Criminal Tax Manual
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23.00 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

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

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

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined*

not more than $10,000 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.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623, which increased the maximum permissible fines for misdemeanors and felonies. Where 18 U.S.C. § 3623 [FN1] is applicable, the maximum fine under section 371 for felony offenses committed after December 31, 1984, would be 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. [FN2] As a result, tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371, the general conspiracy statute. Section 371 sets out two types of conspiracies. *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. Helmsley*, 941 F.2d 71, 90 (2d Cir. 1991); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993).

Section 371 may also be violated by conspiring or agreeing to defraud the United States. "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). *See also*, *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir.1996). In criminal tax prosecutions, this conduct is typically charged as a "Klein conspiracy," where the government alleges the defendant conspired to defraud the United States for the purpose of "impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes." *United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957). *See also United States v. Furkin*, 119 F.3d 1276, 1280-81 (7th Cir. 1996); *Kraig*, 99 F.3d at 1366; *United States v. Sturman*, 951 F.2d 1466, 1472 (6th Cir. 1991); *Alexander v. Thornburgh*, 943 F.2d 825, 829 (8th Cir. 1991); *Helmsley*, 941 F.2d at 90-91; *United States v. Vogt*, 910 F.2d 1184, 1202 (4th Cir. 1990); *United States v. Cambara*, 902 F.2d 144, 146 (1st Cir. 1990).

The body of law on conspiracy covers a large number of issues which have been thoroughly analyzed and summarized in various treatises and other sources. *See, e.g.,* P. Marcus, *Prosecution and Defense of Criminal Conspiracy Cases* (1979); O,Malley, Grenig, and Lee, *Federal Jury Practice and Instructions: Criminal*, ch. 31 (5th Ed. 2000) (successor to Devitt & Blackmar); Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959). As such, the following discussion is intended to highlight only those issues relevant to criminal tax prosecutions.

23.03 **ELEMENTS**

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

1. The existence of an agreement by two or more persons to commit an offense against the United States or defraud the United States;

2. The defendant's knowing and voluntary participation in the conspiracy; and

3. The commission of an overt act in furtherance of the conspiracy. [FN3]

United States v. Falcone, 311 U.S. 205, 210 (1940); *United States v. Hitt*, 249 F.3d 1010, 1015 (D.C. Cir. 2001); *United States v. Fleschner*, 98 F3d 155, 159-60 (4th Cir. 1996); *United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989); *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir. 1989); *United States v. Mealy*, 851 F.2d 890, 896 (7th Cir. 1988); *United States v. Wiley*, 846 F.2d 150, 153-54 (2d Cir. 1988); *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987); *United States v. Penagos*, 823 F.2d 346, 348 (9th Cir. 1987); *United States v. Gonzalez*, 797 F.2d 915, 916 (10th Cir. 1986); *United States v. Porter*, 764 F.2d 1, 15 (1st Cir. 1985); *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986); *United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985); *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973).

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). Stated another way, without an agreement there can be no conspiracy. Further, because the agreement is the essence of the crime, success of the conspiracy is irrelevant. *United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990); *United States v. Kibby*, 848 F.2d 920, 922 (8th Cir. 1988); *United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir. 1982);. It is for this reason that a defendant may be charged with conspiracy as well as the substantive offense which served as the object of the conspiracy. *Iannelli v. United States*, 420 U.S. 770, 791 (1975); *Pinkerton v. United States*, 328 U.S. 640, 645-46 (1946).

The agreement need not be expressly stated, be in writing, or cover all the details of how it is to be carried out. *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, 328 (4th Cir. 1991); *United States v. Hopkins*, 916 F.2d 207, 212 (5th Cir. 1990); *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990); *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988).

Rather, the existence of an agreement may be proved by inference from the actions and statements of the conspirators or from the surrounding circumstances of the scheme. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Collins*, 78 F.3d. 1021, 1037 (6th Cir. 1996); *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. Mariani*, 725 F.2d 862, 865-66 (2d Cir. 1984); *United States v. Ballard*, 663 F.2d 534, 543 (6th Cir. 1981).

Moreover, 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. *United States v. Gonzalez*, 940 F.2d 1413, 1417 (11th Cir. 1991); *United States v. McNeese*, 901 F.2d 585, 599 (7th Cir. 1990); *United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir. 1988).

23.04[2] **Two or More Persons**

A defendant cannot conspire with himself or herself. *Morrison v. California*, 291 U.S. 82, 92 (1934). In order to establish the existence of

an agreement, the government must show that the defendant and at least one other person reached an understanding or agreement to carry out the objective of the conspiracy. *United States v. Giry*, 818 F.2d 120, 125 (1st Cir. 1987); *United States v. Barnes*, 604 F.2d 121, 161 (2d Cir. 1979); *United States v. Chase*, 372 F.2d 453, 459 (4th Cir. 1967); *Sears v. United States*, 343 F.2d 139, 141-42 (5th Cir. 1965).

It makes no difference whether the other person is another defendant or even named in the indictment. *Rogers v. United States*, 340 U.S. 367, 375 (1951) ("identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown"). *See also United States v. 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 (5th Cir. 1990); *United States v. Allen*, 613 F.2d 1248, 1253 (3d Cir. 1980); *United States v. Anderson*, 611 F.2d 504, 511 (4th Cir. 1979);.

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

Prosecutors should be aware that it is the position of the Department of Justice that, in the absence of some sound reason, it is not desirable to identify unindicted coconspirators in conspiracy indictments. United States Attorneys' Manual (USAM) 9-11.130 (Sept. 1997). The recommended practice in such cases is to merely allege that the defendant "conspired with another person or persons known to the grand jury" and supply the identity, if requested, in a bill of particulars. The above policy does not apply, however, where the fact of the person's conspiratorial involvement is a matter of public record or knowledge.

