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 3

23.04[1] Proof of Agreement 3

23.04[2] Two or More Persons 5

23.04[2][a] Limitation on Naming Unindicted Coconspirators 5

23.04[2][b] Conspiring With Government Agents 5

23.04[2][c] Corporations as Conspirators 6

23.04[3] Scope of the Agreement -- Single or Multiple Conspiracies 6

23.05 MEMBERSHIP 9

23.05[1] Intent Requirement 9

23.05[2] Proof of Membership 10

23.05[3] *Pinkerton* Liability 12

23.06 OVERT ACT 14

23.06[1] Definition 13

23.06[2] Acts of Concealment 15

23.07 CONSPIRACY TO DEFRAUD THE UNITED STATES 16

23.07[1] Generally 16

23.07[1][a] Sec. 371: Two Forms of Conspiracy 16

23.07[1][b] Scope of Defraud Clause 17

23.07[1][c] Pleading Requirements 19

23.07[2] *Klein* Conspiracy 20

23.07[2][a] Generally 20

23.07[2][b] Examples: *Klein* fact patterns 22

23.07[2][c] Overbreadth Concerns 42

23.07[2][d] Precedent Governing Different Statutes 41

23.07[3] Overlapping Conspiracies and the Sixth Circuit's Decision in *Minarik* 43

23.07[4] Scope of Intent 45

23.07[4][a] Generally 45

23.07[4][b] Multiple Purposes 45

23.07[4][c] Klein Conspiracy Coupled With a Narcotics or Money Laundering Prosecution 47

23.08 STATUTE OF LIMITATIONS 50

23.08[1] Generally 50

23.08[2] Beginning of Limitations Period 51

23.08[3] Withdrawal Defense 51

23.09 CO-CONSPIRATOR STATEMENTS 53

23.10 VENUE 55

23.11 SENTENCING GUIDELINES 56

23.00 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

23.01 STATUTORY LANGUAGE: 18 U.S.C. § 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 in Title 18.

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[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 who conspire with any other person to defraud the government.

Section 371 defines two types of conspiracies: (1) conspiracies to commit a specific federal offense ("any offense against the United States") and (2) conspiracies "to defraud the United States."

A person violates the first clause of Section 371 (the "offense clause") by conspiring or agreeing to engage in conduct that is prohibited by a federal criminal statute. In criminal tax prosecutions, that typically involves agreeing 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 71, 90 (2d Cir. 1991).

A person violates the second clause of Section 371 (the "defraud clause") by agreeing to defraud the United States. In this context the word "defraud" includes not only obtaining money or property (as under the mail- and wire-fraud statutes in Title 18), but also deceptively obstructing governmental operations: "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* ***Dennis v. United States***, 384 U.S. 855, 861 (1966) (defining "defrauding" the United States in this context as "impairing, obstructing or defeating the lawful function of any department of Government."). When the federal agency being cheated out of money or property or deceptively obstructed is the Internal Revenue Service, such a conspiracy is known as a "*Klein* conspiracy," after ***United States v. Klein***, 247 F.2d 908 (2d Cir. 1957). *See, e.g.*, ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015) ("conspiracy to defraud the IRS . . . is commonly called a *Klein* conspiracy, after the first decision to recognize it"); ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011).

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

Conspiracies under both the offense clause and the defraud clause of 18 U.S.C. § 371 require three elements to 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 to 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.

United States v. Falcone, 311 U.S. 205, 210 (1940); ***United States v. Ngige***, 780 F.3d 497, 503 (1st Cir. 2015); ***United States v. Svoboda***, 347 F.3d 471, 476 (2d Cir. 2003); ***United States v. Whiteford***, 676 F.3d 348, 357 (3d Cir. 2012); ***United States v. Fleschner***, 98 F.3d 155, 159-60 (4th Cir. 1996); ***United States v. Njoku***, 737 F.3d 55, 64 (5th Cir. 2013); ***United States v. Douglas***, 398 F.3d 407, 413 (6th Cir. 2005); ***United States v. Mealy***, 851 F.2d 890, 895-96 (7th Cir. 1988); ***United States v. Hayes,*** 574 F.3d 460, 472 (8th Cir. 2009); ***United States v. Montgomery***, 384 F.3d 1050, 1062 (9th Cir. 2004); ***United States v. Hanzlicek***, 187 F.3d 1228, 1232-33 (10th Cir. 1999) (adding a fourth element of "interdependence"); ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015); ***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). 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 a conspiracy, the

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. 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***, 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. *See, 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 a conspiratorial agreement under Section 371, 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. Rosenblatt***, 554 F.2d 36, 38 & n.2 (2d Cir. 1977); ***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 Co-conspirators

Prosecutors should be aware that it is the policy of the Department of Justice that, in the absence of some sound reason, unindicted co-conspirators should not be identified in conspiracy indictments. Justice Manual 9-11.130 (April 2018) (noting that the practice was severely criticized in ***United States v. Briggs***, 514 F.2d 794 (5th Cir. 1975)). 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. This policy does not apply, however, where the person "has been officially charged with the misconduct at issue." JM 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 under Section 371. *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). 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).[2]

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

A single conspiracy may have multiple objectives and involve a number of sub-agreements to accomplish particular 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***,

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[2] 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).

634 F.2d 1159, 1167 (9th Cir. 1980). On the other hand, a single actor may be involved in several, separate conspiracies. ***Kotteakos v. United States***, 328 U.S. 750, 755 (1946). 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. Rigas***, 605 F.3d 194, 213 (3d Cir. 2010) (en banc); ***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 scheme, and any overlap among participants in the various dealings. *See* ***Rigas***, 605 F.3d at 213 ("The ultimate goal of the totality-of-the-circumstances test is to determine whether there are two agreements or only one."); *see also* ***Berger***, 224 F.3d at 114-115; ***Hanzlicek***, 187 F.3d at 1232 (noting that this is a question of fact); ***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); *see also* ***United States v. Marable***, 578 F.2d 151, 154 (5th Cir. 1978) (court looks to (1) time, (2) co-conspirators, (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. Andrews***, 585 F.2d 961, 964 (10th Cir. 1978); ***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). And a single conspiracy may encompass distinct transactions and conspirators who do not necessarily all know each other, as long as they know "the essential nature of the plan and their connections with it," even without "knowledge of all its details or of the participation of

others." ***Blumenthal v. United States***, 332 U.S. 539, 557 (1947); ***United States v. Parnell***, 581 F.2d 1374, 1382-83 (10th Cir. 1978) (explaining how a single conspiracy can involve different transactions and a changing membership).

One circuit, the Tenth, has added "interdependence" as an element of conspiracy. *See, e.g.*, ***United States v. Hammers***, 942 F.3d 1001, 1013 (10th Cir. 2019); ***United States v. Quarrell***, 310 F.3d 664, 678 (10th Cir. 2002); ***United States v. Edwards***, 69 F.3d 419, 431 (10th Cir. 1995); ***United States v. Hanzlicek***, 187 F.3d 1228, 1232-33 (10th Cir. 1999). "Interdependence requires that a defendant's actions facilitate the endeavors of other alleged coconspirators or facilitate the venture as a whole . . . . [and] also requires proof that the conspirators intended to act together for their shared mutual benefit within the scope of the conspiracy charged." ***United States v. Serrato***, 742 F.3d 461, 467 (10th Cir. 2014) (cleaned up); *accord* Tenth Circuit Pattern Jury Instructions, § 2.19 (defining "interdependence" to require that "the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged").

