 (10th Cir. 1985); ***United States v. Escobar de Bright***, 742 F.2d 1196, 1198-1200 (9th Cir. 1984); ***United States v. Pennell***, 737 F.2d 521, 536 (6th Cir. 1984); ***United States v. Barnes***, 604 F.2d 121, 161 (2d Cir. 1979); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir. 1967); ***Sears v. United States***, 343 F.2d 139, 142 (5th Cir. 1965).

However, in cases in which a valid agreement exists between two or more culpable parties, one of whom committed overt acts solely with a government agent, it is entirely proper to charge that party with conspiracy and prove at trial an overt act that involved only that person and the government agent. ***United States v. Enstam***, 622 F.2d 857, 867 (5th Cir. 1980); ***Sears v. United States***, 343 F.2d 139, 142 (5th Cir. 1965).

23.04[2][c] Corporations as Conspirators

A corporation may be found criminally liable for conspiracy under Section 371. ***United States v. Stevens***, 909 F.2d 431, 432-33 (11th Cir. 1990); ***United States v. Peters***, 732 F.2d 1004, 1008 (1st Cir. 1984); ***United States v. S & Vee Cartage Co.***, 704 F.2d 914, 920 (6th Cir. 1983).[3] Moreover, a corporation can enter into a conspiracy with its own employees. ***United States v. Ams Sintering Co.***, 927 F.2d 232, 236-37 (6th Cir. 1990); ***United States v. Hartley***, 678 F.2d 961, 972 (11th Cir. 1982).

23.04[3] Scope of the Agreement -- Single or Multiple Objects

A single conspiracy may have multiple objectives and involve a number of sub-agreements to accomplish the specified objectives. ***Braverman v. United States***, 317 U.S. 49, 53 (1942); ***United States v. Maldonado-Rivera***, 922 F.2d 934, 963 (2d Cir. 1990); ***United States v. Warner***, 690 F.2d 545, 550 n.8 (6th Cir. 1982); ***United States v. Zemek***, 634 F.2d 1159, 1167 (9th Cir. 1980); ***United States v. Rodriguez***, 585 F.2d 1234, 1248-49 (5th Cir. 1978), *overruled on other grounds by* ***United States v. Michelena-Orovio***, 719 F.2d 738 (5th Cir. 1983) (*en banc*). In determining whether there is a single conspiracy with multiple objectives or multiple conspiracies each with a separate objective, the general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. *See* ***United States v. Berger***, 224 F.3d 107, 113-15 (2d Cir. 2000); ***United States v. Leavis***, 853 F.2d 215, 218 (4th Cir. 1988); ***United States v. Springer***, 831 F.2d 781, 784 (8th Cir. 1984); ***United States v. Arbelaez***, 719 F.2d 1453, 1457-58 (9th Cir. 1983); ***United States v. Warner***, 690 F.2d 545, 548-49 (6th Cir. 1982); ***United States v. Perez***, 489 F.2d 51, 62 (5th Cir. 1973). To determine whether there is one overall agreement, the courts apply a totality of the circumstances test, considering, *inter alia*, the commonality of goals, the nature of the

[3] The cases suggest, however, that because the threat posed to society by conspiracies "arises from the creative interaction of two autonomous minds," no conspiracy can be found to exist between a single human actor and the corporation that the human actor controls. ***United States v. Stevens***, 909 F.2d 431, 432-33 (11th Cir. 1990); ***United States v. Peters***, 732 F.2d 1004, 1008 (1st Cir. 1984).

scheme, and any overlapping of participants in the various dealings. *See* ***United States v. Berger***, 224 F.3d 107, 114-115(2d Cir. 2000); ***United States v. David***, 940 F.2d 722, 734 (1st Cir. 1991); ***United States v. Tarantino***, 846 F.2d 1384, 1392-93 (D.C. Cir. 1988); ***United States v. Smith***, 789 F.2d 196, 201-02 (3d Cir. 1986); ***United States v. DeLuna***, 763 F.2d 897, 918 (8th Cir. 1985), *overruled on other grounds by* ***United States v. Inadi***, 475 U.S. 387, 391 (1986); ***United States v. Plotke***, 725 F.2d 1303, 1308 (11th Cir. 1984); ***United States v. Mayo***, 646 F.2d 369, 372-73 (9th Cir. 1981); ***United States v. Bastone***, 526 F.2d 971, 979-80 (7th Cir. 1975), *overruled on other grounds by* ***United States v. Read***, 658 F.2d 1225, 1236 & n.7 (7th Cir. 1981); *see also* ***United States v. Marable***, 578 F.2d 151, 154 (5th Cir. 1978) (court looks to (1) time, (2) coconspirators, (3) statutory offenses charged, (4) overt acts charged, and (5) location where the events occurred). A single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles over time. *E.g.*, ***United States v. Richerson***, 833 F.2d 1147, 1153-54 (5th Cir. 1987); ***United States v. Spector***, 793 F.2d 932, 935-36 (8th Cir. 1986); ***United States v. Cambindo Valencia***, 609 F.2d 603, 625 (2d Cir. 1979); ***United States v. Mayes***, 512 F.2d 637, 642-43 (6th Cir. 1975).

23.05 MEMBERSHIP

23.05[1] Intent Requirement

To establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and intended to join it with the purpose of accomplishing the object of the conspiracy. *See* ***United States v. Berger***, 224 F.3d 107, 114-115 (2d Cir. 2000); ***United States v. Conley***, 37 F.3d 970, 976-77 (3d Cir. 1994); ***United States v. Rogers***, 982 F.2d 1241, 1244 (8th Cir. 1993); ***United States v. Evans***, 970 F.2d 663, 668 (10th Cir. 1992); ***United States v. Lynch***, 934 F.2d 1226, 1231 (11th Cir. 1991); ***United States v. Brown***, 934 F.2d 886, 889 (7th Cir. 1991); ***United States v. Sanchez***, 928 F.2d 1450, 1457 (6th Cir. 1991); ***United States v. Esparza***,

876 F.2d 1390, 1392 (9th Cir. 1989); ***United States v. Yanin***, 868 F.2d 130, 133 (5th Cir. 1989); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); ***United States v. Norris***, 749 F.2d 1116, 1121 (4th Cir. 1984); ***United States v. Flaherty***, 668 F.2d 566, 580 (1st Cir. 1981). A defendant may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing all of the members. ***Blumenthal v. United States***, 332 U.S. 539, 557 (1947); ***United States v. Horn***, 946 F.2d 738, 741 (10th Cir. 1991); ***United States v. Noble***, 754 F.2d 1324, 1329 (7th Cir. 1985); ***United States v. Lemm***, 680 F.2d 1193, 1204 (8th Cir. 1982); ***United States v. Diecidue***, 603 F.2d 535, 548 (5th Cir. 1979); ***United States v. Camacho***, 528 F.2d 464, 469-70 (9th Cir. 1976). Similarly, a defendant may become a member of a conspiracy even if that person agrees to play a minor role in the conspiracy, so long as he or she understands the essential nature of the scheme and intentionally joins in it. ***United States v. Lopez***, 443 F.3d 1026, 1030 (8th Cir. 2006) (*en banc*); ***United States v. Andrews***, 953 F.2d 1312, 1318 (11th Cir. 1992); ***United States v. Roberts***, 881 F.2d 95, 101 (4th Cir. 1989); ***United States v. Alvarez***, 625 F.2d 1196, 1198 (5th Cir. 1980).

23.05[2] Proof of Membership

Although the government must prove that a defendant was a member of a conspiracy, this requirement may be satisfied by a showing of even a "slight connection" to the conspiracy, so long as the connection is proven beyond a reasonable doubt. ***United States v. Strickland***, 245 F.3d 368, 385 (4th Cir. 2001); ***United States v. Ward***, 190 F.3d 483, 488 (6th Cir. 1998); ***United States v. Slater***, 971 F.2d 626, 630 (10th Cir. 1992); ***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1991); ***United States v. Moya-Gomez***, 860 F.2d 706, 758-59 (7th Cir. 1988). A defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000); ***United States v. David***, 940 F.2d 722, 735 (1st Cir. 1991); ***United States v. Beale***, 921 F.2d 1412, 1430 (11th Cir. 1991); ***United States v. Christian***, 786 F.2d 203,

211 (6th Cir. 1986). Generally, this knowledge can be inferred from the defendant's own acts and statements. *See* ***United States v. Kane***, 944 F.2d 1406, 1410-11 (7th Cir. 1991); ***United States v. Martin***, 920 F.2d 345, 348 (6th Cir. 1990).