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. *Rogers v. United States*, 340 U.S. 367, 375 (1951); *Morrison v. California*, 291 U.S. 82, 92 (1934); *United States v. Giry*, 818 F.2d 120, 125 (1st Cir. 1987); *United States v. Escobar de Bright*, 742 F.2d 1096, 1099 (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);

Even though it is impossible to conspire with an undercover agent or informer, this issue should be distinguished from instances where a valid agreement exists between two or more conspirators, one of whom committed overt acts solely with a government agent. In these situations, it is proper to charge and prove at trial an overt act that involves only one of the conspirators and an undercover agent. *United States v. Enstam*, 622 F.2d 857, 867 (5th Cir. 1980).

23.04[2][c] **Corporations as Conspirators**

A corporation may be criminally liable for conspiracy under section 371. *United States v. Stevens*, 909 F.2d 431, 432-34 (11th Cir. 1990); *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 (6th Cir. 1990); *United States v. Hartley*, 678 F.2d 961, 972 (11th Cir. 1982).

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

A single conspiracy may have multiple objectives and involve a number of sub-agreements to commit each of the specified objectives. *Braverman v. United States*, 317 U.S. 49, 53 (1942); *United States v. Berger*, 224 F.3d 107, 113-115 (2d Cir. 2000); *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. Rodriguez*, 585 F.2d 1234, 1248-49 (5th Cir. 1978). Multiple-object conspiracy cases frequently raise the issue of single or multiple conspiracies. In determining whether a single conspiracy or multiple conspiracies exist, the courts consider whether there is one agreement to commit multiple objectives or more than one agreement, each with a separate object. The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. *See Berger*, 224 F.3d at113-115; *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 (9th Cir. 1983); *United States v. Warner*, 690 F.2d 545, 548-49 (6th Cir. 1982).

A single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles. *United States v. Richerson*, 833 F.2d 1147, 1153-54 (5th Cir. 1987); *United States v. Spector*, 793 F.2d 932, 935-36 (8th Cir. 1986); *United States v. Cambindo-Valencia*, 609 F.2d 603, 625 (2d Cir. 1979); *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir. 1975). In determining whether there is a single conspiracy or multiple conspiracies, the courts apply a totality of the circumstances test under which a combination of the following factors are considered: (1) commonality of goals; (2) nature of the scheme; and (3) overlapping of participants in the various dealings. *See Berger*, 224 F.3d at114-115; *United States v. David*, 940 F.2d 722, 724 (10th 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); *United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir. 1984); *United States v. Mayo*, 646 F.2d 369, 372 (9th Cir. 1981); *United States v. Bastone*, 526 F.2d 971, 979-80 (7th Cir. 1975);. *See also United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978) (court looks to (1) time; (2) coconspirators; (3) statutory offenses charged; (4) overt acts charged; and, (5) location where the events took place).

23.05 **MEMBERSHIP**

23.05[1] **Intent Requirement**

In order to establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and that he or she intended to join it and to accomplish the object of the conspiracy. *See United States v. Berger*, 224 F.3d 107, 114-115 (2d Cir. 2000); *United States v. Dale*, 991 F.2d 819, 851 (D.C. Cir. 1993); *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. Esparza*, 876 F.2d 1390, 1392 (9th Cir. 1989); *United States v. Rankin*, 870 F.2d 109, 113 (3d Cir.1989); *United States v. Yanin*, 868 F.2d 130, 133 (5th Cir. 1989); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States v. Southland*, 760 F.2d 1366, 1169 (2d Cir. 1985); *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, 740 (10th Cir. 1991); *United States v. Noble*, 754 F.2d 1324, 1327 (7th Cir. 1985); *United States v. Massa*, 740 F.2d 629, 636 (8th Cir. 1984); *United States v. Diecidue*, 603 F.2d 535, 548 (5th Cir. 1979).

Similarly, a defendant may become a member of a conspiracy even if that person agrees to play a minor role in the conspiracy, so long as he or she understands the essential nature of the scheme and intentionally joins in it. *United States v. Andrews*, 953 F.2d 1312, 1318 (11th Cir. 1992); *United States v. Medina*, 940 F.2d 1247, 1250 (9th Cir. 1991); *United States v. Warner*, 690 F.2d 545, 550 (6th Cir. 1982).

23.05[2] **Proof of Membership**

Although the government must prove that a defendant was a member of a conspiracy, this requirement may be satisfied by a showing of only a "slight connection" to the conspiracy so long as the connection is proven beyond a reasonable doubt. *United States v. Boone*, 951 F.2d 1526, 1543 (9th Cir. 1991); *United States v. Moya-Gomez*, 860 F.2d 706, 758-59 (7th Cir. 1988); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986).

A defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. *United States v. Hayes*, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1388 (2001); *United States v. David*, 940 F.2d 722, 724 (1st Cir. 1991); *United States v. Beale*, 921 F.2d 1412, 1430 (11th Cir. 1991); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986). Generally, this knowledge can be inferred from the defendant's own acts and statements. *United States v. Kane*, 944 F.2d 1406, 1410 (7th Cir. 1991); *United States v. Martin*, 920 F.2d 345, 348 (6th Cir. 1990).