United States v. Carter, 130 F.3d 1432 (10th Cir. 1997), illustrates how the Tenth Circuit has applied the interdependence element in practice. There, Carter met Anthlia Craft at a bus station in Tulsa, after receiving a pager message from Craft. ***Id.*** at 1435-36. Craft was carrying a bag with bricks of cocaine, and, unbeknownst to Carter, was cooperating with DEA agents who had intercepted her in route to Tulsa. ***Ibid.*** The court rejected Carter's challenge to the sufficiency of the evidence supporting his conspiracy conviction, reasoning that "the jury reasonably could have inferred that Craft was the courier for the cocaine and that Carter picked up Craft at the bus station to assist her in distributing the cocaine. Thus, the jury reasonably could have inferred that Carter was dependent on Craft to smuggle the cocaine to Tulsa, and Craft was dependent on Carter to assist her in the distribution process once she arrived in Tulsa." ***Id.*** at 1440. *See also* ***United States v. Wardell***, 591 F.3d 1279, 1289-91 (10th Cir. 2009) (finding evidence of interdependence sufficient to support conviction for conspiracy to retaliate against a witness who testified against the defendant in a criminal tax case because the evidence "established beyond a reasonable doubt that the success of the venture as a whole—[the witness's] beating—depended upon the steps [the defendant] took to realize this common

goal"; these steps included arranging with a co-conspirator to have the perpetrators of the assault transported to the jail where the witness was imprisoned).

The Tenth Circuit appears to be alone in treating "interdependence" as a separate element, although some circuits, following ***Kotteakos***, 328 U.S. at 755, use "interdependence" as a test for whether various sub-schemes are part of a single, overall criminal agreement instead of multiple agreements. ***United States v. Sanchez-Badillo***, 540 F.3d 24, 29 (1st Cir. 2008); ***United States v. Gaskin***, 364 F.3d 438, 452 n.4 (2d Cir. 2004); ***United States v. Mathis***, 216 F.3d 18, 24 (D.C. Cir. 2000); ***United States v. Adkism***, 180 F.3d 264 (Table), 1999 WL 301315, at *6-7 (5th Cir. 1999); ***United States v. Toler***, 144 F.3d 1423, 1426 (11th Cir. 1998); cf. ***United States v. Farias***, 469 F.3d 393, 398 (5th Cir. 2006) ("we do not explicitly require 'interdependence' in this circuit").[3]

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,

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[3] Earlier Tenth Circuit cases also treated interdependence exclusively as a test for whether there is a single conspiracy, primarily when the government alleged a "chain conspiracy" in which the co-conspirators did not all know one another. *See, e.g.,* ***United States v. Petersen***, 611 F.2d 1313, 1325-26 (10th Cir. 1979) (quoting ***United States v. Elliot***, 571 F.2d 880, 901 (5th Cir. 1978), which described interdependence as "[t]he essential element of a chain conspiracy"); ***United States v. Dickey***, 736 F.2d 571, 582 (10th Cir. 1984) (stating that "[t]o make a finding of a single conspiracy . . . the essential element of interdependence must be met"). Later cases, however, cited indirectly to these earlier cases for the proposition that interdependence is an element of a conspiracy offense. *See* ***United States v. Fox***, 902 F.2d 1508, 1514 (10th Cir. 1990) ("the evidence must demonstrate 'the essential element of interdependence' among the co-conspirators" (quoting ***Dickey***, 736 F.2d at 582)); ***United States v. Evans***, 970 F.2d 663, 668 (10th Cir. 1992) (citing ***Fox*** for the proposition that the elements of conspiracy include "that the alleged coconspirators were interdependent"). But regardless of its origins, "[i]nterdependence[] as an essential element of § 371 conspiracy . . . now appears to be settled law" in the circuit. Tenth Circuit Pattern Jury Instructions, § 2.19, Comment (citing cases); *see* ***ibid.*** (listing "interdependence among members of the conspiracy" as one of the elements the jury should be instructed it must find to convict on a conspiracy charge).

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 only 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). "Although conspirators must pursue the same criminal objective, a conspirator need not agree to commit or facilitate each and every part of the substantive offense. A defendant must merely reach an agreement with the specific intent that the underlying crime *be committed* by some member of the conspiracy." ***Ocasio v. United States***, 136 S. Ct. 1423, 1429 (2016) (cleaned up) (emphasis in original).

When a conspiracy involves "conduct . . . intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue," the enhancement in Sentencing Guidelines Section 2T1.9(b)(2) may apply. *See* ¶ 23.11, *infra*, for further discussion.

23.05[2] Proof of Membership

A defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. ***United States v. Gupta***, 463 F.3d 1182, 1194 (11th Cir. 2006); ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999), *adopted by* 231 F.3d 663, 667 n.1 (9th Cir. 2000) (en banc); ***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); *see generally* ***Holland v. United States***, 348 U.S. 121, 140 (1954) (explaining that in some respects circumstantial evidence "is intrinsically no different from testimonial evidence"). Generally, a defendant's membership in the conspiracy 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 identities or 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); ***Parnell***, 581 F.2d at 1382. 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).

Some circuits have held that 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. Burgos***, 94 F.3d 849, 860-61 (4th Cir. 1996) (en banc); ***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. Dunn***, 564 F.2d 348, 356-57 (9th Cir. 1977); ***United States v. Marsh***, 747 F.2d 7, 13 & n.3 (1st Cir. 1984). As the Ninth Circuit explained in ***Dunn***, the qualification in this formulation requiring proof of the *connection* beyond a reasonable doubt helps avoid potential confusion about the government's burden of proof in a conspiracy prosecution, particularly when it is said — as it was in some earlier cases — that only "slight evidence" is necessary to connect a defendant to a conspiracy:

> Those knowingly participating in the conspiracy in any respect or to any degree are guilty of that crime, but their guilt must be established under the same standards applicable to those charged with any other crime — neither more nor less — and the sufficiency of the evidence is subject to the same standards of review.
>
> Accordingly, we think it appropriate here to restate the slight evidence rule correctly and as we are reasonably certain that our predecessors intended it: Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof.

Ibid.; *see also* **Burgos**, 94 F.3d at 861 (explaining that "[t]he term 'slight' does not describe the *quantum* of evidence that the Government must elicit in order to establish the conspiracy, but rather the *connection* that the defendant maintains with the conspiracy"

(emphasis in original)). Other circuits, concerned about this potential for confusion, have rejected or disapproved the use of the "slight connection" formulation in jury instructions or as a standard for assessing the sufficiency of evidence of membership in a conspiracy. *See* ***United States v. Durrive***, 902 F.2d 1221, 1225-29 (7th Cir. 1990) (concluding that "when the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, 'substantial evidence' should be the test rather than 'slight evidence' or 'slight connection'"); ***United States v. Huezo***, 546 F.3d 174, 180 n.2, 184-89 (2d Cir. 2008) ("[t]he 'not overwhelming evidence' or 'slight evidence' formulation risks misleading not only jurors but district and appellate courts reviewing post-verdict challenges as to the sufficiency of the evidence"); *see* ***id.*** at 184-89 (Newman, J., concurring, joined by Walker, J., and Sotomayor, J.) (arguing that "the quantitative adjectives "slight" or "not overwhelming" or other variations [should] not be repeated either in appellate opinions or in jury instructions with reference to the evidence sufficient to prove beyond a reasonable doubt a defendant's participation in a conspiracy"); *see also* ***United States v. Malatesta***, 590 F.2d 1379, 1381-82 (5th Cir. 1979) (en banc) ("The 'slight evidence' rule . . . is . . . [b]anished as to all appeals hereafter to be decided by this Court"). Prosecutors should take care not to rely on a version of the "slight connection" formulation that is inconsistent with applicable circuit law.

