CHAPTER 705
INCHOATE CRIMES

Part I. Criminal Attempt

Section

Part II. Criminal Solicitation

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Part IV. General Provisions Relating to Inchoate Offenses

Note

L 2001, c 91, §4 purports to amend this chapter.

"PART I. CRIMINAL ATTEMPT

INTRODUCTORY COMMENTARY

This chapter deals with conduct which is designed to culminate in the commission of a substantive offense but which fails to do so. The failure may be due to apprehension or intervention by law enforcement officials or it may be due to some other miscalculation on the part of the defendant. In this sense attempt, solicitation, and conspiracy are predominantly inchoate in nature and are grouped in this chapter for a unified and integrated treatment. While it is true that other offenses, such as reckless endangering, forgery, kidnapping, property damage and burglary, have inchoate aspects, "attempt, solicitation and conspiracy have such generality of definition and of application as inchoate crimes that it is useful to bring them together in the Code and to confront the common problems they present."[1]

§705-500 Criminal attempt. (1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent. [L 1972, c 9, pt of §1; gen ch 1993]

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Introductory Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 24 (1960).

Cross References

Definitions of states of mind, see §702-206.

COMMENTARY ON §705-500

The proscription against criminal attempts is sometimes said to be based on the dangerousness of the actor's conduct. While this rationale would support a result in many cases, in others it would not. A defendant may engage in conduct which itself cannot be said to be dangerous, but which, when measured against the defendant's intent, would indicate that the defendant himself is a dangerous person and the proper subject of the penal law. The Code therefore focuses on the defendant's disposition. Our concern is not with thought or disposition alone; but rather to clarify "what conduct, when engaged in with a purpose to commit a crime or to advance towards the attainment of a criminal objective, should suffice to constitute a criminal attempt."[1]

The nature of intent in attempt cases. Subsection (1) recognizes penal liability where the defendant's conduct is intentional and consummation of the crime is prevented either by the defendant's erroneous appraisal of attendant (i.e., those specified by the definition of the offense) or other circumstances or by some intervening factor following a substantial step in a course of conduct planned to culminate in the commission of the crime. It is easy to recognize penal liability in such cases, notwithstanding the absence of a substantive offense, because the defendant's intent--the defendant's conscious object--is commission of a crime. The defendant's disposition toward criminal activity thus established, attempt liability is imposed, under subsection (1)(a), if the defendant's conduct has advanced so far toward the criminal objective as to constitute the crime had the attendant circumstances been as the defendant believed them to be, or, under subsection (1)(b), if the defendant's conduct has advanced so far toward the criminal objective as to constitute a substantial step in a course of conduct intended to reach that objective.

In subsection (2) liability is imposed on a defendant who has intentionally engaged in conduct which is a substantial step in a course of conduct intended or known to culminate in a prohibited result. Thus, a defendant who intends to destroy a building, and who regards the destruction of its inhabitants as

a regrettable by-product, could be convicted of attempted murder (as well as attempted arson)[2] if the defendant intentionally performed a substantial step (e.g., started a fire) which the defendant knew (i.e., was practically certain) would result in death. Attempt liability is provided for a defendant who engages in such conduct because the defendant's manifestation of dangerousness is of the same order as that of the defendant who engaged in the intentional conduct of subsection (1).

Subsection (2) also covers a relatively infrequent, but nonetheless troublesome, occurrence in attempt cases. A given crime may be so defined that the attendant circumstances may be established by a nonintentional state of mind (i.e., with respect to the attendant circumstances the actor may act knowingly, recklessly, or negligently). If such is the case, and the defendant intentionally engages in conduct planned to culminate in the result, attempt liability should exist if the defendant was otherwise culpable with respect to the attendant circumstances. Suppose, for example, that it is an independent crime to intentionally kill a police officer and that recklessness with respect to the victim's identity as a police officer is sufficient to establish that attendant circumstance. If a defendant attempts to kill a police officer recklessly mistaken as to the intended victim's identity (e.g., the defendant recklessly believes the police officer to be a night security guard), attempt liability ought to result. Subsection (2) so provides. It would hardly make sense to hold that the defendant should be relieved of attempt liability in the situation hypothesized because the defendant did not intend that the victim be a police officer. Furthermore, it would be anomalous to hold that had the defendant succeeded, and the substantive crime been consummated, the defendant would be guilty of the substantive crime but that, upon the failure of the defendant's attempt, the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt.

It should be noted that the requirement of intentional conduct, with respect to attempts, limits the application of the attempt section to offenses which can be committed by intentional conduct. For example, if a given offense can be committed by intentional or reckless conduct, reckless conduct which stops short of consummation of the offense is not sufficient to constitute an attempt to commit the offense. To constitute an attempt, the inchoate behavior must be intentional, i.e., purposeful. This principle is illustrated by the following passage from the commentary to Michigan's recent revision:

> Thus, where criminal liability rests on the causation of a prohibited result, the actor must have an intent to achieve that result even though violation of the substantive offense may require some lesser mens rea. Reckless driving, for example, does not constitute attempted manslaughter. A person charged with the substantive crime of manslaughter may be liable as a result of... recklessness causing death, but the same recklessness would not be sufficient if the victim did not die and the actor were only charged with attempt; here, the state would have to show an intent to achieve the prohibited end result, death of the victim. In this area, as in others if the substantive crime requires only recklessness, the mens rea requirement for an attempt is substantially higher than that for the substantive crime.[3]

Substantial step. Subsections (1)(b) and (2) also deal with and resolve another problem which has troubled courts in deciding attempt cases: the act or conduct sufficient to impose penal liability. It is an old saw that the penal law does not seek to punish evil thought alone. However, in attempt cases some decision must be made as to what conduct, when engaged in with a criminal intent, will be sufficient for the imposition of criminal liability notwithstanding the defendant's failure to commit a substantive offense. It seems clear that there is no difficulty in holding a defendant penally liable for an attempt when the defendant's conduct would have constituted the crime if the defendant had not been mistaken about the attendant circumstances. This is the easy case resolved by subsection (1)(a). In those cases where the defendant's intentional conduct does not constitute the substantive crime either because of some mistake on the defendant's part unrelated to specified attendant circumstances (e.g., mistake as to the capability of the means used) or because the course of conduct has not proceeded to its final objective, some principle must be articulated to indicate when attempt liability initially obtains. This is a most delicate task.

Accepting as we do the position of the Model Penal Code that attempt liability is primarily concerned with the dangerous disposition of the actor as manifested by conduct, this Code also follows the Model Penal Code in rejecting any standard based on the proximity of the actor's conduct to the culmination of the crime.[4] Adherence to that standard would require that the dangerousness of the defendant's conduct rather than the dangerousness of the defendant be regarded as the determining factor. The Code follows the Model Penal Code standard in requiring in subsections (1)(a) and (2) that the relevant conduct amount to a "substantial step in a course of conduct"

planned to culminate in the commission of the crime or intended or known to cause a criminal result.