Mere presence at the scene of a transaction or event is insufficient, of itself, to make someone a member of a conspiracy. *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 others or merely associating with others does not prove that someone joined in an agreement or understanding. *United States v. Davenport*, 808 F.2d 1212, 1218 (6th Cir. 1987); *United States v. Apker*, 705 F.2d 293, 298 (8th Cir. 1983). Also, mere knowledge that something illegal is going on is insufficient to show membership in a conspiracy. *United States v. Schmidt*, 947 F.2d 362, 365 (9th Cir. 1991); *United States v. Brown*, 584 F.2d 252, 260 (8th Cir. 1978); *United States v. Webb*, 359 F.2d 558, 562 (6th Cir. 1966).

23.05[3] **Pinkerton Liability**

A conspirator is responsible for offenses committed by another member of the conspiracy if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946). The government is not required to prove that each defendant specifically agreed to commit the offense or knew that the offense would be committed. *United States v. Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982); *United States v. Etheridge*, 424 F.2d 951, 965 (6th Cir. 1970). Rather, it is sufficient if the government establishes that the offense was in furtherance of the conspiracy or was reasonably foreseen as a necessary or natural consequence of the unlawful agreement. *United States v. Carpenter*, 961 F.2d 824, 828 (9th Cir. 1992); *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991); *United States v. Cummings*, 937 F.2d 941, 944 (4th Cir. 1991); *United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990); *United States v. Redwine*, 715 F.2d 315, 322 (7th Cir. 1983); *United States v. Heater*, 689 F.2d 783, 788 (8th Cir. 1982); *United States v. Tilton*, 610 F.2d 302, 309 (5th Cir. 1980); *United States v. Van Hee*, 531 F.2d 352, 357 (6th Cir. 1976);

Moreover, there is some authority for the proposition that a person who joins a conspiracy adopts the prior acts of the other conspirators and may be held responsible for offenses committed before he or she joined the conspiracy. *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992); *United States v. Cimini*, 427 F.2d 129, 130 (6th Cir. 1970).

23.06 **OVERT ACT**

23.06[1] **Definition**

In order to establish a conspiracy, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy. The function of the overt act requirement is to show that the conspiracy is at work and is simply not an agreement existing solely in the minds of the conspirators. *Yates v. United States*, 354 U.S. 298, 334 (1957); *United States v. Arboleda*, 929 F.2d 858, 865 (1st Cir. 1991).

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). 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. at 334; *Braverman v. United States*, 317 U.S. 49, 53-54 (1942); *United States v. Touhey*, 867 F.2d 534, 537)9th Cir. 1989). Indeed, it may be totally legal in itself. *See United States v. Hermes*, 847 F.2d 493, 495 (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. *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985); *United States v. Zielie*, 734 F.2d 1447, 1456 (11th Cir. 1984); *United States v. Anderson*, 611 F.2d 504, 510 (4th Cir. 1979).

Also, it is not essential that the government establish that each conspirator knew of all the activities of the other conspirators, or that each conspirator participated in all of the activities of the conspiracy. *United States v. Berger*, 224 F.3d 107, 114-115 (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).

In connection with pre-trail discovery of overt acts, the government is not required to disclose all of the overt acts it will 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). Moreover, the government may prove at trial overt acts not charged in the indictment. *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir. 1985); *United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979); *United States v. Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978); *United States v. Fassoulis*, 445 F.2d 13, 19 (2d Cir. 1971).

23.06[2] **Acts of Concealment**

Acts of concealment may constitute overt acts. However, these acts are only admissible if they were committed prior to the object of the conspiracy being fully accomplished. Once 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 obtained, for the purpose only of covering up after the crime." 353 U.S. at 405.

In the context of criminal tax conspiracies, the object of the crime is usually to conceal income and expenses from the IRS. Indeed, the very definition of an affirmative act of tax evasion is "any conduct, the likely effect of which

would be to mislead or conceal." *Spies v. United States*, 317 U.S. 492, 499 (1943). Overt acts in furtherance of conspiracies to defraud the United States in connection with tax assessment and collection or to commit tax offenses generally involve acts which mislead or conceal. Thus, criminal tax conspiracies usually contemplate acts of concealment to further the crime and such acts are admissible as overt acts. *See*, *e.g.*, *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. Cunningham*, 723 F.2d 217, 229 (2d Cir. 1983); *United States v. Mackey*, 571 F.2d 376, 383-84 (7th Cir. 1978); *United States v. Feldman*, 731 F. Supp. 1189, 1197 (S.D.N.Y. 1990). Note that care must be taken when drafting an indictment charging a conspiracy contemplating concealment. If the indictment is not properly drafted to include concealment as an object of the conspiracy, *Grunewald* might preclude the admission into evidence of certain acts of concealment.

23.07 **CONSPIRACY TO DEFRAUD THE UNITED STATES**

23.07[1] **Generally**

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

Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies.

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

The offense clause requires reference in the indictment to another criminal statute which 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. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991); *United States v. Minarik*, 875 F.2d 1186, 1187 (6th Cir. 1989) (*see* later discussion on Overlapping Conspiracies; Section 23.07[3], *supra*). In criminal tax prosecutions, section 371 is used to charge conspiracies to commit tax offenses and/or to defraud the Internal Revenue Service. *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);.

It should be noted that although section 371 provides for two distinct types of violations, the courts have consistently held that the statute provides for one offense, not two. *United States v. Hope*, 861 F.2d 1574, 1578 n.8 (11th Cir. 1988); *Braverman v. United States*, 317 F.2d 49, 52-53 (1942); *but see United States v. Haga*, 821 F.2d 1036, 1039 (5th Cir. 1987) (section 371 makes out two separate offenses).