23.05[3] Pinkerton Liability

A conspirator is criminally responsible for the "substantive offenses" committed by a co-conspirator if the conspirator was a member of the conspiracy when the co-conspirator 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 substantive 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. Sanjar***, 876 F.3d 725, 743 (5th Cir. 2017); ***United States v. Etheridge***, 424 F.2d 951, 965 (6th Cir. 1970). It is sufficient that the government establish the offense was in furtherance of the conspiracy or was reasonably foreseeable as a necessary or natural consequence of the conspiracy. ***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).

Although a conspirator "may join a conspiracy already in existence and become criminally liable for acts committed thereafter in furtherance of the scheme," ***United States v. Hamlin***, 986 F.2d 384, 387 (10th Cir. 1993), the Supreme Court held that a defendant "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy," ***Levine v. United States***, 383 U.S. 265, 266 (1966) (per curiam) (accepting the government's concession on this point). Some cases state, without express qualification, that a person who joins a conspiracy adopts the prior acts of the other conspirators and may be held responsible for conduct committed before he or she joined the conspiracy. *See* ***United States v. Rea***, 958 F.2d 1206, 1214 (2d Cir. 1992); ***United States v. Covelli***, 738 F.2d 847, 859 n.16 (7th Cir. 1984); ***United States v. Bridgeman***, 523 F.2d 1099, 1107-08 (D.C. Cir. 1975); ***United States v. Cimini***, 427 F.2d 129, 130-31 (6th Cir. 1970). These statements are properly understood as referring to liability for the conspiracy itself, not to liability under ***Pinkerton*** for the substantive offenses of co-conspirators. As one court explained, a defendant who joins an ongoing conspiracy may be held liable for "acts or statements of coconspirators that occurred prior to his entry into the conspiracy" for purposes of determining the scope and objects of the conspiracy and for satisfying the overt-act element and venue, even though "such a defendant cannot be held liable for *substantive crimes* committed by coconspirators prior to his entry in the conspiracy." ***United States v. Hamilton***, 587 F.3d 1199, 1207 & n.5 (10th Cir. 2009) (emphasis in original); *see also* ***United States v. Carrascal-Olivera***, 755 F.2d 1446, 1452 & n.8 (11th Cir. 1985).

23.06 OVERT ACT

23.06[1] Definition

In order to establish criminal liability for a conspiracy under Section 371, the government must prove that a member of the conspiracy committed an overt act in

furtherance of the conspiracy — in the words of the statute, that "one or more of such persons d[id] any act to effect the object of the conspiracy." 18 U.S.C. § 371. The function of this statutory 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). Because it is a statutory element, the overt-act requirement does not apply to other conspiracy statutes that, unlike Section 371, do not expressly require an overt act. ***United States v. Shabani***, 513 U.S. 10, 15-17 (1994). Conspiracy statutes that do not contain an overt-act requirement include 18 U.S.C. § 286, which proscribes conspiring to defraud the United States with respect to false, fictitious, or fraudulent claims. *See supra*, Chapter 22.05.

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, the act 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. *See, 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). And because which particular overt act (or acts) were committed is a question of *how* a defendant violated Section 371, not *whether* he did, most courts to address the issue have held that the jury need not unanimously agree on a particular overt act as long as it unanimously agrees that an overt act did, in fact, occur. ***United States v. Kozeny***, 667 F.3d 122 (2d Cir. 2011); ***United States v. Griggs***, 569 F.3d 341, 343 (7th Cir. 2009); *see* ***Schad v. Arizona***, 501 U.S. 624, 649 (1991) (Scalia, J., concurring) ("it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission"); ***Richardson v. United States***, 526 U.S. 813, 817 (1999) ("a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime"); *cf.* ***United States v. Liu,*** 631 F.3d 993, 1000 n.7 (9th Cir. 2011) (questioning whether, in light of ***Schad***, the jury must agree on the identity of the overt act, even though the Ninth Circuit pattern instruction does so require).

23.06[2] Acts of Concealment

Acts of concealment may constitute overt acts. However, these acts are admissible only 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." ***Id***. at 405.

In criminal tax conspiracies, the object of the crime is usually to conceal income or assets from the IRS. Indeed, in the context of tax evasion under 26 U.S.C. § 7201, an "affirmative act of evasion" is generally defined as "any conduct, the likely effect of which would be to mislead or to conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943); *cf.* ***Kawashima v. Holder***, 565 U.S. 478, 488 (2012) (noting that tax evasion will "almost invariably" involve fraud or deceit, even though it is not a necessary element of the offense). Thus, in general, overt acts in furtherance of a conspiracy to commit tax offenses or to defraud the United States in connection with tax assessment and collection will involve acts that mislead or conceal. *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). Given the holding in ***Grunewald***, indictments charging such acts of concealment should make clear that concealing income or assets from the IRS was an object of the conspiracy. *See* ***United States v. Masters***, 924 F.2d 1362, 1368 (7th Cir. 1991) (observing that ***Grunewald*** did not "hold that a conspiracy can never include an agreement to conceal the defendants' conduct"); ***United States v. Upton***, 559 F.3d 3, 14 (1st Cir. 2009) (rejecting argument that ***Grunewald*** "imposes a requirement that conspirators expressly agree to engage in acts of concealment where those acts are done in furtherance of the main objectives of the conspiracy"). Failure to do so might preclude using acts of concealment to satisfy the statute of limitations or to establish venue, *see* ¶¶ 23.08 & 23.10, *infra*.

23.07 CONSPIRACY TO DEFRAUD THE UNITED STATES

23.07[1] Generally

23.07[1][a] Section 371: Two Forms of Conspiracy

As noted above, Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies. ***United States v. Conti***, 804 F.3d 977, 979-80 (9th Cir. 2015); ***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);

United States v. Haga, 821 F.2d 1036, 1039 (5th Cir. 1987) ("Cases construing section 371 have made it plain that the 'commit any offense' clause and the 'defraud the United States' clause describe different criminal offenses."). The first part of the statute, the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes; the second part of the statute, 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); *see also* **Dennis v. United States**, 384 U.S. 855, 862-63 (1966) (referring to these as "alternative clause[s]").

The offense clause requires that the indictment refer 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); *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir. 1991). In criminal tax prosecutions, Section 371 can be used to charge conspiracies to commit specific substantive tax offenses 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).

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 encompasses a wide 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).

In a 1910 case involving the Department of Agriculture, the Supreme Court rejected the argument that in order to prove a conspiracy "to defraud the United States" under Section 371 the government must "charge or prove an actual financial or property loss." ***Haas v. Henckel***, 216 U.S. 462, 479-80 (1910) (construing Rev. Stat. § 5440

(1878), the predecessor of the modern Section 371, which, like the current statute, prohibited conspiracies to "defraud the United States in any manner or for any purpose"). The indictment at issue in ***Haas*** charged that the defendants had conspired to obtain a government crop report "in advance of general publicity" and to "use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial and accurate reports concerning the cotton crop." ***Haas***, 216 U.S. at 478. The Court explained that "it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result." ***Id***. at 479. Rather, the statute was "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." ***Id***.

Fourteen years later, in 1924, the Supreme Court clarified that the defraud clause — although it reaches conspiracies to interfere with the government's lawful functions in ways that do not result in direct financial loss — still requires "fraud" and that ***Haas*** did not eliminate the traditional requirement that a fraudulent scheme be deceitful. ***Hammerschmidt***, 265 U.S. at 187-88. "To conspire to defraud the United States," the Court stated in ***Hammerschmidt***, "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." ***Id***. at 188. Thus, although the defraud clause does not require a contemplated "property or pecuniary loss by the fraud," it still requires that the conspiracy involve some form of "misrepresentation" or "chicane." ***Ibid***.