Subsection (3) provides that conduct shall not be considered a "substantial step" under subsections (1) and (2) unless it is strongly corroborative of the defendant's criminal intent. In excluding acts which are not strongly corroborative, the Code seeks to provide an additional safeguard in the application of the "substantial step" standard so that law enforcement agencies and triers of fact will not put equivocal conduct within its ambit. There are, on the other hand, certain types of conduct which, if strongly corroborative of the defendant's criminal intent, could reasonably be held to constitute a "substantial step" and should not be held insufficient on this issue as matter of law. These types of conduct are: (a) lying in wait, searching for, or following the contemplated victim of the crime; (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (c) reconnoitering the place contemplated for the commission of the crime; (d) unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the crime will be committed; (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (f) possession, collection, or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection, or fabrication serves no lawful purpose of the actor under the circumstances; and (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.[5] Rather than propose codification of these examples, we set them forth in the commentary to aid the court in the interpretation of subsection (3).

It can, of course, be argued that the Code's formulation leaves an area of imprecision where preciseness is most needed. As in other areas of the Code,[6] the limits of what can be made precise must be recognized. It has been said that the genius of the Model Penal Code, from which this Code is to a great extent derived, is demonstrated by its recognition of the limits of precision in statutory language.[7]

> The characteristic spirit of the Code's draftmanship inheres in its adoption of the "Aristotelian axiom" that "it is the mark of the educated man to seek precision in each class of things just so far as the nature of the subject admits." When precision is possible, the Code is devastatingly precise. When precision is not possible, it is not sought, nor is there any pretense that it has been attempted.[8]

While substantiality is obviously a matter of degree, it is no more so in attempt cases than it is in recklessness, negligence, or causation problems. In each case the jury or the court (when it is trying the facts) must address itself to the defendant's conduct and determine, with a view to other stated criteria,[9] whether it should be condemned.

The Code focuses on what is deemed to be the correct function of the act requirement in attempt cases: to provide a standard which (a) distinguishes between conduct which is highly equivocal from the external standpoint and that which is not externally equivocal, or only slightly so, and which (b) is oriented toward the actor's disposition or dangerousness rather than toward proximity to consummation of the substantive crime. In looking at the substantiality of the defendant's step in a course of conduct, the Code requires the trier of fact to measure what has already been done by the defendant--not how much more the defendant must do before consummation of the substantive crime is achieved. To this extent, the shift in focus broadens the scope of attempt liability.

Rejection of defense of impossibility. Focusing as it does on the dangerousness of the actor, rather than on the dangerousness of the actor's conduct, the Code rejects the defense of "impossibility" in attempt cases. The Code does not afford a defense to one who intends a criminal course of conduct but who is mistaken as to certain circumstances which make commission of the crime legally or factually impossible.

Subsection (1) is addressed to the problem of the defendant's mistake as to attendant circumstances (i.e., circumstances specified in the definition of the offense). It makes such mistake immaterial if the crime would have been consummated had the attendant circumstances been as the defendant believed them to be. Thus, for example, a defendant would be guilty of attempt to bribe a juror if the defendant offered a bribe to a person the defendant believed to be a juror notwithstanding the fact that the object of the bribe turned out not to be a juror. A defendant would be guilty of attempted murder if the defendant intentionally shot a corpse or tree stump believing it to be a living person. Of course, the conduct or result must be specified in the definition of an offense; the actor's belief that it is criminal is not sufficient. For example, a person who seeks to give false testimony is not guilty of attempted perjury if the testimony sought to be given is immaterial and would not, if given constitute perjury.[10]

Subsection (1)(b) is addressed in part to the problem of impossibility. A defendant may be mistaken as to circumstances other than those specified in the definition of an offense and such mistake may render actual commission of the offense

impossible. Thus, for example, a defendant may aim and fire a gun at another mistakenly believing that it is loaded or the defendant may set some sort of explosive trap unaware that the fuse is defective and incapable of detonating the charge. Also, the defendant may be mistaken as to attendant circumstances and the defendant may have taken a substantial step toward the defendant's criminal objective, but the defendant's conduct has not advanced far enough to constitute the crime had the attendant circumstances been as the defendant supposed. For example, a defendant may set a fatal trap near a corpse, believing it to be a living person. In such cases, subsection (1)(b) permits liability for the attempt. In the examples stated the defendant believed the means chosen to be sufficient or the attendant circumstances to be present, and the defendant has obviously taken a substantial step in a course of conduct planned to culminate in the commission of a crime. There is no reason to preclude liability for the attempt merely because the defendant was mistaken as to some circumstance which made actual commission of the substantive crime impossible. Where the offense is defined in terms of the result of conduct, subsection (2) would also cover the situation.

Previous Hawaii law. The previous law of attempt, H.R.S. §702-1 (as compiled prior to this Code) required intent plus some act towards commission, as does the Code. However, there was no requirement that the act be a substantial step in furtherance of the commission. There are apparently no Hawaii cases dealing with this point. Courts have usually dealt with the evidentiary function of the actor's conduct in terms of whether it constituted an act of perpetration rather than merely preparation.[11] The Code focuses more directly and clearly on the function of the requirement without seeking precision where precision is not practicable.

The problem of impossibility, which the Code deals with in subsection (1) and (2), was not covered by any prior statute. Moreover, there is apparently no Hawaii case law on this point. However, this section is in accord with recent penal revisions in other jurisdictions.

Case Notes

Evidence held sufficient to support attempted rape and attempted assault. 56 H. 664, 548 P.2d 271 (1976).

Intent being essential element of attempt, charge of attempt to commit theft was insufficient where there was no allegation of intent. 61 H. 177, 599 P.2d 285 (1979).

Instruction concerning "substantial step". 63 H. 105, 621 P.2d 381 (1980).

Concealment of clothes in bag was a substantial step in the course of attempted theft. 67 H. 581, 698 P.2d 293 (1985).

Sexual assault in the fourth degree and attempted sexual assault in the fourth degree are included offenses of attempted sexual assault in the second degree, within the meaning of §701-109(4)(c). 79 H. 46, 897 P.2d 973 (1995).

Defendant charged with attempted murder, in violation of §707-701.5 and this section, may be convicted of attempted manslaughter, in violation of this section and §707-702(2). 80 H. 27, 904 P.2d 912 (1995).

This section combined with §707-702(1)(a) does not give rise to the offense of attempted manslaughter. 80 H. 27, 904 P.2d 912 (1995).

A person commits the offense of attempted prohibited possession of a firearm, pursuant to subsections (1)(b) and (3), and §134-7(b), if he or she intentionally engages in conduct that, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the offense of prohibited possession of a firearm. 93 H. 199, 998 P.2d 479 (2000).

As the offense of attempted prohibited possession of a firearm under §134-7 does not include a result-of-conduct element and subsection (2) does not therefore apply, trial court instruction erroneously defined the state of mind necessary to prove the offense of attempted prohibited possession of a firearm as something less than intentional, as required by subsection (1)(b). 93 H. 199, 998 P.2d 479 (2000).

Pursuant to §§701-109(4)(b), 134-7(b), and subsections (1)(b) and (3), attempted prohibited possession of a firearm is an included offense of prohibited possession of a firearm. 93 H. 199, 998 P.2d 479 (2000).

Where victim testified that defendant sexually assaulted victim in each of the four ways alleged, which was supported by testimony of victim's brother and uncle, evidence was sufficient to prove that defendant intentionally engaged in conduct under the circumstances that defendant believed them to be, the conduct constituted a substantial step in the course of conduct, and defendant intended that the course of conduct culminate in sexual penetration with victim, thus supporting defendant's convictions. 126 H. 383, 271 P.3d 1142 (2012).