It is not essential that the government establish that each conspirator knew of all the activities of the other conspirators or that each conspirator participated in all of the activities of the conspiracy. ***United States v. Berger***, 224 F.3d 107, 114-15 (2d Cir. 2000); ***United States v. Colson***, 662 F.2d 1389, 1391 (11th Cir. 1981); ***United States v. Brunetti***, 615 F.2d 899, 903 (10th Cir. 1980). However, mere presence at the scene of a transaction or event connected to an alleged conspiracy is insufficient, without more, to prove that a person is a member of the conspiracy. *See* ***United States v. Cintolo***, 818 F.2d 980, 1003 (1st Cir. 1987); ***United States v. Holcomb***, 797 F.2d 1320, 1327 (5th Cir. 1986); ***United States v. Raymond***, 793 F.2d 928, 932 (8th Cir. 1986); ***United States v. Marian***, 725 F.2d 862, 865 (2d Cir. 1984); ***United States v. Bostic***, 480 F.2d 965, 968 (6th Cir. 1973). Similarly, merely acting in the same way as other persons or merely associating with other persons does not establish that a person joined in an agreement or understanding with those other persons. *E.g.*, ***United States v. McKee***, 506 F.3d 225, 238-39 (3d Cir. 2007); ***United States v. Knox***, 68 F.3d 990, 995 (7th Cir. 1995); ***United States v. Chang An-Lo***, 851 F.2d 547, 55443 (2d Cir. 1988); ***United States v. Corley***, 824 F.2d 931, 937 (11th Cir. 1987); ***United States v. Casperson***, 773 F.2d 216, 221 (8th Cir. 1985); ***United States v. Murray***, 751 F.2d 1528, 1534 (9th Cir. 1985). Mere knowledge that something illegal is occurring is also insufficient to prove membership in a conspiracy. ***United States v. Schmidt***, 947 F.2d 362, 367 (9th Cir. 1991); ***United States v. Casperson***, 773 F.2d 216, 221 (8th Cir. 1985); ***United States v. Webb***, 359 F.2d 558, 562 (6th Cir. 1966).

23.05[3] Pinkerton Liability

A conspirator is responsible for offenses committed by a co-conspirator if the conspirator was a member of the conspiracy when the coconspirator committed the

offense and the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy. ***Pinkerton v. United States***, 328 U.S. 640, 645-47 (1946). The government is not required to prove that each defendant specifically agreed to commit the offense or knew that the offense would be committed. *E.g.*, ***United States v. Bennett***, 665 F.2d 16, 20 n.4 (2d Cir. 1981); ***United States v. Tilton***, 610 F.2d 302, 309 (5th Cir. 1980); ***United States v. Etheridge***, 424 F.2d 951, 965 (6th Cir. 1970). It is sufficient if the government establishes that the offense was in furtherance of the conspiracy or was reasonably foreseen as a necessary or natural consequence of the unlawful agreement. ***United States v. Fonseca-Caro***, 114 F.3d 906, 908 (9th Cir. 1997); ***United States v. Myers***, 102 F.3d 227, 237 (6th Cir. 1996); ***United States v. Eyster***, 948 F.2d 1196, 1206 n.13 (11th Cir. 1991); ***United States v. Cummings***, 937 F.2d 941, 944 (4th Cir. 1991); ***United States v. Ciambrone***, 787 F.2d 799, 809 (2d Cir. 1986); ***United States v. Redwine***, 715 F.2d 315, 322 (7th Cir. 1983); ***United States v. Tilton***, 610 F.2d 302, 309 (5th Cir. 1980). There is some authority for the proposition that a person who joins a conspiracy adopts the prior acts of the other conspirators and may be held responsible for offenses committed before he or she joined the conspiracy. ***United States v. Rea***, 958 F.2d 1206, 1214 (2d Cir. 1992); ***United States v. Cimini***, 427 F.2d 129, 130 (6th Cir. 1970).

23.06 OVERT ACT

23.06[1] Definition

In order to establish a conspiracy under Section 371, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy. The function of the overt act requirement is to show that the conspiracy "is at work" and is not simply an agreement existing solely in the minds of the conspirators. ***Yates v. United States***, 354 U.S. 298, 334 (1957), *overruled on other grounds by* **Burks v. United States**, 437 U.S. 1, 12 (1978); ***United States v. Arboleda***, 929 F.2d 858, 865 (1st Cir. 1991); ***Carlson v. United States***, 187 F.2d 366, 370 (10th Cir. 1951).

An overt act is any act done by a member of the conspiracy for the purpose of carrying out or accomplishing the object of the conspiracy. ***United States v. Falcone***, 311 U.S. 205, 210 (1940); ***United States v. McKee***, 506 F.3d 225, 243 (3d Cir. 2007) ; ***United States v. Ross***, 190 F.3d 446, 450 (6th Cir. 1999); ***United States v. Davis***, 965 F.2d 804, 811-12 (10th Cir. 1992). Because the purpose of the overt act requirement is merely to show that the conspiracy is at work, the overt act need not be criminal in character. ***Yates v. United States***, 354 U.S. 298, 334 (1957), *overruled on other grounds by* ***Burks v. United States***, 437 U.S. 1, 12 (1978); ***Braverman v. United States***, 317 U.S. 49, 53-54 (1942); ***United States v. Touhey***, 867 F.2d 534, 537 (9th Cir. 1989); ***Carlson v. United States***, 187 F.2d 366, 370 (10th Cir. 1951). Indeed, it may be totally legal in itself. *See*, *e.g.*, ***United States v. Hermes***, 847 F.2d 493, 495-96 (8th Cir. 1988). The government is not required to prove all of the overt acts alleged in an indictment. Proof of at least one overt act committed in furtherance of the conspiracy is sufficient. *E.g*. ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir. 1985); ***United States v. Anderson***, 611 F.2d 504, 510 (4th Cir. 1979); ***United States v. Adamo***, 534 F.2d 31, 38 (3d Cir. 1976).

The government is not required to disclose during pre-trial discovery all of the overt acts it intends to establish at trial. ***United States v. Murray***, 527 F.2d 401, 411 (5th Cir. 1976); ***United States v. Armocida***, 515 F.2d 49, 54 (3d Cir. 1975); ***United States v. Carroll***, 510 F.2d 507, 509 (2d Cir. 1975); ***Cook v. United States***, 354 F.2d 529, 531 (9th Cir. 1965). Moreover, the government may prove at trial overt acts not charged in the indictment. ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir. 1985); ***United States v. Diecidue***, 603 F.2d 535, 563 (5th Cir. 1979); ***United States v. Johnson***, 575 F.2d 1347, 1357 (5th Cir. 1978); ***United States v. Fassoulis***, 445 F.2d 13, 19 (2d Cir. 1971).

23.06[2] Acts of Concealment

Acts of concealment may constitute overt acts. However, these acts are only admissible if they were committed before the object of the conspiracy was fully accomplished. Once the object is accomplished, the conspiracy is over and subsequent overt acts are not probative of the conspiracy. ***Grunewald v. United States***, 353 U.S. 391, 405 (1957).

In ***Grunewald***, the Supreme Court was concerned with the government's attempts to lengthen indefinitely the duration of a conspiracy by simply showing that the conspirators took steps to cover their tracks in order to avoid detection and punishment after the central criminal purpose had been accomplished. The Court stressed that a "distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." ***Grunewald v. United States***, 353 U.S. 391, 405 (1957).

In the context of criminal tax conspiracies, the object of the crime is usually to conceal income and expenses from the IRS. Indeed, the very definition of an affirmative act of tax evasion is "any conduct, the likely effect of which would be to mislead or to conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943). In general, overt acts in furtherance of a conspiracy to defraud the United States in connection with tax assessment and collection or to commit tax offenses involve acts that mislead or conceal. Thus, criminal tax conspiracies usually contemplate acts of concealment to further the crime, and such acts are admissible as overt acts. *See*, *e.g.*, ***Forman v. United States***, 361 U.S. 416, 422-24 (1960), *overruled on other grounds by* ***Burks v. United States***, 437 U.S. 1 (1978); ***United States v. Vogt***, 910 F.2d 1184, 1201-02 (4th Cir. 1990); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. Mackey***, 571 F.2d 376, 383-84 (7th Cir. 1978). Note that care must be taken when drafting an indictment charging a conspiracy contemplating concealment. If the indictment is not properly drafted to

include concealment as an object of the conspiracy, ***Grunewald*** might preclude the admission into evidence of certain acts of concealment.

23.07 CONSPIRACY TO DEFRAUD THE UNITED STATES

23.07[1] Generally

23.07[1][a] Sec. 371: Two Forms of Conspiracy

Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies. ***United States v. Hitt***, 249 F.3d 1010, 1015 (D.C. Cir. 2001); ***United States v. Kraig***, 99 F.3d 1361, 1366 (6th Cir. 1996); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1091 (4th Cir. 1993); ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991). The first part of the statute, which is generally known as the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes. The second part of the statute, which is generally known as the "defraud clause," prohibits conspiring to defraud the United States. ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir. 1992); ***United States v. Touhey***, 867 F.2d 534, 536 (9th Cir. 1989); ***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986).