In the century since ***Hammerschmidt*** was decided, the Supreme Court has repeatedly recognized and re-affirmed its construction of the defraud clause. *See, e.g.*, ***United States v. Scharton***, 285 U.S. 518, 520-21 (1932); ***Glasser v. United States***, 315 U.S. 60, 66 (1942); ***Dennis***, 384 U.S. at 861; ***McNally v. United States***, 483 U.S. 350, 359 n.8. And courts have applied the clause to conspiracies to defraud various federal agencies, including, but not limited to, the Internal Revenue Service. *See, e.g.*, ***United***

States v. Ballistrea, 101 F.3d 827, 832 (2d Cir. 1996) (Food and Drug Administration); ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957) (IRS);[4] ***United States v. Pintar***, 630 F.2d 1270 (8th Cir. 1980) (Upper Great Lakes Regional Commission); ***United States v. Tuohey***, 867 F.2d 534, 537 (9th Cir. 1989) (Federal Deposit Insurance Corporation); ***United States v. Lane***, 765 F.2d 1376, 1379 (9th Cir. 1985) (Social Security Administration); ***United States v. Elbeblawy***, 899 F.3d 925 (11th Cir. 2018) (Department of Health and Human Services); ***United States v. Puerto***, 730 F.2d 627 (11th Cir. 1984) (Treasury Department); ***United States v. Dean***, 55 F.3d 640, 647 (D.C. Cir. 1995) (Department of Housing and Urban Development); ***United States v. Madeoy***, 912 F.2d 1486 (D.C. Cir. 1990) (Federal Housing Administration and Veterans Administration); *cf.* ***United States v. Johnson***, 383 U.S. 169, 172 (1966) (Department of Justice).

Moreover, because a conspiracy to defraud the United States is a type of conspiracy, it is the unlawful agreement that constitutes the crime: it is not necessary 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); ***Pintar***, 630 F.2d at 1277-78. Nor is it necessary to show that the "fraud" contemplated by the conspiracy was a crime on its own. ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989). This means, in a tax case, that a prosecutor who charges a conspiracy to defraud the United States 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).[5] 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***, 265 U.S. at 188; *see also* ***United States v. Hurley***, 957 F.2d 1, 4-5 (1st Cir. 1992); ***Jerkins***, 871 F.2d at 603; ***United States v. Nersesian***,

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[4] Conspiracies to defraud the IRS, commonly called "*Klein* conspiracies" after the case cited here, are discussed at length at ¶ 23.07[2], *infra.*

[5] However, when the government charges a conspiracy to commit a substantive tax offense, "it must prove that "the intended future conduct [the conspirators] agreed upon include all the elements of the substantive crime." ***United States v. Pinckney***, 85 F.3d 4, 8 (2d Cir. 1996) (cleaned up).

824 F.2d 1294, 1313 (2d Cir. 1987); ***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).

23.07[1][c] Pleading Requirements

Because of the broad scope of the defraud clause, the Supreme Court has warned the lower courts to proceed with care in 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.

Dennis v. United States, 384 U.S. 855, 860 (1966). One court 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, co-conspirators, and admissibility of co-conspirators' 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 re-allege 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," after ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957). *See, e.g.*, ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015); ***United States v. Coplan***, 703 F.3d 46, 59-60 (2d Cir. 2012); ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011); ***United States v. Cohen***, 510 F.3d 1114, 1117 (9th Cir. 2007); ***United States v. Tucker***, 419 F.3d 719, 720 (8th Cir. 2005). It is worth noting, however, that the term "*Klein* conspiracy" is "in some sense a misnomer, since the primary holding of *Klein* is a quote from *Hammerschmidt*." ***Coplan***, 703 F.3d at 60 n.18. ***Klein*** simply applied ***Hammerschmidt v. United States***, 265 U.S. 182 (1924), to a tax case, describing a conspiracy:

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes.[6]

Klein, 247 F.2d at 915. Thus, in ***Klein***, the Second Circuit approved the government's use of the defraud clause to charge a conspiracy to deceptively impede the IRS's assessment

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[6] 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***, 265 U.S. at 185-86 (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.

and collection of taxes, regardless of whether the government could prove "direct tax evasion" of an actual tax due and owing. 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 (247 F.2d at 915):

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;

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.

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 deceptively impede the functions of the IRS.

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

First Circuit

1. ***United States v. Flete-Garcia***, 925 F.3d 17, 21-22 (1st Cir. 2019) (scheme to fraudulently obtain tax refunds using stolen identities of Puerto Rico residents).

2. ***United States v. Floyd***, 740 F.3d 22, 26-27 (1st Cir. 2014) (scheme to impede collection of employment taxes by funneling wages through a nominee entity).

3. ***United States v. Allen***, 670 F.3d 12, 14-15 (1st Cir. 2012) (scheme to avoid withholding of income taxes, file "zero" returns, and place assets in name of nominees).

4. ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011) (conspiracy to impede the IRS's ability to determine whether entity qualified for nonprofit status).

5. ***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).

6. ***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).

7. ***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).

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

9. ***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. Daugerdas***, 837 F.3d 212, 218 (2d Cir. 2016) (various complex tax shelters designed to create paper losses to offset real income).

2. ***United States v. Coplan***, 703 F.3d 46, 59-60 (2d Cir. 2012) (same, as well as tax shelters through which defendants purported to convert ordinary income into long-term capital gains through the creation and cancellation of trading partnerships).

3. ***United States v. Drachenberg***, 623 F.3d 122, 123-24 (2d Cir. 2010) (per curiam) (scheme to use nominee entities to conceal income).

4. ***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).

5. ***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).

6. ***United States v. Bilzerian***, 926 F.2d 1285, 1302 (2d Cir. 1991) (dual-object 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)).

7. ***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).

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

9. ***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).

10. ***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).

11. ***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).

12. ***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).

13. ***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. Adeolu***, 836 F.3d 330, 331-32 (3d Cir. 2016) (scheme to prepare returns that claimed false dependents for clients).

2. ***United States v. Ottaviano***, 738 F.3d 586, 589-91 (3d Cir. 2013) (sale of bogus trust schemes that

purported to extinguish tax liabilities by accessing fictitious secret Treasury accounts).

3. ***United States v. Turner***, 718 F.3d 226, 229-30 (3d Cir. 2013) (promotion of scheme to use common-law trusts to impede assessment and collection of taxes).

4. ***United States v. DeMuro***, 677 F.3d 550, 556 (3d Cir. 2012) (spending lavishly on personal and discretionary business items while professing an inability to pay delinquent taxes).

5. ***United States v. Stadtmauer***, 620 F.3d 238, 241-42 (3d Cir. 2010) (conspiracy to impede assessment and collection of business income by claiming bogus charitable and business expense deductions).

6. ***United States v. McKee***, 506 F.3d 225, 238-41 (3d Cir. 2007) (conspiracy to impede IRS's collection of employment taxes).

7. ***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 and to hide this additional income from the IRS by buying U.S. savings bonds or by holding the cash in a safe or a nightstand).

8. ***United States v. Gricco***, 277 F.3d 339, 346-50 (3d Cir. 2002) (scheme to skim cash from airport parking garage; structuring of financial transactions involving the proceeds of this scheme so as to avoid the filing of currency transaction reports).

9. ***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 defendants' use of those other accounts).

Fourth Circuit

1. ***United States v. Jinwright***, 683 F.3d 471, 475-76 (4th Cir. 2012) (conspiracy to underreport income that a pastor earned from his church's reimbursements of his personal expenses and from outside speaking engagements).

2. ***United States v. Thorson***, 633 F.3d 312, 314-17 (4th Cir. 2011) (scheme to claim charitable deductions from donations of cemetery sites, which involved fabrication of documents to create false appearance that the sites had been held long enough to qualify for deduction at fair market value).

3. ***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 Forms W-4, not to file tax returns, to hide income from the banking system, and to deal in cash).