Crime of attempted manslaughter is an included offense of attempted murder. 7 H. App. 291, 757 P.2d 1175 (1987).

Trial court must instruct jury as to what specific facts jury must find before it decides whether defendant is guilty of attempted sexual assault in first degree. 77 H. 177 (App.), 880 P.2d 1224 (1994).

Where there was no evidence, independent of defendant's extrajudicial confession, of the corpus delicti of attempted sexual assault of victim by defendant, defendant's conviction reversed. 103 H. 490 (App.), 83 P.3d 753 (2003).

Trial court's omission of the "strongly corroborative" paragraph in the attempted assault in the second degree instructions was presumptively prejudicial and omission was not harmless beyond a reasonable doubt. 104 H. 517 (App.), 92 P.3d 1027 (2004).

There was insufficient evidence that defendant took a substantial step toward the distribution of at least one-eighth ounce of methamphetamine in defendant's possession where there was no evidence that defendant had engaged in negotiations, offered, or agreed to distribute any of the methamphetamine found in defendant's possession. 107 H. 144 (App.), 111 P.3d 39 (2005).

Discussed: 86 H. 1, 946 P.2d 955 (1997).

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§705-500 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 26 (1960).

2. Under this Code conventional arson has been incorporated as one form of criminal property damage, see chapter 708.

3. Prop. Mich. Rev. Cr. Code, comments at 82.

4. M.P.C., Tentative Draft No. 10, comments at 39-43 (1960).

5. M.P.C. §5.01(2), Proposed Official Draft 81-82 (1962).

6. Cf., e.g., the definitions of "recklessness" and "negligence" in §702-206.

7. Packers, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594, 601 (1963).

8. Id. quoting from Kurland, Religion and the Law 15 (1962).

9. E.g., the corroborative function stated in subsection (3).

10. The person would, however, be guilty of having attempted a lesser offense involving falsification. See chapter 710, part V.

11. See, for a general discussion, M.P.C., Tentative Draft No. 10, comments at 47-68.

" **§705-501 Criminal attempt; attempting to aid another.** (1) A person who engages in conduct intended to aid another to commit a crime is guilty of an attempt to commit the crime, although the crime is not committed or attempted by the other person, provided his conduct would establish his complicity under sections 702-222 through 702-226 if the crime were committed or attempted by the other person.

(2) It is not a defense to a prosecution under this section that under the circumstances it was impossible for the defendant to aid the other person in the commission of the offense, provided he could have done so had the circumstances been as he believed them to be. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-501

When a defendant attempts to aid another in the commission of a crime and the other person attempts or commits the substantive offense, the defendant is liable, under the complicity provisions,[1] for the conduct of the other person. However, where the other person does not attempt or commit the crime, the complicity sections and ordinary attempt definitions do not cover the situation. Subsection (1) provides that the defendant will be guilty of attempt to commit the crime if complicity would have resulted had the other person attempted or committed the substantive offense. For example: A knows that B plans to kill C; B is unaware of A's knowledge and does not seek A's assistance; A prevents a warning from reaching C which would otherwise have reached him; B changes his mind before engaging in any conduct; A is guilty of attempted murder.

In one other respect the complicity sections and the attempt sections operate jointly. If a defendant engages in some conduct intended to aid another but does not complete the course of conduct sufficient for the purpose, the question then posed is whether the more limited conduct would result in complicity under §§702-222 through 226. Section 702-222 provides that complicity may rest on attempt to aid another. In determining whether the defendant's limited conduct is sufficient to constitute an attempt to aid, the standard of substantiality as set forth in §705-500 should be followed. If A, in the example stated above, was apprehended before he was able to prevent a message of warning from reaching C, the question of A's liability would turn on the substantiality of his action, i.e., whether his conduct was strongly corroborative of his criminal intent.

Subsection (2) is intended to eliminate the defense of impossibility. In the example stated above, A would be guilty notwithstanding the fact, e.g., that C died from natural causes before the warning possibly could have reached him.

This section represents an addition to Hawaii law.

§705-501 Commentary:

1. Cf. §§702-222 to 226.

" **§705-502 Grading of criminal attempt.** An attempt to commit a crime is an offense of the same class and grade as the most serious offense which is attempted. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-502

For purposes of sentencing, the Code equates the criminal attempt with the most serious substantive offense attempted. Only in the case where the crime attempted is murder does the Code authorize a different sentence for the substantive offense than for the attempt. This is because §706-606 provides a special sentence for murder. Attempted murder is treated as an ordinary class A felony.

The dispositions[1] (suspension of sentence, probation, imprisonment, etc.) authorized by chapter 706 of the Code are intended to provide primarily a flexible and corrective process. The court's order should be determined by the need for correction as demonstrated by the anti-social disposition (propensities) of the defendant. This being the case, there is generally no difference in the sanctions which ought to be available to the court when a crime is attempted but not consummated. However, where the offense attempted is murder, the unique sentence authorized for that crime is not imposed. Instead, the attempt is treated as any other class A felony. Because §706-606 requires mandatory imprisonment, possibly for life, there is room to economize on sentencing for attempted murder. The various modes of disposition available for a class A felony ought to suffice for correctional needs.

Under previous Hawaii law, the sentencing of attempts is structurally similar to that provided in the Code, except that Hawaii law formerly provided a maximum term of imprisonment of twenty years,[2] whereas the Code, in making the most serious attempt a class A felony, provides for an extended term in cases presenting aggravating circumstances.[3]

Case Notes

Attempted murder is treated as ordinary class A felony. 57 H. 418, 558 P.2d 1012 (1976).

§705-502 Commentary:

1. The word "disposition" is used in the Penal Code and its commentary with two different meanings. In chapter 705 and elsewhere the commentary refers to the actor's disposition; the word is used in this context to refer to the actor's anti-social propensities. Chapter 706 deals with the disposition of convicted defendants. That chapter deals with procedures to be followed and available sanctions upon conviction (i.e., suspension of sentence or imposition of a sentence or imposition of a sentence ordering probation, fine, or imprisonment).

2. H.R.S. §702-5.

3. Cf. chapter 706, Disposition of Convicted Defendants.

"PART II. CRIMINAL SOLICITATION

§705-510 Criminal solicitation. (1) A person is guilty of criminal solicitation if, with the intent to promote or facilitate the commission of a crime, the person commands, encourages, or requests another person to engage in conduct or cause the result specified by the definition of an offense or to engage in conduct which would be sufficient to establish complicity in the specified conduct or result.

(2) It is immaterial under subsection (1) that the defendant fails to communicate with the person the defendant solicits if the defendant's conduct was designed to effect such communication. [L 1972, c 9, pt of §1; gen ch 1993]

Cross References

Liability for conduct of another; complicity, see §702-222.

COMMENTARY ON §705-510

Criminal solicitation can rationally be viewed a number of ways. It can be argued that solicitation is not the proper subject of penal sanction because the resulting offense or anti-social conduct in such cases is dependent upon the independent will of another. Also, the solicitor, by the solicitor's reluctance to engage in the proscribed conduct or cause the

proscribed result oneself, tends to indicate that the solicitor does not present a serious danger. On the other hand, because of the solicitor's connivance and subtlety and because of the criminal cooperation which the solicitor might foster, the solicitor may be thought to create special dangers calling for special sanctions. The Code adopts the position that the disposition of the solicitor presents sufficient dangers to warrant intervention and that the penal liability of the solicitor should not depend upon the fortuity of whether the person solicited agrees to or engages in the requested conduct, or adopts or undertakes to cause the requested result. In such cases penal liability would be imposed on a conspiracy or complicity basis.