The offense clause requires reference in the indictment to another criminal statute that defines the object of the conspiracy. The defraud clause, however, stands on its own, and an indictment charging a conspiracy to defraud does not need to refer to another statute to define the crime. ***United States v. Minarik***, 875 F.2d 1186, 1187 (6th Cir. 1989);[4] *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir. 1991). In criminal tax prosecutions, Section 371 is used to charge conspiracies to commit tax offenses and/or to defraud the IRS. ***United States v. Jerkins***, 871 F.2d 598, 602 (6th Cir. 1989); ***United States v. Little***, 753 F.2d 1420, 1442 (9th Cir. 1984); ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980).

---

[4] *See* ¶ 23.07[3], *infra*, for a more extensive discussion of ***United States v. Minarik***, 875 F.2d 1116 (6th Cir. 1989).

23.07[1][b] Scope of Defraud Clause

The Supreme Court has held that "[t]o conspire to defraud the United States" means (1) "to cheat the government out of money or property" or (2) "to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924). The defraud clause of Section 371 is very broad and encompasses a vast array of conduct, including acts that do not constitute a crime under a separate federal statute. ***United States v. Tuohey***, 867 F.2d 534, 536-67 (9th Cir. 1989). This is because the term "defraud" when used in Section 371 is broader than its common law definition, even going beyond the definition used in the mail and wire fraud statutes. ***McNally v. United States***, 483 U.S. 350, 356 (1987), *superseded on other grounds by statute,* Pub.L. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988); ***Dennis v. United States***, 384 U.S. 855, 861 (1966); ***United States v. Tuohey***, 867 F.2d 534, 537-38 (1989); *but see* ***United States v. Caldwell***, 989 F.2d 1056, 1059 & n.3 (9th Cir. 1993).

Under the defraud clause, the government does not have to establish a pecuniary loss to the United States. ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924); ***United States v. Goldberg***, 105 F.3d 770, 773 (1st Cir. 1997) ("conspiracies to defraud [under Section 371] are not limited to those aiming to deprive the government of money or property, but include conspiracy to interfere with government functions"); ***United States v. Tuohey***, 867 F.2d 534, 537 (9th Cir. 1989); ***United States v. Puerto***, 730 F.2d 627, 630 (11th Cir. 1984). The government also does not have to show that the scheme to defraud was a success or that the government was actually harmed. ***United States v. Rosengarten***, 857 F.2d 76, 79 (2d Cir. 1988); ***United States v. Everett***, 692 F.2d 596, 599 (9th Cir. 1982). Moreover, the government is not required to show that the "fraud" was a crime on its own. ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989). This means the prosecutor is not burdened with having to establish all of the elements of an underlying offense (*e.g.*, tax evasion) and each member's intent to commit that offense

(*e.g.*, willfulness). Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions "by deceit, craft or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924); *see* ***United States v. Hurley***, 957 F.2d 1, 4-5 (1st Cir. 1992); ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989); ***United States v. Nersesian***, 824 F.2d 1294, 1313 (2d Cir. 1987); *accord* ***United States v. Caldwell***, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (*see* discussion at ¶ 23.07[2][c], *infra*). *Cf.* ***United States v. Alston***, 77 F.3d 713, 720-21 (3d Cir. 1996) (holding that where indictment for conspiracy to defraud was narrowly drawn to rest solely on alleged facts of structuring and where government's proof at trial was limited to structuring, government was required to establish willfulness; but recognizing that "a true Klein conspiracy under the 'defraud' clause does not generally require proof of knowledge of illegality.")

Though a conspiracy to defraud may exist where no substantive offense has been committed, deceit or trickery in the scheme is essential to satisfying the defrauding requirement in the statute. ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924). Since a purpose of the defraud clause of Section 371 is to protect the integrity of the programs and policies of the United States and its agencies, the prosecutor must establish that the target of the fraud was the United States or one of its agencies. *See* ***United States v. Johnson***, 383 U.S. 169, 172 (1966); ***United States v. Lane***, 765 F.2d 1376, 1379 (9th Cir. 1985); ***United States v. Pintar***, 630 F.2d 1270, 1278 (8th Cir. 1980).

23.07[1][c] Pleading Requirements

Because of the broad scope of Section 371's defraud clause, in ***Dennis v. United States***, 384 U.S. 855 (1966), the Supreme Court warned the lower courts to proceed with care in interpreting Section 371 cases:

> [I]ndictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility,

> inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.

384 U.S. at 860. The Third Circuit has opined that the courts "must be mindful that [Section 371] is a broad [statute], and that there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the federal criminal sanction." ***United States v. Shoup***, 608 F.2d 950, 955-56 (3d Cir. 1979); *see also* ***United States v. Rosenblatt***, 554 F.2d 36, 41 n.6 (2d Cir. 1977) (potential for abuse under the defraud clause is much greater than under the offense clause because (1) under the defraud clause, the charge is broader and less precise; (2) the defraud clause expands the scope of conspiracy and, thus, liability for crimes, coconspirators, and admissibility of coconspirators' declarations; (3) the defraud clause includes more overt acts and, thus, both lengthens the period of the statute of limitations and increases the number of jurisdictions where venue can be laid; and (4) charges under the defraud clause may avoid the limit placed on the penalty for conspiracy to commit a misdemeanor).

Thus, the courts have held that when the government proceeds under the conspiracy to defraud clause, it must plead the "essential nature" of the alleged fraudulent scheme. *See, e.g.,* ***United States v. Helmsley***, 941 F.2d 71, 90-91 (2d Cir. 1991). It is not sufficient for the indictment to simply reallege the language in the statute; rather, it must allege the fraudulent scheme in its particulars. ***United States v. Rosenblatt***, 554 F.2d 36, 41 (2d Cir. 1977). This means that a defraud clause indictment should include (1) the name of the agency impeded, (2) the functions of the agency that were impeded; (3) the means used to impede the agency; and (4) the identities of those charged with impeding the agency. ***United States v. Mohney***, 949 F.2d 899, 904 (6th Cir. 1991).

23.07[2] Klein Conspiracy

23.07[2][a] Generally

A conspiracy to defraud the IRS charged under Section 371's defraud clause is commonly referred to as a "***Klein*** conspiracy." *See* ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957). A ***Klein*** conspiracy is described as:

> [A] conspir[acy] to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue; to wit, income taxes.[5]

Klein, 247 F.2d at 915; *see also* ***United States v. Fletcher***, 322 F.3d 508, 513 (8th Cir. 2003); ***United States v. Gricco***, 277 F.3d 339, 348 (3d Cir. 2002); ***United States v. Furkin***, 119 F.3d 1276, 1279 (7th Cir. 1997); ***United States v. Sturman***, 951 F.2d 1466, 1472 (6th Cir. 1992); ***United States v. Helmsley***, 941 F.2d 71, 90-91 (2d Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1202 (4th Cir. 1990).

In ***Klein***, the Second Circuit approved the government's use of the defraud clause to charge conduct that impeded the functions of the IRS. 247 F.2d at 916. The court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS, including the following:

> 1. Alteration of the books to make liquidating dividends appear as commissions;
>
> 2. Alteration of the books to make a gratuitous payment of $1,500,000 appear as repayment of a loan;

---

[5] When drafting an indictment charging a ***Klein*** conspiracy, it is preferable to use slightly different language to describe the object of the conspiracy. In ***Haas v. Henkel***, 216 U.S. 462, 479 (1910), the Supreme Court stated that Section 371 "is broad enough in its terms to include any conspiracy *for the purpose of* impairing, obstructing, or defeating the lawful function of any department of government." (Emphasis added.) *See also* ***Hammerschmidt v. United States***, 265 U.S. 182, 185-86 (1924) (quoting ***Haas v. Henkel***, 216 U.S. at 479). Using "for the purpose of," instead of "by," more accurately describes the object of a conspiracy to defraud the United States.

3. A false entry in the books disguising as commissions what was actually a dividend, which in turn was diverted to corporate nominees;

4. A false statement in Klein's personal income tax return regarding the payment for a stock purchase;

5. Klein's false answer to Treasury interrogatories seeking to identify the owners of various corporations;

6. A return falsely reporting that stock was sold for an immense profit;

7. The evasive affidavit of Klein's secretary denying that he remembered altering certain books; and

8. Income tax returns that falsely claimed sales of stock.

247 F.2d at 915.

While it is not necessary to have evidence of acts as pronounced as those in ***Klein***, the government must introduce evidence establishing that the intent of each member of the conspiracy was to impede the functions of the IRS.

23.07[2][b] Examples: Klein fact patterns

First Circuit

1. ***United States v. Goldberg***, 105 F.3d 770, 772 (1st Cir. 1997) (scheme to conceal payments to individuals through use of "straw employees" and benefits to third parties).

2. ***United States v. Hurley***, 957 F.2d 1, 6-7 (1st Cir. 1992) (money laundering scheme using front companies set up in Panama and the Bahamas, and

unconventional business practices such as currency transactions totaling at least $125,000 and checks made out in names of third parties).