4. ***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).

5. ***United States v. Schmidt***, 935 F.2d 1440, 1442-43 (4th Cir. 1991) (scheme to sell trusts known as Unincorporated Business Organizations, 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).

6. ***United States v. Vogt***, 910 F.2d 1184, 1188-90 (4th Cir. 1990) (money laundering scheme using front corporations and foreign bank accounts).

7. ***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. De Nieto***, 922 F.3d 669, 672-73 (5th Cir. 2019) (scheme to fraudulently claim tax refunds using stolen identities).

2. ***United States v. Montgomery***, 747 F.3d 303, 305-06 (5th Cir. 2014) (scheme to underreport gross receipts of contracting business).

3. ***United States v. Heard***, 709 F.3d 413, 418-19 (5th Cir. 2013) (opening and closing corporations,

changing company names, moving physical locations, using different versions of the company names, signing documents with fictitious names, and using mail drops to prevent the IRS from discovering the individuals operating these companies and from collecting unpaid employment taxes).

4. ***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).

5. ***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).

6. ***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).

7. ***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).

8. ***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. Bradley***, 917 F.3d 493, 498-99 (6th Cir. 2019) (scheme to impede assessment and collection of taxes on misappropriated state charter school funds through a series of fraudulent transfers).

2. ***United States v. Rozin***, 664 F.3d 1052, 1054-57 (6th Cir. 2012) (scheme involving bogus deductions from "loss of income" insurance policies).

3. ***United States v. Fisher***, 648 F.3d 442, 445 (6th Cir. 2011) (scheme to impede assessment and collection of employment taxes).

4. ***United States v. Damra***, 621 F.3d 474, 479-81 (6th Cir. 2010) (conspiracy to evade corporate tax by disguising personal payments as business expenses).

5. ***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).

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

7. ***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).

8. ***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).

9. ***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).

10. ***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. Vallone***, 698 F.3d 416, 432-45 (7th Cir. 2012) (promotion and sale of the abusive Aegis scheme, which involved the use of domestic and foreign trusts to conceal income and assets from the IRS, the preparation of fraudulent returns for clients, and making false representations to IRS

agents to defend the scheme during audits), *vacated on other grounds by* ***Dunn v. United States***, 570 U.S. 901 (2013); *see also* ***United States v. Wasson***, 679 F.3d 938, 941-42 (7th Cir. 2012) (same scheme); ***United States v. Hills***, 618 F.3d 619, 623-24 (7th Cir. 2010) (same).

2. ***United States v. McKinney***, 686 F.3d 432, 433-34 (7th Cir. 2012) (use of nominees to avoid collection of business's unpaid taxes).

3. ***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).

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

5. ***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).

6. ***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).

7. ***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).

8. ***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).

9. ***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. Keleta***, 949 F.3d 1082, 1085-86 (8th Cir. 2020) (scheme to claim tax credits for return-preparation clients for which the clients did not qualify).

2. ***United States v. Cole***, 721 F.3d 1016, 1019-21 (8th Cir. 2013) (scheme to impede assessment and collection of taxes on illegal-source income from billing fraud scheme).

3. ***United States v. Wirth***, 719 F.3d 911, 913-14 (8th Cir. 2013) (scheme to falsely claim personal expenses as business expenses)

4. ***United States v. Ellefsen***, 655 F.3d 769, 773-77 (8th Cir. 2011) (scheme to hide income in offshore trusts).

5. ***United States v. Maxwell***, 643 F.3d 1096, 1098-99 (8th Cir. 2011) (scheme to promote trust and nominee schemes and to prepare false returns).

6. ***United States v. Tucker***, 419 F.3d 719, 720 (8th Cir. 2005) (conspiracy to impede assessment and collection of corporate-level tax on the profitable sale of a company through a fraudulent transfer in a bankruptcy proceeding).

7. ***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).

8. ***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).

9. ***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).

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

11. ***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).

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

13. ***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. Kahre***, 737 F.3d 554, 559-60 (9th Cir. 2013) (per curiam) (scheme to impede assessment and collection of income and employment taxes by paying wages in gold and silver coins).

2. ***United States v. Jennings***, 711 F.3d 1144, 1145-46 (9th Cir. 2013) (scheme using nominee entity to disguise personal payments to owners of corporation as business expenses).

3. ***United States v. Meredith***, 685 F.3d 814, 817-19 (9th Cir. 2012) (scheme to promote and sell so-called "pure trusts").

4. ***United States v. Yip***, 592 F.3d 1035, 1036-37 (9th Cir. 2010) (scheme to impede assessment and collection of tax on income earned from off-the-books side business).

5. ***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).

6. ***United States v. Crooks***, 804 F.2d 1441, 1443-44, 1448 (9th Cir. 1986), *modified on denial of rehearing*, 826 F.2d 4 (9th Cir. 1987) (promotion and sale of interests in bogus mineral royalty tax shelters that cycled the same funds between the partnerships and lenders and payees under the promoters' control to create canceled checks that could be provided to the IRS as purported substantiation of the partnerships' bogus mineral royalty payments).

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

8. ***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. Ray***, 899 F.3d 852, 856-57 (10th Cir. 2018) (scheme to claim false deductions for job expenses and charitable contributions on returns prepared for clients).

2. ***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).

3. ***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).

4. ***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).

5. ***United States v. Pinto***, 838 F.2d 426, 428-29 (10th Cir. 1988) (conspirators concealed drug income by using cash to purchase a home, selling that home and purchasing two more homes, and devising sham mortgages purportedly encumbering the later-purchased homes to create the appearance that the purchase money came from loans).

6. ***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. Margarita Garcia***, 906 F.3d 1255 (11th Cir. 2018) (scheme to defraud by paying personal expenses through the business).

2. ***United States v. Shabazz***, 887 F.3d 1204, 1209-11 (11th Cir. 2018) (scheme to defraud using identifying information of prisoners obtained under false pretense of offering services of a charity for the prisoners' benefit).

3. ***United States v. Hough***, 803 F.3d 1181, 1184-85 (11th Cir. 2015) (hiding tens of millions of dollars from the sale of medical schools from the IRS through offshore bank accounts and nominee entities).

4. ***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).

5. ***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).

6. ***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).

7. ***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).

8. ***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 depreciation costs and investment credits were overstated).

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

10. ***United States v. Browning***, 723 F.2d 1544, 1545 (11th Cir. 1984) (money laundering scheme using 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. Davis***, 863 F.3d 894, 901 (D.C. 2017) (scheme to claim bogus deductions and

inflate income to qualify for the maximum Earned Income Tax Credit).

2. ***United States v. Hunter***, 809 F.3d 677, 679 (D.C. Cir. 2016) (promotion and sale of "tax defiance schemes" that included "Bills of Exchange" and frivolous complaints against IRS employees).

3. ***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).

4. ***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] Overbreadth Concerns

Prosecutors charging ***Klein*** conspiracies should be aware of some judicial decisions expressing concerns about the broad scope of the defraud clause.

The First Circuit has emphasized that, given the breadth of the defraud clause, "the fraud has to be a *purpose* or *object* of the conspiracy, and not merely a foreseeable consequence of the conspiratorial scheme" — although the court found that standard met in the case before it. ***United States v. Goldberg***, 105 F.3d 770, 773 (1st Cir. 1997). And the Second Circuit, in ***United States v. Coplan***, 703 F.3d 46, (2d Cir. 2012), *cert. denied* 571 U.S. 819 (2013), expressed "skepticism" about the correctness as an original matter of the Supreme Court's statutory interpretation of the defraud clause in ***Haas v. Henkel***, 216 U.S. 462 (1910), and ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924), while acknowledging that as an inferior court it was bound to follow those "long-lived Supreme Court decisions." 703 F.3d at 61-62. (Another decision, ***United States v. Minarik***, 875 F.2d 1186 (6th Cir. 1989), also expressed concern about the breadth of the defraud clause, though that decision has since been restricted to its facts. *See* ¶ 23.07[3],

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infra.) And in ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993), the Ninth Circuit held that a district court's jury instructions were deficient because the court did not tell the jurors that, in order to convict the defendant of a conspiracy to defraud the United States, they had to find that the defendant intended to do so by "deceitful or dishonest means." ***Caldwell***, 989 F.2d at 1060.