The formulation of subsection (1) is intended to accomplish two purposes. First, it makes clear that, with respect to the culpability of the defendant, the defendant must act with the intent to promote or facilitate the commission of a crime. Second, the subsection resolves the problem presented by equivocal solicitations. Many innocent remarks or innuendoes could be interpreted as invitations to commit an offense--e.g., sexual and bribery offenses. Furthermore, political and social agitation could, in some instances, be misinterpreted as an invitation to violate laws disapproved by the agitator. To avoid these problems, the Code provides that the conduct or result commanded, encouraged, or requested must be "specified by the definition of an offense." Thus, general, equivocal remarks--such as the espousal of a political philosophy recognizing the purported necessity of violence--would not be sufficiently specific vis-a-vis the definition of an offense to constitute criminal solicitation.

Subsection (2) makes it immaterial that the defendant's communication does not reach the person whom the defendant intends to solicit as long as the defendant's conduct is designed to effect the communication.

> In order for liability to attach under this subsection the last proximate act must be done to effect communication with the party intended to be solicited. Conduct falling short of the last act was excluded because it was considered too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness here lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether such message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be

required on the solicitor's part before the party solicited could proceed to the crime.[1]

Criminal solicitation was termed instigation under prior Hawaii law.[2] One was guilty of instigation if one "instigates another to the commission of any offense, by commanding, soliciting or offering to hire, or otherwise endeavoring to induce him to commit the offense."[3] The Code is generally in keeping with this definition. It is to be noted that, under prior law, Hawaii was one of the few states which, accepting the tenets of modern penal theory, recognized that the solicitation of any crime is itself a crime: the majority of jurisdictions only regard as criminal the solicitation of the more serious crimes.[4] Moreover, Hawaii has long recognized that, as the Code provides, the actual degree of influence which the solicitor may effect is immaterial, so long as the solicitor intends to promote the commission of the crime.[5]

§705-510 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 89 (1960).

2. H.R.S. §702-11.

3. Id.

4. Wechsler, Jones, and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of The American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Colum. L. Rev. 571, 623 n.301 (1961).

5. Republic of Hawaii v. Oishi, 9 Haw. 641, 649 (1894).

" **§705-511 Immunity, irresponsibility, or incapacity of a party to criminal solicitation.** (1) A person shall not be liable under section 705-510 for criminal solicitation of another if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person.

(2) It is not a defense to a prosecution under section 705-510 that the person solicited could not be guilty of committing the crime because:

(a) He is, by definition of the offense, legally incapable in an individual capacity of committing the offense solicited;

(b) He is penally irresponsible or has an immunity to prosecution or conviction for the commission of the crime;

(c) He is unaware of the criminal nature of the conduct in question or of the defendant's criminal intent; or

(d) He does not have the state of mind sufficient for the commission of the offense in question.

(3) It is not a defense to a prosecution under section 705-510 that the defendant is, by definition of the offense, legally incapable in an individual capacity of committing the offense solicited. [L 1972, c 9, pt of §1]

Cross References

Liability for conduct of another, see §702-221.

COMMENTARY ON §705-511

Section 705-511 resolves a number of problems arising out of the possible immunity, irresponsibility, or incapacity of a party to a criminal solicitation.

Subsection (1) is intended to insure "that one who could not be liable as an accomplice if the substantive crime were completed will not be liable for solicitation when the crime is not completed."[1] For example, a parent whose child has been kidnapped, and who yielded to the extortion of the kidnapper, would be regarded as a "victim" of the kidnapper-extortionist and not as accomplice. If the parent had offered a ransom to the kidnappers, the parent's status as a victim of the extortion does not change and the parent would not, under subsection (1), be guilty of solicitation. Similarly, in dealing with abortion by an unlicensed physician, if a woman is regarded as a person whose conduct is inevitably incident to the commission of the offense, she could not be an accomplice of the abortionist if the crime is completed. If she commands, encourages, or requests such an abortion, she is not guilty of criminal solicitation. Whether or not her conduct in these contexts should be the subject of a penal offense is an independent question, to be determined on its own merits by the legislature.

Subsection (2) precludes a defense based on the incapacity, irresponsibility, or immunity of the person the defendant solicits. If the defendant solicits another to engage in conduct or cause the result specified by the definition of an offense (or to engage in conduct which would be sufficient to establish complicity), it is immaterial that the other person either does not or cannot, under the circumstances, consummate the crime.

This subsection is, in part, a counterpart of the complicity provisions which impose legal accountability upon a defendant who acts through an innocent agent.[2] This provision "is based on the universally acknowledged principle that one is no less guilty of a crime because he uses the overt behavior of an innocent or irresponsible agent."[3] If the agent engages in the conduct in question, accountability for the conduct results. If the agent fails or refuses to engage in the conduct in question, the solicitation is nonetheless criminal.

Subsection (2) also provides that the immunity of the person solicited from prosecution or conviction does not in any way provide a defense for the solicitor. The immunity provided by law for the person solicited is not expandable or transferable to the defendant. For example, A, with the requisite intent, solicits B to engage in conduct which ordinarily would be sufficient to establish complicity in conduct specified by the definition of an offense. B, however, cannot be guilty as an accomplice because B is a "victim" of the offense or a person "whose conduct is inevitably incident to its [the crime's] commission." A is liable for criminal solicitation.

Subsection (3) is the counterpart of the provision which permits complicity in the conduct of another which, if performed by the defendant, would not be criminal. Thus, for example, a defendant may be guilty of the rape of his wife if he successfully solicits or aids another man to have sexual intercourse with her by forcible compulsion. His complicity makes him legally accountable for conduct which, had he engaged in it himself, would not have rendered him penally liable. If the solicitation is not successful, the solicitor should be liable for the solicitation. The Code so provides.

Although previous Hawaii law provided that a solicitor of criminal activity was liable as an accomplice where the offense was completed,[4] the provision in this subsection, that one shall not be liable for solicitation unless one would be liable as an accomplice if the offense were completed, has had no counterpart in Hawaii statutory or case law. However, subsection (1) is in accord with the common law of most jurisdictions.[5] The same is true with regard to subsections (2) and (3) on incapacity, immunity, and irresponsibility.[6]

§705-511 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 96 (1967).

2. Cf. §702-221.

3. Prop. Mich. Rev. Cr. Code §1010, comments at 96 (1967).

4. H.R.S. §704-3.

5. Wechsler, Jones, and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Colum. L. Rev. 571, 626 (1961).

6. Prop. Mich. Rev. Cr. Code, comments at 96 (1967).

" **§705-512 Grading of criminal solicitation.** Criminal solicitation is an offense one class or grade, as the case may be, less than the offense solicited; provided that criminal solicitation to commit murder in any degree is a class A felony. [L 1972, c 9, pt of §1; am L 1997, c 149, §2]

Cross References

Disposition of convicted defendants, see chapter 706.