3. ***United States v. Cambara***, 902 F.2d 144, 146-47 (1st Cir. 1990) (laundering money through use of real estate management company as front company, structuring cash withdrawals, and purchasing large assets with currency), *abrogated on other grounds by* ***United States v. Martinez-Salazar***, 528 U.S. 304, 310-11 (2000).

4. ***United States v. Lizotte***, 856 F.2d 341, 342-43 (1st Cir. 1988) (money laundering scheme using cash to purchase real estate through nominees).

5. ***United States v. Tarvers***, 833 F.2d 1068, 1071-72 (1st Cir. 1987) (money laundering scheme using nail polish remover company set up as front and nominees using cash to purchase real estate).

Second Circuit

1. ***United States v. Macchia***, 35 F.3d 662, 666 (2d Cir. 1994) (gasoline excise tax scheme using daisy chain of fictitious transactions to make it appear that an insolvent "burn" company had been the first entity to engage in a sale requiring payment of the fuel excise tax).

2. ***United States v. Aracri***, 968 F.2d 1512, 1515 (2d Cir. 1992) (***Klein*** conspiracy in federal gasoline excise tax context, creation of sham paper sales of gas among various entities, creation of shell corporations to hold tax exemption licenses).

3. ***United States v. Bilzerian***, 926 F.2d 1285, 1302 (2d Cir. 1991) (dual objective conspiracy -- to defraud SEC and IRS by parking stock to generate false tax losses and false claims for deductions, accumulating stock through nominees, and failing to comply with SEC reporting requirements under 15 U.S.C. § 78m(d)).

4. ***United States v. Attanasio***, 870 F.2d 809, 816 (2d Cir. 1989) (creating false capital gain

transactions and laundering $600,000 through attorney trust accounts).

5. ***United States v. Gurary***, 860 F.2d 521, 524 (2d Cir. 1988) (creation of phoney invoices for "goods" that did not exist, and sale of those invoices to companies that included the phoney costs in their cost-of-goods sold figure on corporate tax returns).

6. ***United States v. Rosengarten***, 857 F.2d 76, 77 (2d Cir. 1988) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

7. ***United States v. Turoff***, 853 F.2d 1037, 1040-41 (2d Cir. 1988) (failing to report substantial interest income derived from mail fraud scheme and depositing monies into a credit union that did not report interest to the IRS).

8. ***United States v. Nersesian***, 824 F.2d 1294, 1309-10 (2d Cir. 1987) (converting $117,000 in cash into money orders and traveler's checks in amounts less than $10,000 to avoid CTR filings).

9. ***United States v. Sigalow***, 812 F.2d 783, 784-85 (2d Cir. 1987) (serving as a frontman owner of massage parlors known to be under investigation by IRS; knowingly filing false tax returns in role as front; systematic destruction of business records).

10. ***United States v. Heinemann***, 801 F.2d 86, 91-92 (2d Cir. 1986) (sale of ministries in purported tax exempt churches offering vow of poverty and false charitable deductions).

Third Circuit

1. ***United States v. McKee***, 506 F.3d 225, 238-41 (3d Cir. 2007) (anti-tax teachings of organization to which defendants belonged and defendants' commitment to those teachings; no withholding of taxes from paychecks of members of the organization; organization's advocacy of non-tax-payment as well as overt acts and omissions to effectuate those goals; failure of head of

organization to file personal federal income tax returns).

2. ***United States v. Gambone***, 314 F.3d 163, 167-68, 176-77 (3d Cir. 2003) (systematic plan to receive payments from home purchasers in cash; omitting the additional payments from the company books; hiding this additional income from the IRS by buying U.S. savings bonds or by holding the cash in a safe or a nightstand).

3. ***United States v. Gricco***, 277 F.3d 339, 348-50 (3d Cir. 2002) (failure to report on personal income tax returns money that defendants and others had stolen from airport parking facilities; structuring of various financial transactions so as to avoid the filing of currency transaction reports; statements to various participants in scheme not to deposit their illicit income in a bank but instead to purchase safes for their homes).

4. ***United States v. American Investors of Pittsburgh, Inc.***, 879 F.2d 1087, 1101-02 (3d Cir. 1989) (money laundering scheme using structured currency transactions and unauthorized use of other customer accounts to funnel currency; false statements to IRS regarding defendant's use of those other accounts).

5. ***United States v. Olgin***, 745 F.2d 263, 265-66 (3d Cir. 1984) (use of corporate checks to fictitious payees to generate cash proceeds; failure to record cash sales; failure to issue receipts for cash sales; failure to report cash sales to accountants hired to prepare corporate tax returns).

Fourth Circuit

1. ***United States v. Fleschner***, 98 F.3d 155, 159 (4th Cir. 1996) (defendants, associated with the Hickory Carolina Patriots, advised others to claim excess allowances on W-4 forms, not to file tax returns, to hide income from the banking system, and to deal in cash).

2. ***United States v. Hirschfeld***, 964 F.2d 318, 323-24 (4th Cir. 1992) (complex series of financial transactions designed to create significant tax losses and provide cash flow from illegal underwriting of a small corporation; creation of fraudulent settlement of sham lawsuit to generate $2.1 million false tax deduction).

3. ***United States v. Schmidt***, 935 F.2d 1440, 1442-43 (4th Cir. 1991) (scheme to sell trusts known as Unincorporated Business Organizations (UBOs), where participants could assign income and assets to the trusts and take false business deductions on personal expenses, as well as hide their income in financial institutions in the Marshall Islands), *overruled on other grounds by* ***United States v. Delfino***, 510 F.3d 468, 472 (4th Cir. 2007).

4. ***United States v. Vogt***, 910 F.2d 1184, 1188-1190 (4th Cir. 1990) (money laundering scheme using front corporations and foreign bank accounts).

5. ***United States v. Kelley***, 769 F.2d 215, 216 (4th Cir. 1985) (leader of tax protestor organization counseled members to claim exempt status on Forms W-4 to avoid withholding, to report zero wages on tax returns, and to deal only in cash).

Fifth Circuit

1. ***United States v. Aubin***, 87 F.3d 141, 144 (5th Cir. 1996) (land flip, purchase and simultaneous resale devised to obtain cash without identifying parties).

2. ***United States v. Bourgeois***, 950 F.2d 980, 983 (5th Cir. 1992) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

3. ***United States v. Chesson***, 933 F.2d 298, 306-07 (5th Cir. 1991) (corporation paying personal expenses of owner, as well as construction costs for new church and school, all of which were written off as business deductions or charitable donations, and use of altered invoices).

4. ***United States v. Montalvo***, 820 F.2d 686, 690 (5th Cir. 1987) (money laundering scheme using front companies and foreign bank accounts; drug proceeds disguised as loan repayments).

5. ***United States v. Lamp***, 779 F.2d 1088, 1092 (5th Cir. 1986) (drug trafficker under IRS criminal investigation concocted story with codefendant to justify his increases in net worth and corroborate his lack of ownership of certain property and assets).

Sixth Circuit

1. ***United States v. Sabino***, 274 F.3d 1053, 1062 (6th Cir. 2001), *amended on rehearing*, 307 F.3d 446 (6th Cir. 2002) (use of trusts to hold all personal and business assets; frequent changes in nominal trustees of the trusts; retention of personal control over the trusts by defendants through use of signature stamp; using trusts to pay personal expenses and buy personal items; closing all personal bank accounts and certificates of deposit originally held in defendants' names; failure by trusts to file tax returns).

2. ***United States v. Kraig***, 99 F.3d 1361, 1364 (6th Cir. 1996) (attorney aided client in concealing assets through use of foreign shell corporations).

3. ***United States v. Sturman***, 951 F.2d 1466, 1471-72 (6th Cir. 1991), (conspirators created 150 corporations, five of which were in foreign countries with strict secrecy laws; listed nominees as owners of the corporations; used the corporations

to conceal income and make it difficult to trace income, expenses and cash skims; and destroyed corporate records after receipt of subpoenas).

4. ***United States v. Mohney***, 949 F.2d 899, 900, 904-05 (6th Cir. 1991) (conspirators concealed ownership of adult entertainment businesses by using nominees on tax returns, skimming cash receipts, and using corporate checks to pay personal expenses).

5. ***United States v. Iles***, 906 F.2d 1122, 1124 (6th Cir. 1990) (promotion and sale of three sham tax shelters and preparation of tax returns of investors in the shelters).

6. ***United States v. Jerkins***, 871 F.2d 598, 600-01 (6th Cir. 1989) (attorney aided client in money laundering scheme by depositing cash in attorney's trust fund account then purchasing real estate in the names of nominees).

Seventh Circuit

1. ***United States v. Chavin***, 316 F.3d 666, 668-69 (7th Cir. 2002) (conspirators created fraudulent bad debt loss deduction of $900,000 by manufacturing a sham sale of a clothing store owned by defendant to defendant's cousin without defendant's ceding any control over store).