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

The defraud clause of section 371 is very broad and encompasses a vast array of conduct, including acts which do not constitute a crime under a separate federal statute. *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989). This is because the term "defraud" when used in section 371 is broader than its common law definition and even goes beyond the definition used in the mail and wire fraud statutes. *McNally v. United States*, 483 U.S. 350, 356 (1987); *Dennis v. United States*, 384 U.S. 855, 861 (1966); *Tuohey*,

867 F.2d at 537-38. *But see United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993).

The Supreme Court has held that "conspiracy 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, trickery, or at least by dishonest means. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

Under the defraud clause, the government does not have to establish a pecuniary loss to the United States. *Hammerschmidt*, 265 U.S. at 188; *Tuohey*, 867 F.2d at 537; *United States v. Puerto*, 730 F.2d 627, 630 (11th Cir. 1984). Moreover, the government is not required 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).

More importantly, however, under the defraud clause the government is not required to show that the "fraud" was a crime on its own. *United States v. Jerkins*, 871 F.2d 598, 603 (6th Cir. 1989). This means the prosecutor is not burdened with having to establish all of the elements of an underlying offense (*e.g.*, tax evasion) and each member's intent to commit that offense (*e.g.*, willfulness). Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions "by deceit, craft, trickery, or at least by means that are dishonest." *Hammerschmidt*, 265 U.S. at 188; *United States v. Hurley*, 957 F.2d 1, 4-5 (1st Cir. 1992); *United States v. Jerkins*, 871 F.2d 598, 603 (6th Cir. 1989); *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987). *Accord United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993) (see discussion as §23.07[2][c], *infra*.

Though a conspiracy to defraud may exist where no substantive offense has been committed, deceit or trickery in the scheme is essential to satisfying the defrauding requirement in the statute. *Hammerschmidt*, 265 U.S. at 188. Similarly, since the purpose of the defraud clause of section 371 is to protect the integrity of the programs and policies of the United States and its agencies, the prosecutor must establish that the target of the fraud was the United States or one of its agencies. *United States v. Johnson*, 383 U.S. 169, 170 (1966); *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985); *United States v. Pintar*, 630 F.2d 1270, 1278 (8th Cir. 1980). Moreover, a conspiracy to defraud is not limited to those aiming to deprive the government of money or property, but may include a conspiracy to interfere with government functions. *United States v. Goldberg*, 105 F.3d 770, 773 (1st Cir. 1997).

23.07[1][c] **Pleading Requirements**

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

> [I]ndictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.

384 U.S. at 860.

Following the warning in *Dennis*, the Third Circuit in *United States v. Shoup*, 608 F.2d 950 (3d Cir. 1979), added that the courts "must be mindful that the statute is a broad one, 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." 608 F.2d at 955-56. *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 former the charge is broader and less precise; (2) the former expands the scope of conspiracy and, thus, liability for crimes, coconspirators, and admissibility of coconspirators' declarations; (3) the former

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 former 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, 91 (2d Cir. 1991). It is not sufficient for the indictment to simply reallege the language in the statute; rather, it must allege the fraudulent scheme in its particulars. *United States v. Rosenblatt*, 554 F.2d 36, 41 (2d Cir. 1977). This means that a defraud clause indictment should include: (1) the name of the agency impeded; (2) what functions of the agency were impeded; (3) what means were used to impede the agency; and (4) the identity 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 generally charged under section 371's defraud clause is commonly referred to as a "Klein conspiracy." *See, e.g., United States v. Klein*, 247 F.2d 908, 915 (2d Cir. 1957). The general description of a *Klein* conspiracy is as follows:

> [T]o defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes. [FN4]

Klein, 247 F.2d at 915. *See also United States v. Sturman*, 951 F.2d 1466, 1472 (6th Cir. 1992); *Alexander v. Thornburgh*, 943 F.2d 825, 829 (8th Cir. 1991); *United States v. Helmsley*, 941 F.2d 71, 90-91 (2d Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1202 (4th Cir. 1990); *United States v. Cambara*, 902 F.2d 144, 146 (1st Cir. 1990).

In the *Klein* case, the Second Circuit upheld the government's use of the defraud clause to charge conduct that impeded the functions of the IRS and upheld the conspiracy conviction, finding sufficient evidence to make out the crime. 247 F.2d at 916. The court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS. These acts included:

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 a 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 Cuban corporations;

6. A return falsely reporting that stock was sold in 1950 for an immense profit;

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

8. Income tax returns which falsely claimed a sale of stock.

247 F.2d at 915.

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

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

First Circuit

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

2. *United States v. Hurley*, 957 F.2d 1 (1st Cir. 1992) (money laundering scheme using front companies set up in Panama and the Bahamas, and unconventional business practices such as $100,000 transactions in currency and checks made out in names of third parties).

3. *United States v. Cambara*, 902 F.2d 144 (1st Cir. 1990) (laundering money through use of real estate management company as front company; structuring cash withdrawals; and purchasing large assets with currency).

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

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

Second Circuit

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

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

3. *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) (dual objective conspiracy -- to defraud SEC and IRS by parking stock to generate false tax losses and false claims for deductions; accumulating stock through nominees; and failing to comply with SEC reporting requirements under § 13(d)).

4. *United States v. Attanasio*, 870 F.2d 809 (2d Cir. 1989) (creating false capital gain transactions and laundering $600,000 through attorney trust accounts).

5. *United States v. Gurary*, 860 F.2d 521 (2d Cir. 1988) (creation of phoney invoices for non-existent goods which companies would buy and include in their cost-of-goods sold figure on corporate tax returns).