Prosecutors responding to judicial concerns about the breadth of the defraud clause, or to defendants citing ***Caldwell, Goldberg***, or ***Coplan***, should be familiar with those decisions and understand the limits of their holdings. ***Caldwell*** and ***Goldberg*** did not question the current scope of the defraud clause but instead discussed why the clause's scope should not be enlarged. And ***Coplan***, although it questioned the "*Klein* doctrine," correctly recognized that the doctrine comes not from the Second Circuit's decision in ***Klein*** but from century-old Supreme Court precedents in ***Haas*** and ***Hammerschmidt***. None of these decisions provides a basis for a lower court to depart from the well-established precedent governing the defraud clause.

23.07[2][d] Precedent Governing Different Statutes

Defendants sometimes attempt to attack the ***Klein*** doctrine using recent Supreme Court decisions where the Court has restricted the reach of different statutes. *See, e.g.*, ***Kelly v. United States***, 140 S. Ct. 1565 (2020) ("property fraud" statutes, including mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, and federal-program fraud, 18 U.S.C. § 666); ***Marinello v. United States***, 138 S. Ct. 1101 (2018) ("tax obstruction" statute, 26 U.S.C. § 7212(a), discussed in ¶17.04, *supra*); ***Skilling v. United States***, 561 U.S. 358 (2010) ("honest services" fraud, 18 U.S.C. § 1346).

These decisions have no relevance to Section 371 or the defraud clause. The government successfully rebutted such an argument in ***United States v. Atilla***, 966 F. 3d 118 (2d Cir. 2020). Atilla was convicted of violating Section 371 by conspiring to obstruct the lawful functions of the Treasury Department in enforcing the laws imposing economic sanctions on Iran. ***Id.*** at 121-23. Atilla challenged this conviction, relying on ***Marinello*** to argue that "that the defraud clause should be construed narrowly to avoid vagueness concerns." ***Id.*** at 130-31. The court, however, found the analogy to ***<u>Marinello</u>*** "inapposite because in that case, the Supreme Court analyzed 26 U.S.C. § 7212(a)'s

unique text, context, and history – which are wholly unrelated to § 371's defraud clause." ***Ibid.***

United States v. Flynn, ___ F.3d ___, 2020 WL 4687010 (8th Cir. Aug. 13, 2020), likewise declined to apply ***Marinello*** to the defraud clause. Flynn pleaded guilty to a ***Klein*** conspiracy and unsuccessfully sought to withdraw his guilty plea before sentencing. ***Id.*** at *1-2. Flynn argued on appeal that his guilty plea lacked a factual basis because ***Marinello***, which requires proof of a nexus to a pending or reasonably foreseeable targeted to sustain a tax obstruction conviction under § 7212(a), requires proof of a similar "nexus" to establish a ***Klein*** conspiracy. ***Id.*** at *3-4. This is so, Flynn maintained, because § 371's defraud clause is otherwise void for vagueness. ***Id.*** at *4-5 & n.4.

Flynn rejected these arguments, concluding that "***Marinello*** did not alter ***Klein*** conspiracies." 2020 WL 4687010 at *3-5 & n.4. The court explained that, unlike § 7212(a), "the broad language in § 371 makes no reference to 'the due administration [of the Internal Revenue Code].'" ***Id.*** at 4. And ***Flynn*** reasoned that because "the broad scope of ***Klein*** conspiracies is sanctioned in 'long-lived Supreme Court decisions' . . . arguments aimed at narrowing it 'are properly directed to a higher authority.'" ***Ibid.*** (quoting ***Coplan***, 703 F.3d at 62).

23.07[3] Overlapping Conspiracies and the Sixth Circuit's **Minarik** *Decision*

As noted, 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 stated 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.

Subsequent Sixth Circuit decisions, however, have "confined the [***Minarik***] decision to its facts." ***United States v. Damra***, 621 F.3d 474, 506 (6th Cir. 2010); *see also* ***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); ***United States v. Kraig***, 99 F.3d 1361, 1364-68 (6th Cir. 1996); ***United States v. Khalife***, 106 F.3d 1300, 1303-04 (6th Cir. 1997); ***United States v. Rozin***, 664 F.3d 1052, 1064-66 (6th Cir. 2012). These cases have held that ***Minarik*** is applicable "only when the defendant receives no specific notice of the crimes charged, the violation was too isolated to comprise a conspiracy to defraud, and the taxpayer's duties are technical." ***Damra***, 621 F.3d at 507; *see also* ***Khalife***, 106 F.3d at 1303-04 (elaborating upon these requirements, and concluding that ***Minarik***'s statement regarding the application of the offense and defraud clauses of § 371 was "[d]icta").

Other circuits have rejected ***Minarik*** entirely 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); ***United States v. Haga***, 821 F.2d 1036, 1044-45 (5th Cir. 1987).

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 deceptively 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] Multiple Purposes

Although each member of the conspiracy must intend to deceptively impede the IRS, that need not be the exclusive or even primary purpose of the conspiracy. *Cf.* ¶ 8.06[3], *supra* (explaining that a defendant is guilty under Section 7201 if tax evasion "plays any part" in the defendant's conduct, even if there are other purposes, as well, such as concealment of a crime, quoting ***Spies v. United States***, 317 U.S. 492, 499 (1943)).

In ***Goldberg***, the First Circuit, although expressing concern about the breadth of the ***Klein*** doctrine, *see* ¶ 23.07[2][c], *supra*, nonetheless rejected the argument that deceptively impeding the IRS must be the "primary purpose" of a ***Klein*** conspiracy:

> [Goldberg] argues, inventively, that the conspirators either must have as their primary purpose the aim of frustrating the IRS or must be agreeing to undertake the conduct in question to conceal some other crime. An example of the first alternative (primary purpose) is ***Klein*** itself where a web of shell companies and deceptive arrangements was devised to evade taxes; the second alternative captures the money laundering precedents.
>
> This view of section 371 might explain a number of cases and create a barrier against overreaching by prosecutors. But it makes no doctrinal sense. A conspiracy can have multiple objects, ***Ingram v. United States***, 360 U.S. 672, 679-80 (1959), and any agreed-upon object can be a purpose of the conspiracy and used to define its character.

105 F.3d at 773-74. Having rejected the "primary purpose" argument, ***Goldberg*** clarified that "interfering with government functions" must be "*a* purpose" of the conspiracy, as opposed to "merely a foreseeable effect of joint action taken for other reasons." ***Id.*** at 774 (emphasis added); *see also* ***United States v. Gricco***, 277 F.3d 339, 348 (3d Cir. 2002), *overruled on other grounds*, ***United States v. Cesare,*** 581 F.3d 206, 208 n.3 (3d Cir. 2009); ***United States v. Adkinson***, 158 F.3d 1147, 1155 (11th Cir. 1998).