2. ***United States v. Furkin***, 119 F.3d 1276, 1280 (7th Cir. 1997) (scheme involved not generating records reflecting income from gambling machines, not reporting income from gambling machines, and encouraging others to lie).

3. ***United States v. Price***, 995 F.2d 729, 730 (7th Cir. 1993) (scheme involved concealing corporate receipts using secret bank accounts, second sales journal, alteration of deposit tickets, false notations on memo portion of corporate checks, and forged sales invoices that were later supplied to an IRS auditor).

4. ***United States v. Brown***, 944 F.2d 1377, 1386-87 (7th Cir. 1991) (conspirators structured currency transactions and used a nearly bankrupt mortgage brokerage firm to engage in elaborate and time-consuming transfers of funds).

5. ***United States v. Beverly***, 913 F.2d 337, 358 (7th Cir. 1990) (drug trafficker used codefendant as nominee owner of certain assets, real estate, and businesses and used codefendant's bank account to pay expenses).

6. ***United States v. Bucey***, 876 F.2d 1297, 1299-1300 (7th Cir. 1989) (money laundering scheme using bogus church as a front to move proceeds to offshore bank accounts and foreign corporations).

7. ***United States v. Hooks***, 848 F.2d 785, 793 (7th Cir. 1988) (diversion of bearer bonds worth $375,000 from inclusion in estate and liquidation of bonds through nominee).

Eighth Circuit

1. ***United States v. Fletcher***, 322 F.3d 508, 513-15 (8th Cir. 2003) (claims at seminars given for clients and potential clients of a tax consulting and return preparation business that there were secret provisions in the Internal Revenue Code that could "convert" personal expenses to business expenses; creation of a phony invoice to support an improper deduction for client whose tax return was under audit).

2. ***United States v. Sileven***, 985 F.2d 962, 967-69 (8th Cir. 1993) (untaxed cash receipts from business transferred to Canada and returned as nontaxable loan proceeds).

3. ***United States v. Tierney***, 947 F.2d 854, 866-67 (8th Cir. 1991) (backdating of documents to create a paper trail to falsely corroborate that ethanol plants, promoted and sold as tax shelters, had been placed in service by the end of 1982).

4. ***United States v. Derezinski***, 945 F.2d 1006, 1011-12 (8th Cir. 1991) (falsifying business records; structuring currency transactions; and employing nominees).

5. ***Alexander v. Thornburgh***, 943 F.2d 825, 827-29 (8th Cir. 1991) (owner of adult entertainment business set up sham corporations and operated his companies using false names and names of employees), *vacated on other grounds*, 509 U.S. 544, 559 (1993).

6. ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (sale of packages to participants in a Form 1099 scheme).

7. ***United States v. Zimmerman***, 832 F.2d 454, 456 (8th Cir. 1987) (sale of ministries in Universal Life Church, which allowed participants to engage in sham transactions, check kiting, and fund rotation schemes).

Ninth Circuit

1. ***United States v. Huebner***, 48 F.3d 376, 377-78 (9th Cir. 1994) (defendants created sham debts and advised clients to file bankruptcy to impede IRS collection activity).

2. ***United States v. Caldwell***, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (use of warehouse bank where participants used numbered bank accounts, no records were kept of financial transactions, and participants' bills were paid through generic bank account).

3. ***United States v. Crooks***, 804 F.2d 1441, 1448 (9th Cir. 1986) (promotion and sale of bogus mineral royalty tax shelters using check cyclone system to create canceled checks representing loans and tax deductible payments from the shelter).

4. ***United States v. Moran***, 759 F.2d 777, 780 (9th Cir. 1985) (money laundering scheme using foreign bank accounts and foreign corporations).

5. ***United States v. Little***, 753 F.2d 1420, 1427 (9th Cir. 1985) (promotion and sale of real estate tax shelters using retroactive application to new partner of partnership losses attributable to periods prior to partner's entry into partnership).

Tenth Circuit

1. ***United States v. Thompson***, 518 F.3d 832, 840-43, 847 (10th Cir. 2008) (commission checks deposited into bank account not disclosed to return preparer; conversion of some commission checks to cash; deposit of commission checks into one defendant's personal savings account; corporate funds used to purchase property on which defendants intended to build personal residence; creation of phony loan document).

2. ***United States v. Scott***, 37 F.3d 1564, 1573 (10th Cir. 1994) (promotion of trusts and unincorporated business organizations to eliminate income tax liability without losing control of money or assets).

3. ***United States v. Tranakos***, 911 F.2d 1422, 1430 (10th Cir. 1990) (selling of sham common law trusts in an attempt to redirect income and avoid taxation).

4. ***United States v. Pinto***, 838 F.2d 426, 428-29 (10th Cir. 1988) (conspirators concealed drug income by using cash to purchase the first in a series of three homes and later obtaining sham mortgages to create the appearance that the purchase money came from loans).

5. ***United States v. Kapnison***, 743 F.2d 1450, 1252 (10th Cir. 1985) (scheme to obtain loans from banks for various borrowers, receive kickbacks from the proceeds of the loans, and fail to report the kickbacks).

Eleventh Circuit

1. ***United States v. Hernandez***, 921 F.2d 1569, 1575-76 (11th Cir. 1991) (money laundering

scheme where funds were converted to money orders and then deposited into a nominee bank account for nightclub owned in name of third party).

2. ***United States v. Lafaurie***, 833 F.2d 1468, 1469-70 (11th Cir. 1987) (money laundering scheme using foreign bank accounts, front corporations, and structured purchases of cashier's checks and money orders to avoid CTR filing).

3. ***United States v. Cure***, 804 F.2d 625, 626-27 (11th Cir. 1986) (money laundering scheme in which purchases of cashier's checks were structured).

4. ***United States v. Carrodeguas***, 747 F.2d 1390, 1392 (11th Cir. 1984) (scheme to avoid reporting of bonus income by arranging for corporate accounting records to be falsified).

5. ***United States v. Barshov***, 733 F.2d 842, 846 (11th Cir. 1984) (promotion and sale of limited partnership to buy movies, where purchase price was inflated and thereby overstated depreciation costs and investment credits).

6. ***United States v. Sans***, 731 F.2d 1521, 1534 (11th Cir. 1984) (money laundering scheme using structured currency transactions to avoid CTR filings).

7. ***United States v. Browning***, 723 F.2d 1544, 1545 (11th Cir. 1984) (money laundering scheme used investment counseling firm as front and foreign bank accounts to return money in the form of fictitious loans or salaries from offshore companies).

District of Columbia Circuit

1. ***United States v. Dale***, 991 F.2d 819, 826-29 (D.C. Cir. 1993) (scheme to defraud by falsifying deductions, misclassifying payments, and creating phony debts, etc.).

2. ***United States v. Treadwell***, 760 F.2d 327, 329-32 (D.C. Cir. 1985) (scheme to misappropriate assets from a low-income housing project by misapplication, diversion, and theft).

23.07[2][c] The Ninth Circuit's Caldwell Decision

Prosecutors charging ***Klein*** conspiracies in the Ninth Circuit should be aware of ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993). There, the court of appeals found that the district court's jury instructions on a conspiracy-to-defraud charge were deficient because the trial court did not tell the jurors that, in order to convict the defendant, they had to find that she agreed to defraud the United States by "deceitful or dishonest means." ***Caldwell***, 989 F.2d at 1060. According to the court, "[t]he Supreme Court has made it clear that 'defraud' [as used in Section 371] is limited only to wrongs done by 'deceit, craft or trickery, or at least by means that are dishonest,'" and obstructing governmental functions in other ways does not constitute "defrauding" the IRS. ***Caldwell***, 989 F.2d at 1059 (citing ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924)). The court of appeals concluded that, under the instructions given, the jury might have improperly convicted based solely on a determination that the defendant agreed "to help obstruct the IRS, even if she didn't agree to do so deceitfully or dishonestly." ***Caldwell***, 989 F.2d at 1060-61.

Although the Department does not believe that the jury instructions in ***Caldwell*** were deficient, the wiser course of action may be to use jury instructions incorporating language similar to that found in ***Hammerschmidt v. United States***, 265 U.S. at 188. In other words, the prudent course of action is to request that the district court instruct the jury that Section 371 prohibits not only conspiracies to defraud the United States by cheating the government out of money, such as income tax payments or property, but also conspiracies to defraud the United States for the purpose of impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as

the IRS, by deceit, craft, trickery, or means that are dishonest. *See*, *e.g.*, pattern jury instructions cited in ***Caldwell***, 989 F.2d at 1060.

23.07[3] Overlapping Conspiracies

As stated earlier, Section 371 provides for two forms of conspiracies. The defraud clause and the offense clause overlap, however, when a fraud against the United States also violates a specific federal statute. *See* ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991). The question then becomes which clause should be charged.