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

7. *United States v. Turoff*, 853 F.2d 1037 (2d Cir. 1988) (failing to report substantial interest income derived from mail

fraud scheme and depositing monies into a credit union which did not report interest to the IRS).

8. *United States v. Mollica*, 849 F.2d 723 (2d Cir. 1988) (issuing phoney corporate checks with forged endorsements to create funds used to pay personal expenses that were then deducted as business expenses; diverting earned income into secret bank accounts; and not reporting interest income received on loans).

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

10. *United States v. Sigalow*, 812 F.2d 783 (2d Cir. 1987) (use of third party as a frontman owner of massage parlors under investigation by IRS; systematic destruction of business records).

11. *United States v. Heinemann*, 801 F.2d 86 (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. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (3d Cir. 1989) (money laundering scheme using structured currency transactions and unauthorized use of other customer accounts to funnel currency).

2. *United States v. Olgin*, 745 F.2d 263 (3d Cir. 1984) (use of corporate checks to fictitious payees to generate cash proceeds; failure to record cash sales; and failure to issue receipts for cash sales).

Fourth Circuit

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

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

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

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

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

Fifth Circuit

1. *United States v. Aubin*, 87 F.3d 141 (5th Cir. 1996) (land flip, purchase and simultaneous resale devised to obtain cash

without identifying parties).

2. *United States v. Breque*, 964 F.2d 381 (5th Cir. 1992) (money laundering scheme using money exchange business to exchange U.S. currency into pesos without CTRs being filed).

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

4. *United States v. Chesson*, 933 F.2d 298 (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).

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

6. *United States v. Lamp*, 779 F.2d 1088 (5th Cir. 1986) (drug trafficker under IRS criminal investigation concocts 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. Kraig*, 99 F.3d 1361 (6th Cir. 1996) (attorney aided client in concealing assets, mainly real estate, through foreign shell corporations).

2. *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991), (creating 150 corporations, five of which were in foreign countries with strict secrecy laws; listing nominees as owners of the corporations; using the corporations to conceal income and make it difficult to trace income, expenses and cash skims; and destroying corporate records after receipt of subpoenas).

3. *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991) (using nominees as owner of adult entertainment businesses; skimming cash receipts; and using corporate checks to pay personal expenses).

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

5. *United States v. Jerkins*, 871 F.2d 598 (6th Cir. 1989) (money laundering scheme purchasing real estate in the name of nominees; structuring currency deposits; and filing false returns).

Seventh Circuit

1. *United States v. Furkin*, 119 F.3d 1276 (7th Cir. 1997) (not reporting income from gambling machines and encouraging others to lie).

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

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

4. *United States v. Beverly*, 913 F.2d 337 (7th Cir. 1990) (use

of codefendant as nominee owner of certain assets, real estate and businesses and of codefendant's bank account to pay expenses of drug trafficker).

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

6. *United States v. Hooks*, 848 F.2d 785 (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. Sileven*, 985 F.2d 962 (8th Cir. 1993) (untaxed cash receipts from business transferred to Canada and returned as nontaxable loan proceeds).

2. *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991) (backdating 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).

3. *United States v. Derezinski*, 945 F.2d 1006 (8th Cir. 1991) (money laundering scheme by precious metals dealer attempting to conceal income of drug dealer utilizing structured currency transactions and the falsification of business records by using fictitious names for the trades).

4. *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991) (owner of adult entertainment business set up sham corporations and operated his companies using false names and names of employees).

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

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

Ninth Circuit

1. *United States v. Huebner*, 48 F.3d 376, 378 (9th Cir. 1994) (defendants created sham debts and advised clients to file bankruptcy to impede IRS collection activity).

2. *United States v. Hobbs*, 991 F.2d 569 (9th Cir. 1993) (defendants brokered real estate transactions for a narcotics dealer, arranged for properties to be put in name of nominee, and structured purchase of cashier's checks).

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

4. *United States v. Bosch*, 914 F.2d 1239 (9th Cir. 1990) (laundered drug sale proceeds using CTRs which did not reveal the true source of the money).

5. *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987) (money laundering scheme, using foreign corporation and foreign bank accounts, and supplying false or incomplete information for preparation of CTRs).

6. *United States v. Crooks*, 804 F.2d 1441 (9th Cir. 1986) (promotion and sale of bogus mineral royalty tax shelters using

check cyclone system to create canceled checks representing loans and tax deductible payments from the shelter).

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

8. *United States v. Little*, 753 F.2d 1420 (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. Scott*, 37 F.3d 1564 (10th Cir. 1994) (promotion of trusts and unincorporated business organizations to eliminate income tax liability without losing control of money or assets).

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

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

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

Eleventh Circuit

1. *United States v. Hernandez*, 921 F.2d 1569 (11th Cir. 1991) (money laundering scheme where funds were converted to money orders and then deposited into a nominee bank account for nightclub owned in name of third party).

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

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

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

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

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

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

District of Columbia Circuit

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

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

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

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

Although the Department does not believe that the jury instructions in *Caldwell* were deficient, the wiser course of action may be to use jury instructions incorporating language similar to that found in *Hammerschmidt v. United States*, 265 U.S. at 188. In other words, the prudent course of action is to instruct the jury that section 371 prohibits not only conspiracies to defraud the United States by cheating the government out of money, such as income tax payments or property, but also conspiracies to defraud the United States for the purpose of impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. *See*, *e.g.*, pattern jury instructions cited in *Caldwell*, 989 F.2d at 1060.