COMMENTARY ON §705-512

This section provides for grading of criminal solicitations. Solicitations are offenses one class or grade, as the case may be, less than the offense solicited. For example, solicitation of a class A felony is a class B felony; solicitation of a class C felony is a misdemeanor; solicitation of a petty misdemeanor is a violation. This reflects the position that generally solicitations, because of the reluctance of the defendant himself to engage in the specified conduct or cause the specified result, and the dependence of the conduct or result on the will of another, should be treated as a lower order of penal liability than commission of corresponding substantive offenses.

In the past Hawaii law equated criminal solicitation with attempt in imposing penalty.[1] One who was guilty of solicitation ("instigation") under Hawaii law was "subject to the penalty of an attempt to commit the offense."[2] Hence, as in the previous Hawaii law of attempt, solicitation carries a maximum sentence of twenty years' imprisonment, with the option of a fine if the penalty for the completed substantive offense is a term of less than twenty years' imprisonment. The Code, in reducing the penalty for all criminal solicitation one class or grade from that for the completed substantive offense, departs from past law and provides for a more rational relationship between the sentence for soliciting a substantive offense and the sentence for that offense.[3]

SUPPLEMENTAL COMMENTARY ON §705-512

Act 149, Session Laws 1997, amended this section to provide that criminal solicitation to commit murder in any degree is a class A felony. The legislature found that the offense of murder warranted punishment under the Code sufficient to fit the grave consequences of the crime, and that persons who are found guilty of conspiracy or solicitation to commit murder should also be penalized to a similarly serious degree. The legislature recognized that two Hawaii Supreme Court opinions, State v. Kaakimaka (84 H. 280, 933 P.2d 617 (1997)) and State v. Soto (84 H. 229, 933 P.2d 66 (1997)), concluded that conspiracy to commit murder and solicitation to commit murder are class C felonies. The legislature acknowledged that the decisions had led to incongruous sentencing under the sentencing guidelines of the Code. Conspiracy and solicitation are ordinarily designated the same level of felony offense as the underlying crime, or at the very least, one grade lower. Senate Standing Committee Report No. 1600.

§705-512 Commentary:

1. H.R.S. §702-11.

2. Id.

3. Cf. M.P.C. §5.05(1).

"PART III. CRIMINAL CONSPIRACY

§705-520 Criminal conspiracy. A person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a crime:

(1) He agrees with one or more persons that they or one or more of them will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and

(2) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-520

The offense of criminal conspiracy provides for intervention by law-enforcement agencies into preparatory conduct prior to consummation of a substantive penal offense and it provides for

dealing with "special dangers incident to group activity."[1] Despite the necessity of providing some basis for intervention into criminal preparation and combination, conspiracy offenses have been subject to criticism because they have been used as a vehicle for vague charges, wholesale joinder of defendants, and circumvention of the rules of evidence. Sections 705-520 through 525 attempt to rationalize the law of conspiracy and to eliminate, as much as possible, areas of potential abuse.

Conspiratorial objective. Section 705-520 provides that the conspiratorial objective must be the commission of a crime. Undesirable, but noncriminal, behavior, such as civil frauds, cannot be made the subject of the penal law through broad application of a conspiracy charge.[2] In those relatively few instances where activities are made criminal only when engaged in by a group, and not if engaged in by an individual, e.g., anti-trust legislation, they should be dealt with independently in special conspiracy provisions which should be precise in defining the conduct proscribed.

Unilateral approach. The Code's formulation of the definition of criminal conspiracy, and its exclusion of certain defenses in §705-523, takes a unilateral rather than bilateral or multilateral approach to the offense. Unlike the prior definition based on the concurrence of "two or more persons," the Code focuses on a given defendant and states what conduct on the defendant's part is sufficient to establish the defendant's liability for criminal conspiracy. Group liability is not necessary. The actor's agreement does not require a "meeting of the minds" with one or more other persons; the Code does not require that at least two persons be guilty of a criminal conspiracy. The "agreement" on the part of a "co-conspirator" might be feigned; but this has no bearing on the defendant's individual liability. Implicit in the general formulation of §705-520, and made specific by §705-523, is the concept that the defendant's liability is in no way affected by the immunity, irresponsibility, or incapacity of the person with whom the defendant conspires. Furthermore, under the unilateral approach of §705-520, the failure to prosecute, or the unavailability for prosecution, or the prior acquittal of a co-conspirator would not affect the defendant's liability.

Definition of conspiracy. The greatest difficulty in formulating a definition of conspiracy, and other inchoate crimes, is relating its preparatory nature to the host of substantive offenses to which it might be applicable.

> One difficulty common to the definition of all inchoate crimes is that the definition must be expressed in terms of preparation to commit another crime which is the object of the preparation; the definition must take account of both

> the policy of the inchoate crime and the varying elements, culpability requirements and policies of all substantive crimes.[3]

The Code requires that the culpability sufficient to establish liability for criminal conspiracy be intent to promote or facilitate the commission of a crime. The problem presents itself most acutely in cases where the defendant's "relationship to a criminal plan is essentially peripheral."[4] Thus, for example, one who rents or agrees to rent premises to another knowing that the premises will be used for an illegal activity (e.g., house of prostitution, narcotics den, or gambling casino) would not be guilty of conspiring with another to commit the crime unless it is proved that he intends to promote or facilitate the illegal operation. Mere knowledge of probable illegal use is not sufficient. To some extent, the defendant's ability or inability to control the situation takes on evidentiary significance with relation to the defendant's intent. For example, if the defendant is one of a number of malt dealers and the defendant sells the commodity to a person known to run an illegal still, the basis for finding an intent to promote or facilitate the operation may be considerably less than in the case where the defendant is the only available supplier. In the former case, the defendant's refusal to sell would probably not have any effect on the illegal operation. Moreover, the presence of other malt dealers would mean that the continued operation of the still would not necessarily mean more business for the defendant. In the latter case, the defendant's refusal to sell might prevent the operation of the illegal still, and the defendant's monopoly position provides an incentive for future sales.

Furthermore, regardless of the state of mind required by the definition of a substantive offense to establish culpability with respect to proscribed conduct or results, the Code requires intentional behavior for conspiracy. This can best be illustrated by borrowing two examples from the Model Penal Code commentary.

> Thus, it would not be sufficient, as it is under the attempt draft, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it. For example... if two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not of a conspiracy to kill the inhabitants. While this result may seem unduly restrictive from the viewpoint of the completed crime, it is necessitated by the extremely preparatory

behavior that may be involved in conspiracy. Had the crime been completed or had the preparation progressed even to the stage of an attempt, the result would be otherwise. As to the attempt, knowledge or belief that the inhabitants would be killed would suffice. As to the completed crime, the complicity draft covers the matter, despite its general requirement of a purpose to promote or facilitate the commission of the crime, by the special provision of Section 2.06(4).[5] This provides that where causing a particular result is an element of a crime, a person is an accomplice in the crime if he was an accomplice in the behavior that caused the result and shared the same purpose or knowledge with respect to the result that is required by the definition of the crime.