Even in the absence of a "primary purpose" rule of the sort that ***Goldberg*** rejected, the requirement to prove that interfering with the IRS's operations is a purpose of a ***Klein*** conspiracy, rather than a mere foreseeable consequence, is a significant requirement. ***Goldberg*** itself concluded that the two conspiracies to defraud at issue in the case "f[e]ll within the outer bounds of Section 371." ***Id.*** at 775. ***Goldberg*** nonetheless found sufficient evidence that these conspiracies — both of which had non-tax objects relating to Goldberg's efforts to derail a harbor tunnel project that he believed would harm his businesses — also had tax-obstructive purposes because both conspiracies involved "falsify[ing] IRS documents to misstate or misattribute income." ***Id.*** at 771-72, 774-75. But ***Goldberg*** cautioned, in dictum, that "[t]his would be a different case if, without filing false tax documents, Goldberg had agreed with his partners to pay [someone] under the table, knowing that [person] had no intention of reporting the money to the IRS." ***Id.*** at 774.

In ***United States v. Pappathanasi***, 383 F. Supp. 2d 289 (D. Mass. 2005), the district relied upon ***Goldberg*** to grant the defendants' motion for a judgment of acquittal on a ***Klein*** conspiracy charge. A jury found the ***Pappathanasi*** defendants guilty of a ***Klein*** conspiracy that "involved a rebate program for the sale of light cream by [defendants' company named] WLC to Dunkin' Donut stores, in which WLC allegedly gave franchisees inflated invoices and then rebated the difference back to them in checks and cash." ***Id.*** at 290. The district court, in overturning the jury's verdict, observed that, unlike in ***Goldberg***, "neither the defendants nor WLC filed any false documents with the IRS." ***Id.*** at 295. Relying on ***Goldberg***'s dictum, the district court concluded that the evidence of a tax-obstructive purpose was insufficient even though "[s]ome of the Dunkin' Donuts franchisees' rebates were paid in cash, and it could be inferred that [one of the defendants] knew that they might not pay taxes on the money." ***Ibid.***

23.07[4][c] **Klein** ***Conspiracy Coupled with a Narcotics or Money Laundering Prosecution***

In some cases, prosecutors will charge a ***Klein*** conspiracy in conjunction with narcotics or money laundering charges. Such cases typically involve the failure to report income derived from the sale of narcotics 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 co-conspirators 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 ***Ingram*** Court 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. According to the court, in ***Enstam*** and ***Browning***, the government "offered independent evidence of an intent to avoid income taxes,"[7] 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.

Consistent with the Fifth and Eleventh Circuits' decisions in ***Enstam*** and ***Browning***, other circuits have also sustained convictions 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. Beverly***, 913 F.2d 337, 357-58 (7th Cir. 1990); ***United States v. Vogt***, 910 F.2d

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[7] That evidence consisted primarily of statements made by co-conspirators evincing an intent to avoid taxes. 908 F.2d at 822.

1184, 1202-03 (4th Cir. 1990); ***United States v. Bucey***, 876 F.2d 1297, 1311-13 (7th Cir. 1989).

The First Circuit, in contrast, 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 with establishing independent proof of the tax motive. The government must establish (1) that the defendant participated in or knew about a 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); *see also* ***United States v. Salmonese***, 352 F.3d 608, 614 (2d Cir. 2003) (noting "the requirement for an overt act within the limitations period"). And because statutes of limitation and venue requirements serve distinct purposes, the overt act serving to make the conspiracy timely need not be committed in the district in which the defendant is charged. ***United States v. Tannenbaum***, 934 F.2d 8, 12-13 (2d Cir. 1991).

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 accomplished, or until 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). *See also* ***United States v. Jimenez Recio***, 537 U.S. 270 (2003) (a conspiracy does not automatically terminate simply because the Government has defeated its object).

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 that demonstrates one has abandoned 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 full burden of establishing this affirmative defense; the burden does not shift to the government merely because the defendant "produces some evidence supporting such a defense." ***Smith v. United States***, 568 U.S. 106, 107, 110-12 (2013).

In short, the government technically is not required to prove that each member of the conspiracy committed an overt act within the limitations period. Indeed, a defendant cannot raise such a "statute-of-limitations bar for the first time on appeal." ***Musacchio v. United States***, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016).[8] In practice, however, a prosecutor should critically review those conspirators whose membership predates the limitations period and be prepared to rebut any withdrawal defense based on the statute of limitations.

23.09 CO-CONSPIRATOR STATEMENTS

Statements made by a co-conspirator as part of a conspiracy are not excluded from evidence by the hearsay rule or the Confrontation Clause of the Sixth Amendment. Fed. R. Evid. 801(d)(2)(E); ***Crawford v. Washington***, 541 U.S. 36, 56 (2004) ("by their nature . . . statements in furtherance of a conspiracy" are "not testimonial"). Whether a statement qualifies as a co-conspirator statement must be proved by a preponderance of the evidence, and the court must consider the statement itself in determining whether there existed a conspiracy and whether the statement was in furtherance of the conspiracy. ***Bourjaily v. United States***, 483 U.S. 171 (1987). There also must be some independent corroborating evidence: although "[t]he statement must be considered," it

[8] Some circuits have indicated, however, that a defendant may still attempt to premise a claim of ineffective assistance of counsel on a failure to raise a limitations defense, even after ***Musacchio***. *See, e.g.,* ***United States v. Samchuk***, 739 Fed. App'x 460, 461 (9th Cir. 2018) (declining to address issue on direct appeal, and observing that the ineffective assistance "claim is better suited for review in a [collateral] proceeding . . . under 28 U.S.C. § 2255").

"does not by itself establish . . . the existence of the conspiracy or participation in it." Fed. R. Evid. 801(d).

Because the existence of a conspiracy for the purpose of introducing a co-conspirator statement is a preliminary, factual question for the court, *see* Fed. R. Evid. 104; ***Bourjaily***, 483 U.S. at 181, "it is not necessary that the conspiracy upon which admissibility of the statement is predicated be that [conspiracy] charged" in the indictment. ***United States v. El-Mezain***, 664 F.3d 467, 502 (5th Cir. 2011). Indeed, many courts have concluded that the "conspiracy" need not be criminal at all. The subsection excluding co-conspirator statements from the definition of "hearsay" in Rule 801(d)(2) deals with statements by an "opposing party," including the defendant's own statements and statements by a defendant's agent. *See* Fed. R. Evid. 801(a), (c); *see also* ***id.***, Notes of Committee on the Judiciary, Senate Report No. 93–1277. Accordingly, numerous courts of appeals have concluded that the "conspiracy" referred to in Rule 801(d)(2)(E) includes joint undertakings generally, both legal and illegal. *See* ***United States v. Russo***, 302 F.3d 37, 45 (2d Cir. 2002) (collecting cases) ("[T]he objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all."); *see also* ***Government of the Virgin Islands v. Brathwaite***, 782 F.2d 399, 403 & n.1 (3d Cir. 1986); ***United States v. Nelson***, 732 F.3d 504, 516 (5th Cir. 2013); ***United States v. Porter***, 933 F.2d 1010 (6th Cir. 1991); ***United States v. Kelley***, 864 F.2d 569, 573 (7th Cir. 1989); ***United States v. Layton***, 855 F.2d 1388, 1400 (9th Cir. 1988); ***United States v. Bucaro***, 801 F.2d 1230, 1232 (10th Cir. 1986); ***United States v. Brockenborrugh***, 575 F.3d 726, 735 (D.C. Cir. 2009).