23.07[3] **Overlapping Conspiracies**

As stated earlier, section 371 provides for two forms of conspiracies depending on which clause in the statute is charged. These two clauses overlap, however, when a fraud on the United States also violates a specific federal statute. *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 held that in order to properly alert defendants of the charges against them, prosecutors must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate a specific statute. 875 F.2d at 1187.

Other circuits reject the holding in *Minarik* and allow the government to charge the defraud clause where the fraud constitutes a separate federal criminal offense. *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); *Alexander v. Thornburgh*, 943 F.2d 825, 830-31 (8th Cir. 1991); *United States v. Notch*, 939 F.2d 895, 901 (10th Cir. 1991); *United States v. Bilzerian*, 926 F.2d 1285, 1301-02 (2d Cir. 1991); *United States v. Reynolds*, 919 F.2d 435, 438-39 (7th Cir. 1990);.

The Sixth Circuit itself has restricted *Minarik* to its facts. *United States v. Sturman*, 951 F.2d 1466, 1473-74 (6th Cir. 1991); *United States v. Mohney*, 949 F.2d 899, 902-03 (6th Cir. 1991).

Nonetheless, a review of the relevant case law is instructive on this issue.

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

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

The Sixth Circuit articulated three rationales for its decision. First, the court stated that the purpose of the defraud section "was to reach conduct not covered elsewhere in the criminal code" and thus should not be used when a specific provision covers that conduct. 875 F.2d at 1194. Second, section 371's misdemeanor clause, which limits punishment of conspiracies whose object is defined as a misdemeanor, would be defeated if those crimes could be prosecuted as felonies under the defraud clause. 875 F.2d at 1194. Finally, the court found that the prosecution created impermissible confusion as to the nature of the charge by incorrectly charging a conspiracy to violate 26 U.S.C. § 7206(4) as a conspiracy to defraud, by failing to allege the essential nature of the scheme, and by changing its theory of the case at trial. 875 F.2d at 1195.

The Sixth Circuit revisited the section 371 issue raised in *Minarik* two years later in *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991). The defendant, Harry Virgil Mohney, and three others were charged with conspiring to "defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue." The indictment described the object as follows:

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

949 F.2d at 904.

The defense moved to dismiss the conspiracy count, asserting that it was impermissibly brought under the defraud clause instead of the offense clause. The district court, relying on *Minarik*, granted the motion to dismiss, finding that 26 U.S.C. § 7206(1), which prohibits the filing of false tax returns, "fits perfectly the conduct which is the core, the very essence of the government's charge in Count I." 949 F.2d at 904.

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

In explaining its position, the Sixth Circuit offered two justifications. First, in this case, unlike in *Minarik*, there were no "constantly shifting

government theories depriving the defendants of notice of the charges against them." 949 F.2d at 903. Instead, the indictment "tracked the language of section 371, named the agency impeded and explained how, and by whom, the agency was impeded, and clearly charged a violation of the defraud clause of section 371." 949 F.2d at 903-04. Second, the court found that the conduct charged under the conspiracy did not all fit under section 7206(1). Rather, the court found that the conduct involved violations of several statutes, including 26 U.S.C. § 7206(1), § 7206(2), § 7203, § 7201, § 7202 and 18 U.S.C. § 1001. As a result, the court concluded that "where the conduct charged violates several statutes, the most complete description of the objective may be a conspiracy to defraud a particular agency of the government." 949 F.2d 904, 905.

In *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991), the Sixth Circuit directly addressed the situation where the conduct charged did violate several statutes and still was charged under the defraud clause. The defendant, Reuben Sturman, and others were charged with a *Klein* conspiracy. The defense filed a motion to dismiss, relying on *Minarik*, and argued that the conduct alleged in the conspiracy should have been charged under the offense clause as a conspiracy to commit either a violation of 26 U.S.C. § 7206(1) or § 7206(4). The district court denied the motion. 951 F.2d at 1472.

The court of appeals upheld the district court's decision, finding that the broad nature of the conspiracy and the associated violation of several statutes distinguished the case from *Minarik*. The court highlighted the "broad nature" of Sturman's conduct, stating:

> Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No provision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code, but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses.

951 F.2d at 1473.

More recently, the Sixth Circuit rejected a *Minarik* argument, finding that an indictment under the defraud clause is appropriate when the conspiracy alleges violations of more than one statute. *United States v. Kraig*, 99 F.3d 1361, 1367 (6th Cir. 1996). The *Kraig* Court found that a scheme to use nominees, sham transactions and other means of obstruction was more analogous to *Sturman* and *Mohney* than *Minarik*. 99 F.3d at 1367. In addition, the Sixth Circuit found that the *Kraig* indictment, unlike the indictment in *Minarik*, provided adequate notice of the conduct constituting the charges. 99 F.3d at 1367.

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

On a somewhat related issue, the Third Circuit, in *United States v. Alston*, 77 F.3d 713, 721 (1996), found that. although the government had charged the defendant with conspiracy to defraud the United States where he acted in concert with another to avoid the requirement to file currency transaction reports, the conspiracy was, in fact, a "straight-out structuring conspiracy." The court noted that the government "conceded that its theory against Alston for fraud against the United States is nothing more than structuring." 77 F.3d at

720. Because the court found that Alston had been charged with conspiring "to defraud by structuring," the court held that the government had to prove that the defendant knew structuring was illegal and reversed his conviction because it had failed to do so. 77 F.3d at 718 (citing *Ratzlaff v. United States*, 510 U.S. 135, 146-49 (1994). The court rejected the government's argument that because Alston was charged with conspiracy to defraud, the government did not have to prove willfulness. 77 F.3d at 720. Because the government conceded that it had not proven thatthedefendant had knowledge of the illegality of structuring, the court reversed the conviction. 77 F.3d at 714-715, 721. *Alston* stands in stark contrast to decisions holding that in order to establish a conspiracy to defraud, the government need only establish an intent to defraud and not the intent necessary to commit some other substantive offense. *See United States v. Khalife*, 106 F.3d 1300, 1303 (6th Cir. 1997) (quoting *United States v. Collins*, 78 F.3d 1021, 1038 (6th Cir. 1996)); *United States v. Alston*, 77 F.3d at 721-31 (Roth, J., dissenting); *United States v. Jackson*, 33 F.3d 866, 871-72 (7th Cir. 1994); *United States v. Cyprian*, 23 F.3d 1189, 1201-02 (7th Cir. 1994); *United States v. Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987).