A fortiori, where recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime--where, for example, homicide through negligence is made criminal--there could not be a conspiracy to commit that crime. This should be distinguished, however, from a crime defined in terms of conduct that creates a risk of harm, such as reckless driving or driving above a certain speed limit. In this situation the conduct rather than any result it may produce is the element of the crime, and it would suffice for guilt of conspiracy that the actor's purpose is to promote or facilitate such conduct--for example, if he urged the driver of the car to go faster and faster.[6]

The Model Penal Code commentary leaves open the question of whether a defendant can be guilty of criminal conspiracy if the defendant is not aware of the existence of attendant circumstances specified by the definition of the substantive offense which is the object of the conspiracy.[7] This is of obvious importance in those crimes which do not require that the defendant act intentionally or knowingly with respect to attendant circumstances. It does not seem wise to leave this question to resolution by future interpretation.

It seems clear, and it is the position of the Code, that, because of the preparatory nature of conspiracy, intention to promote or facilitate the commission of the offense requires an awareness on the part of the conspirator that the circumstances exist.

Nature of the agreement. The agreement required by the Code is a consensus, "which need not, of course, be formal or, indeed, explicit in the sense that it is put into words."[8] Moreover, the consensus need not, as the discussion on the general unilateral approach of the Code would indicate, be

characterized by sincerity on the part of the defendant's co-conspirator.

Overt act required. The Code requires that an overt act be done in pursuance to a conspiracy. Previous Hawaii law, following the common law,[9] specifically rejected the requirement of an overt act.[10] The Code imposes this additional requirement because the inchoate nature of the offense requires some indicia of a settled intention. The overt act need not be a substantial step as defined in §705-500 but may be any act in pursuance of the conspiratorial purpose.

Prior law. Prior Hawaii law was somewhat vague in defining conspiracy. The nature of the agreement required was apparently left to an intuitive understanding of the word "conspire."[11] The Code avoids some confusion by requiring that the conspirators "agree" upon penally proscribed conduct or result. No state of mind was specifically required, but the formulation of the previous conspiracy definition in effect required, as the Code does specifically, that the defendant act intentionally.[12]

The prior law made criminal a conspiracy to achieve a noncriminal objective. A conspiracy to maintain a suit known to be groundless is made criminal.[13] Unless malicious prosecution, traditionally a civil tort, is made a criminal offense, the Code eliminates it and other noncriminal wrongs, as a possible objective of a criminal conspiracy.

Hawaii was also in accord with the majority of jurisdictions in taking the bilateral or multilateral approach discussed above.[14] The problem of a conspiracy prosecution failing for both conspirators simply because one is found innocent or immune to prosecution has apparently never reached the Supreme Court of Hawaii. However, the Code's unilateral approach, as described above, obviates entirely such potential problems.

Case Notes

Substantial direct and circumstantial evidence existed from which jury could have convicted defendant. 64 H. 65, 637 P.2d 407 (1981).

Jury may render defendant guilty of conspiracy and not guilty of the substantive offense. 69 H. 363, 742 P.2d 369 (1987).

Complaint sufficiently alleged all material elements of offense of criminal conspiracy and thus not fatally defective. 81 H. 198, 915 P.2d 672 (1996).

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§705-520 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 96 (1960).

2. Cf. 18 U.S.C. §371 (conspiracy "either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose") which "has grown through judicial interpretation to cover 'virtually any impairment of the Government's operating efficiency.'" M.P.C., Tentative Draft No. 10, comments at 103 (1960) quoting Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 461n (1959).

3. M.P.C., Tentative Draft No. 10, comments at 106 (1960).

4. Id. at 107.

5. See §702-223 of this Code.

6. M.P.C., Tentative Draft No. 10, comments at 109-110 (1960).

7. Id. at 113.

8. Id. at 117.

9. Id. at 140.

10. H.R.S. §728-3.

11. H.R.S. §728-1.

12. H.R.S. §728-1.

13. Id. §728-1(c).

14. Id.

" **§705-521 Scope of conspiratorial relationship.** If a person guilty of criminal conspiracy, as defined in section 705-520, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit the crime with such other person or persons, whether or not he knows their identity. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-521

This section is addressed to the problem of defining the scope of the conspiratorial relationship. Organized crime may involve

a network of activity of which the defendant's conduct is but a small part. For example, the narcotics traffic may involve smuggling, possession, and sale of the narcotic. Questions affecting multiple prosecutions, joint prosecution, admissibility of evidence, and the statute of limitations have conventionally turned on the scope of the conspiracy charged.

The Code divorces procedural and evidentiary problems from the definition or scope of criminal conspiracy. Procedural problems are handled separately in §705-524 (dealing with venue) and in the rules of court and statutes relating to penal procedure.

The definition of §705-520 in effect limits the scope of the conspiracy to those crimes which the defendant intends to promote or facilitate. Section 705-521 limits the scope of the conspiracy "in term of parties, to those with whom he agreed, except where the same crime that he conspired to commit is, to his knowledge, also the object of a conspiracy between one of his co-conspirators and another person or persons."[1] In cases involving a broad scope of criminal operations entailing numerous different offenses, the focus is on whether the defendant knows that the defendant's co-conspirator has conspired with another person to commit the same crime. Focusing separately on each criminal objective, it is possible to conclude that different members of a criminal network are guilty of different conspiracies. Thus, in a narcotics operation, a smuggler, a distributor, and a retailer may all be guilty of conspiring that the retailer possess the narcotics, whereas the retailer may not be guilty of a conspiracy to have the smuggler engage in smuggling. The retailer may have no knowledge of or may be completely indifferent to the source or character of the retailer's supply.

Agreement under §§705-520 and 521 need not be explicit; it can, of course, be inferred from mutual facilitation and purpose. Section 705-521 specifically provides that in cases where there is no direct correspondence or cooperation, the defendant may be guilty of conspiracy with other persons, possibly unidentified, if the defendant knows that the defendant's co-conspirator has conspired with them to commit the same offense.

The inquiry which the Code requires is more complicated than that allowed under current and past doctrine which, in some statements,[2] has permitted a member of an illegal operation to be guilty of a conspiracy involving all of the operation's criminal objectives no matter how remote from the defendant's individual involvement.

> We recognize that the inquiry demanded by the Draft will often be more detailed and sometimes will be more complicated than that called for under looser, current

doctrine. We submit that any greater difficulty involved is justified by the need for effective means of limiting a conspirator's criminal liability and preventing the other abuses possible under looser approaches toward the scope of a conspiracy. Further, we submit that the focus upon each individual's culpability with regard to each criminal objective should be more helpful to juries than the broad formulations with which they are often charged today; and that it accords more closely with traditional standards for testing criminal liability.[3]

Previous Hawaii law made no reference to the scope of conspiracy in terms of the parties involved.

§705-521 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 119 (1960).

2. See United States v. Bruno, 105 F.2d 921 (2d Cir. 1939).

3. M.P.C., Tentative Draft No. 10, comments at 126 (1960).

" **§705-522 Conspiracy with multiple criminal objectives.** If a person conspires to commit a number of crimes, the person is guilty of only one conspiracy if the multiple crimes are the object of the same agreement or continuous conspiratorial relationship. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §705-522

This section substantially adopts the language of §5.03(3) of the Model Penal Code. In conspiracy, the danger for which the sanction is imposed arises out of the special circumstances of the joining of several individuals to effect a criminal object. Here, the law quite correctly recognizes that there is a special and unique danger in individuals combining to commit crime: this danger is easily seen in the pervasive and pernicious aspects of so-called "organized crime" today. Hence it may be seen that, in the area of conspiracy, the particular crimes which are the object of the conspiracy are of concern only in defining the criminality of the conspiratorial intent. Since it is the actual combination or agreement which we seek to condemn, each combination or agreement constitutes a single separate crime of conspiracy, regardless of how many separate offenses are intended under the agreement.