In the usual conspiracy prosecution, however, there will be substantial overlap between the evidence needed to prove the existence of a conspiracy to the court (to establish applicability of the co-conspirator exception by a preponderance of the evidence) and the evidence needed to prove the existence of a conspiracy to the jury (to prove the conspiracy charged in the indictment beyond a reasonable doubt). Circuit practice varies as to how and when the government must meet these two distinct burdens. A number of circuits encourage district courts to conditionally admit co-conspirator statements and then evaluate, at the conclusion of the government's case, whether the government met its burden of proving the conspiracy by a preponderance of the evidence. *See* ***United Sates v. Correa-Osorio***, 784 F.3d 11, 23-24 (1st Cir. 2015); ***United States v.***

Tracy, 12 F.3d 1186, 1199-1200 (2d Cir. 1993); ***United States v. Blevins***, 960 F.2d 1252, 1256 (4th Cir. 1992); ***United States v. Cardena***, 842 F.3d 959, 994-95 (7th Cir. 2016); ***United States v. Cazares***, 521 F.3d 991, 998 n. 5 (8th Cir. 2008). In other circuits, a district court will generally hold a pretrial hearing, often called a ***James*** hearing after the Fifth Circuit's decision in ***United States v. James***, 590 F.2d 575 (5th Cir. 1979) (en banc), to determine whether a conspiracy existed and whether the statements sought to be offered were made in furtherance of that conspiracy. *See* ***id.*** at 581-82 ("The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator."); ***United States v. Urena***, 27 F.3d 1487, 1491 (10th Cir. 1994) ("The strongly preferred order of proof in determining the admissibility of an alleged co-conspirator statement is first to hold a *James* hearing, outside the presence of the jury to determine by a preponderance of the evidence the existence of a predicate conspiracy."). Other circuits leave the question of whether to hold a pretrial hearing or to conditionally admit the statement entirely to the trial judge. *See, e.g.*, ***United States v. Weaver***, 507 F.3d 178, 187-88 (3d Cir. 2007). Even in the circuits that prefer a ***James*** hearing, however, such a hearing is a matter of discretion, not a requirement. *See* ***United States v. Gonzalez-Balderas***, 11 F.3d 1218, 1224 (5th Cir. 1994); ***United States v. Hewes***, 729 F.2d 1302, 1312 (11th Cir. 1984).

23.10 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); ***Smith v. United States***, 568 U.S. 106, 111 (2013) ("Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence") (cleaned up); ***United States v. Tannenbaum***, 934 F.2d 8, 12 (2d Cir. 1991); *see also* ***United States v. Askia***, 893 F.3d 1110, 1119 (8th Cir. 2018) (referring to conspiracy as a "well-established continuing offense[]" for statute-of-limitations purposes); ***United States v. Jaynes***, 75 F.3d 1493, 1505 (10th Cir. 1996) ("prototypical continuing offense"). The government must establish venue by a preponderance of the evidence. *E.g.*, ***United States v. Lukashov***, 694 F.3d 1107, 1120 (9th Cir. 2012); ***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.*, ***Tannenbaum***, 934 F.2d at 13; ***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).

23.11 SENTENCING GUIDELINES

Conspiracies under the offense clause and the defraud clause of Section 371 are governed by different provisions of the Sentencing Guidelines. The general Guidelines

provision for conspiracies, USSG § 2X1.1, applies to offense-clause conspiracies, while ***Klein*** conspiracies are specifically covered by USSG § 2T1.9. *See* ¶ 16.02[6], *supra*; ¶ 43.03[1][g], *infra*; *see also* USSG App. A (statutory index).

Under Section 2X1.1(a), the base offense level is the "base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." Under this provision, "the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied." USSG § 2X1.1 comment. (n.2).

The offense level under Section 2X1.1 is decreased by three levels "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." USSG § 2X1.1(b)(2). The Guidelines commentary explains that, for "most prosecutions for conspiracies, . . . no reduction of the offense level is warranted" under this provision because "the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim." USSG § 2X1.1 comment. (backg'd).

Under Section 2T1.9, the base offense level is the offense level — including any applicable specific offense characteristics — from § 2T1.1 (which covers most tax crimes) or § 2T1.4 (which specifically covers aiding and assisting in the filing of false returns), "as appropriate," but the offense level is increased to a minimum of 10 if either of those provisions yields an offense level lower than 10. USSG § 2T1.9(a), comment. (n.2).[9] There are also offense-level enhancements for planned or threatened use of

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[9] In ***United States v. Kraig***, 99 F.3d 1361 (6th Cir. 1996), the defendant argued that his offense level should be 10 under this provision because "his offense is not similar to either of the tax offenses covered by sections 2T1.1 or 2T1.3," which the version of 2T1.9 then applicable cross-referenced instead

violence (four levels) or for "encourag[ing] persons other than or in addition to co-conspirators to violate the internal revenue laws" (two levels), but if both these enhancements apply, only "the greater" 4 level enhancement is applied. USSG 2T1.9(b); *see also* ***United States v. Hopper***, 177 F.3d 824, 833 (9th Cir. 1999) (remanding for resentencing because both enhancements were applied). The enhancement for encouraging others besides co-conspirators to violate the internal revenue laws cannot be applied in addition to the enhancements under § 2T1.4(b)(1) for being in the business of preparing false returns, deriving substantial income from the scheme, or using sophisticated means in carrying out the offense. *See* USSG § 2T1.9(b)(2).

Application note 4 to Section 2T1.9 explains that "[s]ubsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws," and gives two examples of offenses to which the enhancement applies: "an offense involving a 'tax protest' group that encourages persons to violate the tax laws," and "an offense involving the marketing of fraudulent tax shelters or schemes." *See also, e.g.,* ***United States v. Reinke***, 283 F.3d 918, 920-21 (8th Cir. 2003) (applying enhancement where defendants "marketed and sold hundreds of trusts" and falsely "told trust purchasers that they could assign their assets and income to the trusts and then deduct from their taxes the money that they paid for personal living expenses"); ***United States v. Fant***, 180 F.3d 261 (Table), 1999 WL 274489, at *1 (5th Cir. 1999) (per curiam) (applying enhancement where defendant "invited someone who was not a coconspirator to a 'tax protest' meeting for the purpose of encouraging him to violate the tax laws"). The enhancement's application, however, is not limited to these examples, and prosecutors should seek the enhancement where it applies. *See* ***United States v. Macchia***, 104 F.3d 350 (Table), 1996 WL 518509, at *3 (2d Cir. 1996) (rejecting argument that enhancement applies only to

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of Section 2T1.4. ***Id.*** at 1370. The court, however, rejected this argument, concluding that "the plain language of the guideline directs that one of these two sections is to be used" if the offense level under the "most applicable" of those two sections is greater than 10. ***Ibid.***; *see also* USSG § 2T1.9, comment. (n.2) (directing the use of "whichever guideline [2T1.1 or 2T1.4] most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service").

"tax protest groups and promoters of fraudulent tax shelters," and applying it where the defendant encouraged others to prepare false invoices so he and his co-conspirators could evade gasoline excise taxes); ***United States v. Rabin***, 986 F. Supp. 887, 890-91 (D. N.J. 1997) (where agreement in *Klein* conspiracy was between company manager and company union representative, enhancement applied where a girlfriend and an attorney were encouraged to violate tax laws).

In ***United States v. Sabino***, 307 F.3d 446 (6th Cir. 2002), the court rejected the defendants' argument that it was improper double-counting to impose an obstruction of justice enhancement under USSG § 3C1.1 for providing false grand jury testimony when they were convicted of a ***Klein*** conspiracy and sentenced under Section 2T1.9. Although the defendants' false statements to the grand jury were alleged as overt acts in furtherance of the conspiracy, the court reasoned that because Section 2T1.9 "applies to conspiracies under § 371 that are designed to 'defraud the United States by impeding, impairing, obstructing, and defeating . . . the collection of revenue,'" there was "no reason to conclude that this guideline takes into consideration a defendant's obstruction of the administration of justice in furtherance of the fraudulent scheme, such as giving false testimony before the grand jury or bribing a witness." ***Id.*** at 450-51 (quoting USSG 2T1.9, comment. (n.1)).