23.07[4] **Scope of Intent**

23.07[4][a] **Generally**

The crime of conspiracy includes an intent element which requires the government to show that each member of the conspiracy had knowledge of the object of the conspiracy and joined the conspiracy intending achieve that object. *Ingram v. United States*, 360 U.S. 672, 678 (1959). The government may use circumstantial evidence to establish this element. *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), *cert. denied*, 121 S.Ct. 1388 (2001); Further, the government need only show that a defendant knew of the essential nature of the scheme -- the government need not show that a defendant 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 show that each member knew that at least one of the objects of the scheme was to impede the functions of the IRS and intended to join in the scheme to achieve that object. *See*, *e.g.*, *United States v. Shermetaro*, 625 F.2d 104, 109 (6th Cir. 1980).

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

In many cases, prosecutors will charge a *Klein* conspiracy in connection with narcotics and/or money laundering charges. Such cases typically involve the failure to report income derived from the sale of narcotics and/or the laundering of drug proceeds to disguise the source of the funds. 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.

The courts are split on this issue. One line of authority reserves ruling on the issue and instead uses a fact-based analysis to determine a particular defendant's intent. *United States v. Browning*, 723 F.2d 1544, 1546-49 (11th Cir. 1984); *United States v. Enstam*, 622 F.2d 857, 861-64 (5th Cir. 1980);. *See also United States v. Hernandez*, 921 F.2d 1569, 1575-76 (11th Cir. 1991); *United States v. Beverly*, 913 F.2d 337, 357-58 (7th Cir. 1990); *United States v. Vogt*, 910 F.2d 1184, 1202-03 (4th Cir. 1990); *United States v. Bucey*, 876 F.2d 1297, 1311-13 (7th Cir. 1989); *United States v. Montalvo*, 820 F.2d 686, 689-91 (5th Cir. 1987).

For example, in *Enstam*, 622 F.2d 857 (5th Cir. 1980), the Fifth Circuit upheld the defendant's conviction for a *Klein* conspiracy, finding sufficient evidence of his intent to impede the IRS. The defendant and his associates sent drug money out of the country and returned it to the United States in the form of fictitious loans. The government charged Enstam with a *Klein* conspiracy. The defense argued that the object of the conspiracy was to hide the source of the drug profits and not to impede the IRS. 622 F.2d at 860-61.

The court of appeals found that although one object of the conspiracy was to launder drug proceeds, another object of the conspiracy was to obstruct the functioning of the IRS. 622 F.2d at 861-62. The court based its finding of the second object on the fact that the defendant's own explanations as to the purpose of the money laundering scheme, combined with his coconspirators' references to their fear of the IRS, created a reasonable inference of an intent to "thwart the effective functioning of the Internal Revenue Service." 622 F.2d at 861-63.

Similarly, in *Browning*, the Eleventh Circuit upheld the defendant's conviction for a *Klein* conspiracy, finding sufficient evidence of his intent to impede the IRS. Defendant Browning and three others were indicted on a *Klein* conspiracy relating to a scheme to launder large amounts of cash generated by illegal drug transactions. The court of appeals found overwhelming evidence that one of the objectives of the conspiracy was to launder illegally obtained money. 723 F.2d at 1546. The court also found the evidence supported an additional object: "impairing the identification of revenue and the collection of tax due and owing on such revenue." In addressing the defendant's lack of intent on the *Klein* object, the court stated:

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

723 F.2d at 1547.

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

A second line of authority 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*, 819 F.2d 253 (9th Cir. 1987), the Ninth Circuit reversed a defendant's *Klein* conspiracy conviction where the evidence failed to show 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 vehicles and equipment purchased by the Drummonds as his own, for the purpose of keeping title out of their 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. Krasovich argued that there was no direct or circumstantial evidence to indicate that he agreed with anyone to impede the functions of the IRS. 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 the purpose of the concealment was to impede the function of the IRS. 819 F.2d at 256.

The *Krasovich* court based it holding on the Supreme Court case of *Ingram v. United States*, 360 U.S. 672 (1959). There, the Court reversed the convictions of two low level coconspirators in a gambling operation who had been charged under the offense clause of section 371 with conspiracy to evade the wagering tax. 360 U.S. at 673. The Supreme Court stressed that, under the offense clause, the government must establish an intent to agree and an intent to commit the substantive offense itself. 360 U.S. at 678.

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

In *United States v. Pritchett*, 908 F.2d 816 (1990), the Eleventh Circuit followed the rationale of *Ingram* and *Krasovich*. The defendants, David and Mark Pritchett, along with three others, were indicted for conspiracy to distribute cocaine and conspiracy to evade the personal income taxes of Joe Pritchett. The evidence showed that both defendants knew of the drug operation and participated in concealing assets of Joe Pritchett, including the unknown contents of several safe deposit boxes. 908 F.2d at 821.