The traditional conspiracy question, of whether different objectives executed over a period of time are included in the

same agreement, is largely avoided by the modifying clause at the end of the section. Rather than considering such questions of intent and causality, the Code focuses upon the more significant question of a continuous association for criminal purposes.[1]

In this area, the Code is in accord with the present prevailing doctrine of most jurisdictions. The development of the present doctrine may easily be traced in a series of Supreme Court decisions.

In United States v. Rabinowich,[2] the Court recognized that a conspiracy is not to be equated with the commission of the crime contemplated, and neither arises under nor violates the statute the violation of which is its object.[3] Subsequently, in Frohwerk v. United States,[4] the Supreme Court attempted to settle a question which had formerly been uncertain in the federal courts; i.e., whether a conspiracy was singular although its objectives were multiple. The Court held that "the conspiracy is the crime, and that is one, however diverse its objects."[5] The issue was resolved in Braverman v. United States,[6] wherein the Court explains,

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.[7]

It is this view which is adopted in both the Model Penal Code and the present Code.

Previous Hawaii law, in treating one joining after the formation of a conspiracy as if one had been part of it from the beginning,[8] would include in one's criminal object those crimes perpetrated before one joined. Hence, under past Hawaii law, if A and B conspired to rob V and sell the stolen goods at various remote locations, C, who joined after the robbery of V, would be held guilty of the conspiracy to rob V, as well as of the conspiracy to distribute the stolen goods.[9] The Code, in its unilateral approach to conspiratorial liability, holds a person liable for conspiracy only with respect to those acts and results which the person's agreement includes. Hence in the above example, C is liable only of conspiracy to distribute stolen goods, and not of conspiracy to commit robbery. This result is obtained by the language requiring that the crimes be the object of the same agreement or relationship into which the conspirator has entered.

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§705-522 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 129-30 (1960).

2. 238 U.S. 78 (1915).

3. Id. at 87.

4. 249 U.S. 204 (1919).

5. Id. at 210.

6. 317 U.S. 49 (1942).

7. Id. at 53-54; for a complete discussion of this line of cases, see M.P.C., Tentative Draft No. 10, comments at 127-128 (1960).

8. H.R.S. §728-2.

9. See Territory of Hawaii v. Kitabayashi, 41 Haw. 428 (1956).

" **§705-523 Immunity, irresponsibility, or incapacity of a party to criminal conspiracy.** (1) A person shall not be liable under section 705-520 for criminal conspiracy if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person.

(2) It is not a defense to a prosecution under section 705-520 that a person with whom the defendant conspires could not be guilty of committing the crime because:

(a) He is, by definition of the offense, legally incapable in an individual capacity of committing the offense;

(b) He is penally irresponsible or has an immunity to prosecution or conviction for the commission of the crime;

(c) He is unaware of the criminal nature of the conduct in question or of the defendant's criminal intent; or

(d) He does not have the state of mind sufficient for the commission of the offense in question.

(3) It is not a defense to a prosecution under section 705-520 that the defendant is, by definition of the offense, legally incapable in an individual capacity of committing the offense that is the object of the conspiracy. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-523

The problems arising out of possible immunity, irresponsibility, or incapacity of a person to a criminal conspiracy are dealt with essentially in the commentary on §705-511 (dealing with immunity, irresponsibility, or incapacity of a party to criminal solicitation). This section is intended to resolve these problems should they arise in a conspiracy context.

This section has no counterpart in previous Hawaii law. Other jurisdictions have held that there can be no conspiracy in such situations because a conspiracy, as an agreement of two or more persons, requires at least two guilty conspirators.[1] In keeping with the unilateral approach to conspiracy of this Code, however, it is evident that the danger of the conspiracy arising from collective joint action remains essentially the same whether or not one of the conspirators cannot be successfully prosecuted. Moreover, one of the principal reasons for imposing penal liability in the area of inchoate crimes, i.e., the unequivocal presence of a strong intent to commit a crime, is present regardless of the co-conspirator's innocence, incapacity, or irresponsibility.[2]

§705-523 Commentary:

1. Prop. Mich. Rev. Cr. Code, comments at 102.

2. Id.; see also commentary on §705-520.

" **§705-524 Venue in criminal conspiracy prosecutions.** For purposes of determining venue in a prosecution for criminal conspiracy, a criminal conspiracy is committed in any circuit in which the defendant enters into the conspiracy and in any circuit in which the defendant or person with whom the defendant conspires does an overt act. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §705-524

Section 705-524 is aimed at affording the defendant constitutional venue protection. The Sixth Amendment to the Federal Constitution provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." However, the use of a conspiracy charge under current, loose definitions of conspiracy dilute this protection. The unilateral approach of the Code, its limited definition and scope of conspiracy, and

section 705-524 combine to establish proper venue. As the Model Penal Code commentary points out:

> It is contemplated that the stricter tests of a conspiracy's scope advanced in the Draft will considerably limit the present dilution of the constitutional protection. [Section 705-524] explicitly provides that proper venue for a conspiracy charge will be tested by the defendant's agreement or overt act or an overt act of a person with whom he conspired. It assures that in complex cases involving a number of separate conspiracies, venue as to each conspiracy with which each defendant is charged will not be laid on the basis of an overt act done pursuant to a different conspiracy or by a person with whom he did not conspire.[1]

§705-524 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 138-39 (1960).

" **§705-525 Duration of conspiracy.** For purposes of section 701-108, the following apply:

(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom the defendant conspired.

(2) It is prima facie evidence that the agreement has been abandoned if neither the defendant nor anyone with whom the defendant conspired did any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to the individual only if and when the individual advises those with whom the individual conspired of the individual's abandonment or the individual informs the law-enforcement authorities of the existence of the conspiracy and of the individual's participation therein. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §705-525

This section adopts the Model Penal Code's provisions defining the duration of a conspiracy for purposes of time limitations.

Subsection (1) is in accord with the generally accepted doctrine that the conspiracy terminates when the crime or crimes

which are its objectives are committed or all the conspirators agree to abandon the conspiracy.

It should be pointed out that where abandonment is not an issue and termination rests on accomplishment of the criminal objective, subsidiary agreements of concealment must be distinguished from offenses requiring an extended period of time for commission and, therefore, also acts of concealment during that period of time. In the former cases it is held that the conspiracy terminates with the accomplishment of its primary objective and its duration is not extended by agreement and effort to conceal the venture from law-enforcement authorities. The latter cases hold that the conspiracy continues until its final objective is reached. Thus, a conspiracy to use undue influence to obtain "no prosecution" rulings from the Bureau of Internal Revenue has been held to terminate upon getting the rulings and is not extended by concealment activities thereafter, whereas a conspiracy to commit the offense of income tax evasion has been held to continue until the period of limitation on tax prosecutions runs, and acts of concealment are regarded as in furtherance of the conspiratorial objective.[1]

Subsection (2) provides that it is prima facie evidence that the agreement has been abandoned prior to the applicable period of limitation by all conspirators if none performs an overt act in pursuance of the conspiracy during period of limitation. This evidentiary rule is, of course, not conclusive and, in the absence of an overt act, other evidence of the vitality of the conspiracy during the period of limitation may be sufficient to prove that the agreement has not been abandoned.