In ***United States v. Minarik***, 875 F.2d 1186 (6th Cir. 1989), the Sixth Circuit opined that in order to properly alert defendants to the charges against them, prosecutors must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate a specific statute. 875 F.2d at 1187.

Other circuits reject the holding in ***Minarik*** and allow the government to charge the defraud clause regardless of whether the fraud constitutes a separate federal criminal offense. *See*, *e.g.*, ***United States v. Fletcher***, 322 F.3d 508, 519 (8th Cir. 2003); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1092 (4th Cir. 1993); ***United States v. Harmas***, 974 F.2d 1262, 1266-67 (11th Cir. 1992); ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir. 1992); ***United States v. Derezinski***, 945 F.2d 1006, 1010 (8th Cir. 1991); ***United States v. Notch***, 939 F.2d 895, 900-01 (10th Cir. 1991); ***United States v. Bilzerian***, 926 F.2d 1285, 1301-02 (2d Cir. 1991); ***United States v. Reynolds***, 919 F.2d 435, 438-39 (7th Cir. 1990).

The Sixth Circuit itself has restricted ***Minarik*** to its facts. *See* ***United States v. Sturman***, 951 F.2d 1466, 1473-74 (6th Cir. 1991); ***United States v. Mohney***, 949 F.2d 899, 900-03 (6th Cir. 1991). Nonetheless, a review of the relevant case law is instructive on this issue.

In ***Minarik***, defendant Aline Campbell had been issued three tax assessments totalling $108,788.15. Campbell told the IRS she was "not a person made liable for a tax" and did "not owe a tax." Campbell then solicited the aid of her friend, defendant Robert Minarik, to help her sell her home and conceal the sales proceeds. The home was sold, with the buyer issuing eight cashier's checks to Campbell, seven in the amount of $4,900 each and one in the amount of $3,732.18. The next day, Campbell and Minarik cashed the checks at three branches of the bank that had issued the cashier's checks. When Campbell attempted to cash two checks at the fourth branch, the IRS was contacted. The defendants were charged with conspiracy to "defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." 875 F.2d at 1187-88.

The Sixth Circuit found that the defendant's conduct could have been properly charged under 26 U.S.C. § 7206(4), which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed. The court then held that "the 'offense' and 'defraud' clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4)." 875 F.2d at 1187.

The Sixth Circuit articulated four rationales for its decision. First, the court stated that the purpose of the defraud clause "was to reach conduct not covered elsewhere in the criminal code" and thus should not be used when a specific provision covers that conduct. 875 F.2d at 1194. Second, the court concluded that Section 371's misdemeanor clause, which limits punishment of conspiracies whose object is defined as a misdemeanor, would be defeated if those crimes could be prosecuted as felonies under the defraud clause. 875 F.2d at 1194. Next, the court determined that its interpretation was the only way that full effect could be given to "the intention of Congress as expressed in § 7206(4) of the Internal Revenue Code." 875 F.2d at 1194. Finally, the court found that the prosecution created impermissible confusion as to the exact nature of the charge by

incorrectly charging a conspiracy to violate 26 U.S.C. § 7206(4) as a conspiracy to defraud, by failing to allege the essential nature of the scheme, and by changing its theory of the case at trial. 875 F.2d at 1194-95.

Two years later, in ***United States v. Mohney***, 949 F.2d 899 (6th Cir. 1991), the Sixth Circuit revisited the Section 371 issue raised in ***Minarik***. The defendant, Harry Virgil Mohney, and three others were charged with conspiring to "defraud the United States of America by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service." The indictment described the object as follows:

> [T]o defraud the United States by concealing the true ownership and control of particular adult oriented sexually explicit entertainment businesses, for the purpose of concealing the sources of funds used to acquire and expand those businesses, their sources of supply and their customers, and the amount and disposition of their income.

949 F.2d at 904.

The defense moved to dismiss the conspiracy count, asserting that it was impermissibly brought under the defraud clause instead of the offense clause. The district court, relying on ***Minarik***, granted the motion to dismiss, finding that 26 U.S.C. § 7206(1), which prohibits the filing of false tax returns, "fits perfectly the conduct which is the core, the very essence of the government's charge in Count I." 949 F.2d at 900.

The Sixth Circuit reversed the lower court's decision. The court limited ***Minarik*** to the specific facts of that case and stressed that ***Minarik*** was not to be read as requiring that "all prosecutors charge all conspiracies to violate a specific statute under the offense clause of section 371." 949 F.2d at 902. The court also acknowledged that other circuits have allowed prosecutions under the defraud clause "despite the availability of a separate applicable substantive offense." 949 F.2d at 902-03.

In explaining its position, the Sixth Circuit offered two justifications. First, in ***Mohney***, unlike in ***Minarik***, there were no "constantly shifting government theories depriving the defendants of notice of the charges against them." 949 F.2d at 903. Instead, the indictment "tracked the language of section 371, named the agency impeded and explained how, and by whom, the agency was impeded, and clearly charged a violation of the defraud clause of section 371." 949 F.2d at 904. Second, the ***Mohney*** court determined that the conduct charged under the defraud clause did not all fit under Section 7206(1). Rather, the court found, the conduct involved violations of several statutes, including 26 U.S.C. §§ 7206(1), 7206(2), 7203, 7201 and 7207, and 18 U.S.C. § 1001. As a result, the court concluded that "where the conduct charged violates several statutes, the most complete description of the objective may be a conspiracy to defraud a particular agency of the government." 949 F.2d 904, 905.

In ***United States v. Sturman***, 951 F.2d 1466 (6th Cir. 1991), the Sixth Circuit directly addressed the situation in which the charged conduct violated multiple statutes. The defendant, Reuben Sturman, and others were charged with a ***Klein*** conspiracy. All of the defendants, relying on ***Minarik,*** filed motions to dismiss, arguing that the conduct alleged in the conspiracy should have been charged under the offense clause as a conspiracy to commit a violation of either 26 U.S.C. § 7206(1) or 26 U.S.C. § 7206(4). The district court denied the motion. 951 F.2d at 1471-73.

The court of appeals affirmed, finding that the broad nature of the conspiracy and the associated violation of several statutes distinguished the case from ***Minarik***. The court highlighted the "broad nature of the conspiracy":

> Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing and assessment functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No

> provision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses.

951 F.2d at 1473-74.

The Sixth Circuit rejected another argument based on ***Minarik*** in ***United States v. Kraig***, 99 F.3d 1361 (6th Cir. 1996). In ***Kraig***, the defendant, who had been Sturman's attorney, had established nominees for Sturman's use, facilitated sham transactions, and engaged in other means of obstructing the IRS. 99 F.3d at 1364-65. The court of appeals concluded that the conduct in which the defendant had engaged was more analogous to the conduct charged in ***Sturman*** and ***Mohney*** than the conduct charged in ***Minarik***. 99 F.3d at 1367. The court also held, relying on both ***Sturman*** and ***Mohney***, that an indictment under the defraud clause is appropriate when the conspiracy involves violations of more than one statute. 99 F.3d at 1367. In addition, the Sixth Circuit found that the ***Kraig*** indictment, unlike the indictment in ***Minarik***, provided adequate notice of the conduct constituting the charges. 99 F.3d at 1367. Finally, the court concluded that "unlike ***Minarik***, the government did not shift its theory between the 'offense' and 'defraud' clauses of section 371." 99 F.3d at 1368.

Thus, even in the Sixth Circuit, ***Minarik*** has been limited to its facts. It would appear that ***Minarik*** is applicable only if all of the following conditions exist: (1) the government charged a conspiracy under the defraud clause when the facts show that the alleged conduct violated a ***single***, separate federal criminal statute; (2) the government failed to charge the essential nature of the scheme or to detail how the United States was impeded and impaired; and (3) the government constantly changed its prosecution theory and failed to adequately inform the defendant of the charges.

23.07[4] Scope of Intent

23.07[4][a] Generally

The crime of conspiracy includes an intent element that requires the government to show that each member of the conspiracy had knowledge of the object of the conspiracy and joined the conspiracy intending to achieve that object. ***Ingram v. United States***, 360 U.S. 672, 678 (1959). The government may rely on circumstantial evidence to establish this element. *E.g.*, ***United States v. Lore***, 430 F.3d 190, 204 (3d Cir. 2005); ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000); ***United States v. Gonzalez***, 810 F.2d 1538, 1542-43 (11th Cir. 1987). Further, the government need only show that a defendant knew of the essential nature of the scheme -- the government need not show that he or she knew all of the details or the identity of all other members of the conspiracy. *See*, *e.g.*, ***United States v. Browning***, 723 F.2d 1544, 1546 (11th Cir. 1984). In the context of a ***Klein*** conspiracy, this typically means that the government must prove that each member knew that at least one of the objects of the scheme was to impede the functions of the IRS and that the member intended to join in the scheme to achieve that object. *See*, *e.g.*, ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980).