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

> [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.

The court distinguished its earlier cases of *Enstam* and *Browning* by pointing to the independent proof issue. According to the court, the opposite findings in these other two decisions were reconcilable because in those cases the government offered independent evidence of an intent to avoid income taxes. That evidence consisted primarily of statements made by coconspirators evincing an intent to avoid taxes. 908 F.2d at 821-22.

The court in *Pritchett* did not address, however, the fact that: (1) the *Enstam* and *Browning* cases dealt with *Klein* conspiracies, not conspiracies to commit a specific offense like tax evasion; and (2) the coconspirator statements that evinced an intent to evade taxes were made outside the presence of the defendants and yet were being used to infer their intent to impede the IRS.

A third line of authority on this issue holds 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, 4-8 (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).

In the context of money laundering schemes charged under a *Klein* conspiracy theory, the First Circuit has held that an agreement to launder money derived from narcotics trafficking is evidence of an act of impeding the IRS in its collection of taxes. *See, e.g., United States v. Tarvers*,

833 F.2d 1068, 1076 (1st Cir. 1987).

Thus, in the First Circuit, the government need not necessarily be concerned about other motives behind acts of concealment or in establishing independent proof of the tax motive. However, the government must establish: (1) the defendant participated in or knew about the money laundering scheme; and (2) 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 (1988).

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. 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 (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 (10th Cir. 1980); *United States v. Fruehauf*, 577 F.2d 1038, 1070 (6th Cir.); *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, 397 (1957). *See also United States v. Fletcher*, 928 F.2d 495, 498 (2d 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).

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, 1234 (7th Cir. 1981) (interpreting the *Hyde* decision). Once the government shows a member joined the conspiracy, their continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See*, *e.g.*, *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991); *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).

However, a showing of withdrawal before the limitations period (*i.e.*, more than six years prior to the indictment where the limitations period is six years) is a complete defense to a conspiracy charge. *Read*, 658 F.2d at 1233. The defendant carries the burden of establishing this affirmative defense. *United States v. Berger*, 224 F.3d 107, 118 (2d Cir. 2000); *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991); *Juodakis*, 834 F.2d at 1102-03; *Finestone*, 816 F.2d at 589; *Krasn*, 614 F.2d at 1236; *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964). *But see United States v. MMR Corp.*, 907 F.2d 489, 501 (5th Cir. 1990) (burden is two step process on defense and government); *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989) (government retains burden of persuasion); *United States v. Jannoti*, 729 F.2d 213, 221 (3d Cir. 1984) (burden, initially on defense, shifted to government); *Read*, 658 F.2d at 1236 (burden of production on defendant; burden of persuasion remains on government to negate withdrawal defense); *Manual of Model Criminal Jury Instructions for the Ninth Circuit* (1997 Ed.), § 8.5.4, p.151. (following *Read*).

In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court defined withdrawal from a conspiracy to mean:

> Affirmative 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.

438 U.S. at 464-65. The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See Berger*, 224 F.3d at 118; *United States v. Antar*, 53 F.3d 568, 583 (3d Cir. 1995); *Lash*, 937 F.2d at 1083; *Juodakis*, 834 F.2d at 1102; *Finestone*, 816 F.2d at 589; *Gonzalez*, 797 F.2d at 917; *Krasn*, 614 F.2d at 1236.

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

23.09 **VENUE**

The crime of conspiracy is a continuing offense, the prosecution of which is proper "in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a) (1988); *United States v. Tannenbaum*, 934 F.2d 8, 12 (2d Cir. 1991).

Thus, venue is appropriate 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, 363 (1912); *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 (9th Cir. 1989); *United States v. Record*, 873 F.2d 1363, 1366

(10th Cir. 1989); *Finestone*, 816 F.2d at 589; *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987); *United States v. Sandini*, 803 F.2d 123, 128 (3d Cir. 1986); *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).

The government is not required to show that all of the members of a conspiracy committed an overt act within the district of prosecution. So long as one conspirator committed an overt act within the district, venue is established as to all members of the conspiracy. *See*, *e.g.*, *United States v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991); *Uribe*, 890 F.2d at 558; *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988).

The government must establish venue by a preponderance of the evidence. *Smith*, 918 F.2d at 1557; *Record*, 873 F.2d at 1366; *United States v. Moeckly*, 769 F.2d 453, 460 (8th Cir. 1985). Moreover, the overt act serving as the basis of the 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).

Courts have also held that "where 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). Finally, 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).

FN 1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

FN 2. 26 U.S.C. § 7214(a)(4) contains a provision prohibiting conspiracy to defraud the United States. However, this statute only applies to officers and employees of the United States acting in connection with any revenue law of the United States.

FN 3. *See* discussion at section 23.07[2][c] concerning the need to prove that a conspiracy to defraud the United States for the purpose of impeding, impairing, obstructing, or defeating the lawful functions of an agency of the government was accomplished by deceit, craft, trickery, or means that are dishonest.

FN 4. When drafting an indictment charging a *Klein* conspiracy, it is preferable to use slightly different language to describe the object of the conspiracy. In *Haas v. Henkel*, 216 U.S. 462, 479 (1910), the Supreme Court stated that section 371 "is broad enough in its terms to include any conspiracy for *the purpose of* impairing, obstructing, or defeating the lawful function of any department of Government." (Emphasis added.) *See also Hammerschmidt v. United States*, 265 U.S. at 185-86 (quoting *Hass v. Henkel*, 216 U.S. at 479). Using the words "for the purpose of" more accurately describes the object of a conspiracy to defraud the United States.