23.07[4][b] Klein Conspiracy Coupled With a Narcotics or Money Laundering Prosecution

In many cases, prosecutors will charge a ***Klein*** conspiracy in conjunction with narcotics and/or money laundering charges. Such cases typically involve the failure to report income derived from the sale of narcotics and/or the laundering of drug proceeds. In these cases, the element of intent, especially as to the ***Klein*** objective, becomes an issue. A question is raised as to whether acts of concealing sources of income and disguising the character of narcotics proceeds are alone sufficient to infer an intent to impede and impair the functions of the IRS.

A line of cases holds that when acts of concealment are reasonably explainable in terms other than a motivation to evade taxes, the government must produce *independent evidence* of an intent to evade taxes. ***United States v. Pritchett***, 908 F.2d 816, 820-22 (11th Cir. 1990); ***United States v. Krasovich***, 819 F.2d 253, 256 (9th Cir. 1987).

For example, in ***Krasovich***, the Ninth Circuit reversed a defendant's ***Klein*** conspiracy conviction where the evidence adduced at trial failed to establish a link between the defendant and the tax laws. 819 F.2d at 256. Krasovich was an auto mechanic for John and Andrea Drummond, who were cocaine traffickers. The evidence at trial showed that Krasovich knew the Drummonds sold narcotics and that Krasovich knowingly registered, in his own name, vehicles and equipment purchased by the Drummonds, for the purpose of keeping title out of the Drummonds' names. 819 F.2d at 254.

The government charged Krasovich and the Drummonds with a ***Klein*** conspiracy relating to the personal income taxes of John Drummond. 819 F.2d at 254-55. Krasovich argued that there was no direct or circumstantial evidence to indicate that he agreed with anyone to impede the functions of the IRS. In response, the government pointed to the defendant's acts of concealment as circumstantial evidence of his intent. 819 F.2d at 255-56. The court of appeals rejected the government's position. The court found that when efforts at concealment can be explained in terms of motivation other than to evade taxes, the government must supply other evidence to show the defendant knew that the purpose of the concealment was to impede the functions of the IRS. 819 F.2d at 256.

The ***Krasovich*** court based its holding on the Supreme Court decision in ***Ingram v. United States***, 360 U.S. 672 (1959). There, the Court reversed the convictions of two low-level coconspirators in a gambling operation, who had been charged under the offense clause of Section 371 with conspiracy to evade the wagering tax. 360 U.S. at 673.

The Supreme Court stressed that, under the offense clause, the government must establish an intent to agree and an intent to commit the substantive offense itself. 360 U.S. at 678.

The Court, in ***Ingram***, found the record barren of any direct evidence to establish an underlying intent to evade taxes. Further, the Court held that the government could not use the acts of concealing the gambling operation to infer a tax motive because concealment is common to all crime and may be used to infer any number of motives. Without independent proof to show knowledge of the tax motive, the intent element could not be made out, and the Court reversed the convictions. 360 U.S. at 678-80.

In ***United States v. Pritchett***, 908 F.2d 816 (1990), the Eleventh Circuit followed the rationale of ***Ingram*** and ***Krasovich***. The defendants, David and Mark Pritchett, along with three others, were indicted for conspiracy to distribute cocaine and conspiracy to evade the personal income taxes of Joe Pritchett. The evidence showed that both defendants knew of the drug operation and participated in concealing assets of Joe Pritchett, including the unknown contents of several safe deposit boxes. 908 F.2d at 818-21.

Relying on ***Ingram***, and ***Krasovich***, the court found:

> [T]hese two [defendants'] efforts at concealing Joe's source of income and ownership interests are "not reasonably explainable only in terms of motivation to evade taxes." . . . Because David knew about and participated in the drug sales, his efforts at hiding the income are explained in terms of an effort to prevent detection of the drug business. The evidence does not show that Mark knew Joe's cash represented current income, and therefore only shows that Mark knew that Joe was hiding his ownership interests in various assets.

908 F.2d at 821 (quoting ***Ingram***, 360 U.S. at 679).

The court distinguished two earlier cases -- ***United States v. Enstam***, 622 F.2d 857, 861-64 (5th Cir. 1980), and ***United States v. Browning***, 723 F.2d 1544, 1546-49

(11th Cir. 1984), based on what it described as differences in the evidence in those cases. (***Enstam*** and ***Browning*** are discussed below.) According to the court, in ***Enstam*** and ***Browning***, the government "offered independent evidence of an intent to avoid income taxes,"[6] evidence the court found to be lacking in ***Pritchett***. 908 F.2d at 821-22. The ***Pritchett*** court concluded that, because of the additional evidence proven in ***Enstam*** and ***Browning***, the findings in those cases were consistent with ***Ingram***. 908 F.2d at 821-22.

In ***Browning***, the Eleventh Circuit specifically declined to decide whether, standing alone, acts of concealing sources of income and disguising the character of narcotics proceeds are sufficient to support an inference that a defendant intended to impede and impair the functions of the IRS. Defendant Browning and three others were indicted for a ***Klein*** conspiracy relating to a scheme to launder large amounts of cash generated by illegal drug transactions. 723 F.2d at 1545. The court of appeals found overwhelming evidence that one of the objectives of the conspiracy was to launder illegally obtained money. 723 F.2d at 1546-47. The court also found that the evidence supported a second object -- "impairing the identification of revenue and the collection of tax due and owing on such revenue." 723 F.2d at 1547. In addressing the defendant's claim that the evidence was insufficient to establish that he knowingly participated in the charged ***Klein*** conspiracy, the court stated:

> Whether the form of the money laundering transaction alone is sufficient to support the jury's finding that one of the objectives of the conspiracy was to impair the identification of revenue and the collection of tax due and owing on such revenue is a question that, as in ***United States v. Enstam***, we do not reach on the record. In this case, there is ample evidence that one of the purposes of the money laundering schemes utilized by the conspirators was to thwart the effective functioning of the IRS.

723 F.2d at 1547.

---

[6] That evidence consisted primarily of statements made by coconspirators evincing an intent to avoid taxes. 908 F.2d at 822.

This ample evidence included (1) videotaped meetings in which Browning's coconspirators stated that the purpose in laundering the money was to hide the source of the income in the event of an audit by the IRS; (2) a videotaped meeting during which one of Browning's coconspirators expressed a desire to have certain proceeds designated as a fictitious consulting fee and paid in the next taxable year so as to avoid showing a large amount of income in any one taxable year and risking a possible IRS audit; and (3) a videotaped meeting with one of Browning's coconspirators in which he discussed his hesitation in setting up a corporation in the Grand Cayman Islands for fear that the authorities there might release information to the IRS. 723 F.2d at 1547-49.

Similarly, in ***Enstam***, the former Fifth Circuit upheld the convictions of Raymond Enstam and Ralph Holley for a ***Klein*** conspiracy, finding sufficient evidence of each defendant's intent to impede the IRS. The defendants and their associates sent drug money out of the country and returned it to the United States in the form of fictitious loans. The defendants argued that the object of the conspiracy was to hide the source of the drug profits and not to impede the IRS. 622 F.2d at 860-61. The court of appeals found that although one object of the conspiracy was to launder drug proceeds, another object of the conspiracy was to obstruct the functioning of the IRS. 622 F.2d at 861-62. The court of appeals affirmed the defendants' convictions on the ***Klein*** conspiracy charge, concluding that Enstam's own explanations about the purpose of the money laundering scheme, combined with his coconspirators' references to their fear of the IRS, created a reasonable inference of an intent to "thwart the effective functioning of the Internal Revenue Service." 622 F.2d at 861-63.

Convictions have also been upheld in other cases where there was evidence supporting a finding of intent to defraud the IRS along with evidence of concealment of the source of money or other assets or the true ownership of income or assets. *See* ***United States v. Hernandez***, 921 F.2d 1569, 1575-76 (11th Cir. 1991); ***United States v. Beverly***, 913 F.2d 337, 357-58 (7th Cir. 1990); ***United States v. Vogt***, 910 F.2d 1184, 1202-03

(4th Cir. 1990); ***United States v. Bucey***, 876 F.2d 1297, 1311-13 (7th Cir. 1989); ***United States v. Montalvo***, 820 F.2d 686, 689-91 (5th Cir. 1987).

The First Circuit has held that the act of "laundering" money itself constitutes impeding the IRS in its ability to collect taxes. ***United States v. Hurley***, 957 F.2d 1, 4-7 (1st Cir. 1992); ***United States v. Paiva***, 892 F.2d 148, 162 (1st Cir. 1989); ***United States v. Tarvers***, 833 F.2d 1068, 1075-76 (1st Cir. 1987). Thus, in the First Circuit, the government need not necessarily be concerned about other motives behind acts of concealment or in establishing independent proof of the tax motive. The government must establish (1) that the defendant participated in or knew about the money laundering scheme that had the effect of impeding the IRS in its collection of taxes and (2) that the defendant knew the money being laundered came from illegal activities. ***Tarvers***, 833 F.2d at 1076. Where possible, however, the prosecutor should seek to introduce evidence of an intent to impede the IRS.

23.08 STATUTE OF LIMITATIONS

23.08[1] Generally

The statute of limitations for a conspiracy to evade taxes under the offense clause of Section 371 is six years. Similarly, the statute of limitations for a ***Klein*** conspiracy under the defraud clause of Section 371 is six years. Both of these offenses are controlled by 26 U.S.C. § 6531, which provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years --
>
> > (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

. . . .

> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531.

Occasionally, defendants charged with a tax conspiracy under Section 371 will argue that a five-year statute of limitations should apply to Section 371, pursuant to 18 U.S.C. § 3282, which is the general limitations statute for Title 18 offenses. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See* ***United States v. Bellomo***, 176 F.3d 580, 598 (2d Cir. 1999); ***United States v. Aubin***, 87 F.3d 141, 145 (5th Cir. 1996); ***United States v. Aracri***, 968 F.2d 1512, 1517 (2d Cir. 1992); ***United States v. Waldman***, 941 F.2d 1544, 1548-49 (11th Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. White***, 671 F.2d 1126, 1133-34 (8th Cir. 1982); ***United States v. Brunetti***, 615 F.2d 899, 901-02 (10th Cir. 1980); ***United States v. Fruehauf Corp.***, 577 F.2d 1038, 1070 (6th Cir. 1978); ***United States v. Lowder***, 492 F.2d 953, 955-56 (4th Cir. 1974).

23.08[2] Beginning of Limitations Period

The statute of limitations in a conspiracy begins to run from the last overt act proved. ***Grunewald v. United States***, 353 U.S. 391, 396-97 (1957); *see also* ***United States v. Anderson***, 319 F.3d 1218, 1218 (10th Cir. 2003); ***United States v. Dandy***, 998 F.2d 1344, 1355 (6th Cir. 1993); ***United States v. Fletcher***, 928 F.2d 495, 498 (2d Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990).

23.08[3] Withdrawal Defense

The government is not required to prove that each member of a conspiracy committed an overt act within the statute of limitations. ***Hyde v. United States***, 225 U.S.

347, 369-70 (1912); *see also* ***United States v. Read***, 658 F.2d 1225, 1233-34 (7th Cir. 1981) (interpreting ***Hyde***). Once the government establishes that a member joined the conspiracy, that member's continued participation in the conspiracy is presumed until the object of the conspiracy has been defeated or the member has withdrawn from or abandoned the conspiratorial purpose. *See*, *e.g.*, ***United States v. Vaquero***, 997 F.2d 78, 82 (5th Cir. 1993); ***United States v. West***, 877 F.2d 281, 289 (4th Cir. 1989); ***United States v. Juodakis***, 834 F.2d 1099, 1103 (1st Cir. 1987); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir. 1987); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980).

Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. ***Hyde v. United States***, 225 U.S. at 369. Whether a conspirator has withdrawn from the conspiracy is a question of fact for the jury. In ***United States v. U.S. Gypsum Co.***, 438 U.S. 422, 464-65 (1978), the Supreme Court stated that "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See* ***United States v. Berger***, 224 F.3d 107, 118-19 (2d Cir. 2000); ***United States v. Antar***, 53 F.3d 568, 583 (3d Cir. 1995), *overruled on other grounds by* ***Smith v. Berg***, 247 F.3d 532, 534 (3d Cir.2001); ***United States v. Lash***, 937 F.2d 1077, 1083 (6th Cir. 1991); ***United States v. Juodakis***, 834 F.2d 1099, 1102 (1st Cir. 1987); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir. 1987); ***United States v. Gonzalez***, 797 F.2d 915, 917 (10th Cir. 1986); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980).

A conspirator's withdrawal from a conspiracy starts the running of the statute of limitations as to that conspirator. If an indictment is filed after the applicable statute of limitations period as to a conspirator has run (*i.e.*, more than six years after the

conspirator's withdrawal from the conspiracy where the limitations period is six years), the statute of limitations bars prosecution of that conspirator for his or her participation in the conspiracy. ***United States v. Read***, 658 F.2d 1225, 1232-33 (7th Cir. 1981). The defendant carries the burden of establishing this affirmative defense. ***United States v. Berger***, 224 F.3d 107, 118-19 (2d Cir. 2000); ***United States v. Dale***, 991 F.2d 819, 854 (D.C. Cir. 1993); ***United States v. Lash***, 937 F.2d 1077, 1083-84 (6th Cir. 1991); ***United States v. Juodakis***, 834 F.2d 1099, 1102-03 (1st Cir. 1987); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir. 1987); United States v. Killian, 639 F.2d 206, 208-09 (5th Cir. Unit A 1981); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980); ***United States v. Boyd***, 610 F.2d 521, 528 (8th Cir. 1979); ***United States v. Parnell***, 581 F.2d 1374, 1384 (10th Cir. 1978); ***United States v. Borelli***, 336 F.2d 376, 388 (2d Cir. 1964); *but see* ***United States v. MMR Corp.***, 907 F.2d 489, 501 (5th Cir. 1990) (calling "interesting" defendants' claim that earlier cases' holdings placing burden of establishing withdrawal on defendant were based on a misinterpretation of ***Hyde***, but not reaching question because "the issue was not sufficiently raised"); ***United States v. West***, 877 F.2d 281, 289 (4th Cir. 1989) (government retains burden of persuasion); ***United States v. Jannotti***, 729 F.2d 213, 221 (3d Cir. 1984) (burden, initially on defense, shifted to government); ***Read***, 658 F.2d at 1236 (burden of production on defendant; burden of persuasion remains on government to negate withdrawal defense); ***Manual of Model Criminal Jury Instructions for the Ninth Circuit***, § 8.19 (2003 Ed.) (citing ***Read***).

In short, the government technically is not required to prove that each member of the conspiracy committed an overt act within the limitations period. However, in practice, the prosecutor should critically review those conspirators whose membership predates the limitations period and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

23.09 VENUE

The crime of conspiracy is a continuing offense, the prosecution of which is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a); ***United States v. Tannenbaum***, 934 F.2d 8, 12 (2d Cir. 1991). The government must establish venue by a preponderance of the evidence. *E.g.*, ***United States v. Smith***, 918 F.2d 1551, 1557 (11th Cir. 1990); ***United States v. Record***, 873 F.2d 1363, 1366 (10th Cir. 1989); ***United States v. Moeckly***, 769 F.2d 453, 460 (8th Cir. 1985). The government may rely on an overt act not alleged in the indictment as the basis for venue. ***United States v. Schwartz***, 535 F.2d 160, 164-65 (2d Cir. 1976).

Venue as to an offense arising under 18 U.S.C. § 371 lies in any district where the agreement was made or where an overt act in furtherance of the conspiracy was committed. ***Hyde v. United States***, 225 U.S. 347, 362-63 (1912); ***United States v. Crozier***, 259 F.3d 503, 519 (6th Cir. 2001); ***United States v. Pomranz***, 43 F.3d 156, 158-59 (5th Cir. 1995); ***United States v. Lam Kwong-Wah***, 924 F.2d 298, 301 (D.C. Cir. 1991); ***United States v. Smith***, 918 F.2d 1551, 1557 (11th Cir. 1990); ***United States v. Uribe***, 890 F.2d 554, 558 (1st Cir. 1989); ***United States v. Ahumada-Avalos***, 875 F.2d 681, 682-83 (9th Cir. 1989); ***United States v. Record***, 873 F.2d 1363, 1366 (10th Cir. 1989); ***United States v. Ramirez-Amaya***, 812 F.2d 813, 816 (2d Cir. 1987); ***United States v. Levy Auto Parts of Canada***, 787 F.2d 946, 952 (4th Cir. 1986); ***United States v. Andrus***, 775 F.2d 825, 846 (7th Cir. 1985); ***United States v. Moeckly***, 769 F.2d 453, 460-61 (8th Cir. 1985). "[W]here a criminal conspirator commits an act in one district which is intended to further a conspiracy by virtue of its effect in another district, the act has been committed in both districts and venue is properly laid in either." ***United States v. Lewis***, 676 F.2d 508, 511 (11th Cir. 1982); *see* ***United States v. Brown***, 739 F.2d 1136, 1148 (7th Cir. 1984).

The government is not required to show that all of the members of a conspiracy committed an overt act within the district of prosecution. So long as one conspirator

committed an overt act within the district, venue is established as to all members of the conspiracy. *See*, *e.g.*, ***United States v. Tannenbaum***, 934 F.2d 8, 13 (2d Cir. 1991); ***United States v. Uribe***, 890 F.2d 554, 558 (1st Cir. 1989); ***United States v. Meyers***, 847 F.2d 1408, 1411 (9th Cir. 1988). Moreover, the overt act serving as the basis for venue need not be committed within the statute of limitations. *See* ***Tannenbaum***, 934 F.2d at 13 (rules governing venue and limitations serve different purposes).