Subsection (3) provides for abandonment of the conspiracy by an individual member and its termination as to the individual member. Abandonment of a conspiracy must be distinguished from renunciation under §705-530(3). The former starts the period of limitation running but does not otherwise affect liability. The latter constitutes an affirmative defense.

The Code's formulation requires that to abandon the conspiracy the individual member must take steps to remove the encouragement which the individual member's prior allegiance had given the individual member's co-conspirators.

> As a general matter, the policy behind statutes of limitation dictates that they should begin to run when an individual's criminal conduct ends. If the crime is conspiracy, this conduct theoretically ends when he ceases to agree in the purpose that the conspiratorial objective be committed. Since, however, conspiracy involves the additional considerations that his conduct has incited and encouraged others in their criminal purposes, which they may continue to pursue, the law should require in addition

some action to remove the incitement caused by his agreement, in order that the others may be dissuaded and commission of the crime be averted. It is submitted that the generally accepted requirement that he advise his coconspirators of his abandonment should suffice for this purpose. The Draft provides, in addition, the alternative method of informing and confessing to the law enforcement authorities, since this affords an even greater likelihood that commission of the crime will be prevented and may in some cases provide the conspirator with a safer or more practical means of abandoning the scheme.[2]

There was no previous Hawaii law dealing with the duration of a conspiracy.

§705-525 Commentary:

1. Compare Grunewald v. United States, 353 U.S. 391 (1957), with Forman v. United States, 361 U.S. 416, rehearing denied, 362 U.S. 937 (1960).

2. M.P.C., Tentative Draft No. 10, comments at 155 (1960).

" **§705-526 Grading of criminal conspiracy.** (1) A conspiracy to commit murder in any degree is a class A felony.

(2) Except as provided in subsection (1), a conspiracy to commit a class A felony is a class B felony.

(3) Except as provided in subsections (1) and (2), conspiracy to commit a crime is an offense of the same class and grade as the most serious offense which is an object of the conspiracy. [L 1972, c 9, pt of §1; am L 1997, c 149, §3]

COMMENTARY ON §705-526

Except for the reduction of conspiracy to commit a class A felony, the Code makes the same sanctions available for criminal conspiracy as are made available for the substantive offense which is the object of the conspiracy. The discussion in the commentary on §705-502 regarding the Code's position in postulating a general equivalence, for sentencing purposes, between criminal attempt and the offense attempted is generally applicable to this section which postulates approximately the same equivalence in the conspiracy context. Due to the extreme inchoate nature of the offense, reduction in sentence in the case of class A felonies is provided.

Under previous Hawaii law, a conspiracy to commit any felony was a conspiracy of the "first degree," punishable by a term of

imprisonment of up to ten years, or a maximum fine of $10,000, or both.[1] The Code reserves this magnitude of sentence (which corresponds roughly to a sentence for a class B felony[2] for conspiracies to commit offenses which the Code has made class A or B felonies. Under the Code, however, conspiracy to commit a class C felony may not be penalized as severely as under past Hawaii law, since under the Code a class C felony ordinarily carries a maximum sentence of five years' imprisonment.[3]

The Code is also in accord with previous Hawaii law regarding conspiracies to commit misdemeanors, since both normally impose a maximum fine of $1,000, or a maximum term of imprisonment of one year, or both.[4] The former law would, however, have allowed for harsher treatment of those offenses which the Code terms petty misdemeanors, since conspiracies to commit all non-felonies were treated the same under Hawaii law.[5]

Generally speaking, the Code is in substantial accord with previous Hawaii law, however, it allows for a closer concurrence between the grade of the crime which was the object of the conspiracy and the sanction imposed for that conspiracy.

SUPPLEMENTAL COMMENTARY ON §705-526

Act 149, Session Laws 1997, amended this section to provide that conspiracy to commit murder in any degree is a class A felony. The legislature found that the offense of murder warranted punishment under the Code sufficient to fit the grave consequences of the crime, and that persons who are found guilty of conspiracy or solicitation to commit murder should also be penalized to a similarly serious degree. The legislature recognized that two Hawaii supreme court opinions, State v. Kaakimaka (84 H. 280, 933 P.2d 617 (1997)) and State v. Soto (84 H. 229, 933 P.2d 66 (1997)), concluded that conspiracy to commit murder and solicitation to commit murder are class C felonies. The legislature acknowledged that the decisions had led to incongruous sentencing under the sentencing guidelines of the Code. Conspiracy and solicitation are ordinarily designated the same level of felony offense as the underlying crime, or at the very least, one grade lower. Senate Standing Committee Report No. 1600.

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§705-526 Commentary:

1. H.R.S. §728-9.

2. Cf. §§706-640 and 660.

3. §706-660.

4. H.R.S. §728-10; §§706-640(3) and 663, this Code.

5. H.R.S. §728-10.

"PART IV. GENERAL PROVISIONS RELATING TO INCHOATE OFFENSES

§705-530 Renunciation of attempt, solicitation, or conspiracy; affirmative defense. (1) In a prosecution for criminal attempt, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the attempt.

(2) In a prosecution for criminal solicitation, it is an affirmative defense that the defendant, under circumstances manifesting a complete and voluntary renunciation of the defendant's criminal intent:

(a) First notified the person solicited of the defendant's renunciation[;]

(b) Gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result solicited.

(3) In a prosecution for criminal conspiracy, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy.

(4) A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by:

(a) A belief that circumstances exist which increase the probability of detection or apprehension of the accused or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or

(b) A decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

(5) A warning to law-enforcement authorities is not "timely" within the meaning of this section unless the authorities, reasonably acting upon the warning, would have the

opportunity to prevent the conduct or result. An effort is not "reasonable" within the meaning of this section unless the defendant, under reasonably foreseeable circumstances, would have prevented the conduct or result. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §705-530

Modern penal theory recognizes two basic reasons for allowing renunciation as an affirmative defense to inchoate crimes. First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the penal law seeks to prevent. Where the defendant has performed acts which indicate, prima facie, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.[1]

Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.[2]

Renunciation in all three inchoate situations requires that the defendant either give timely warning to the police, or make a reasonable effort to prevent the culmination of the crime. If the warning to the police is timely, as defined in subsection (5), this alone is sufficient to establish the defense, and no further effort, reasonable or otherwise, is required of the defendant. It is assumed that the police make reasonable efforts in this regard; and when they do not do so, it makes little sense to punish one who so relies upon them. Where the police have not been warned, efforts at prevention must be reasonable, in the sense of substantial, as well as timely. As reasonable is defined, it must be sufficient under all foreseeable circumstances to prevent the offense. Only where the prevention is thwarted by circumstances which are not reasonably foreseeable does the Code allow the defense of

renunciation. Thus unless such unforeseeable circumstances occur, the substantive offense will always be prevented.

When the defendant has been able to prevent the occurrence of the substantive evil, the defendant has counterbalanced the danger to society which the defendant's actions presented. In terms of the foregoing rationales of renunciation, the defendant has evidenced a sufficient lack of firmness in the defendant's criminal purpose that liability ought not to apply, and the law has perhaps succeeded in encouraging the defendant to abandon the defendant's criminal activities.

It would not be reasonable to hold the defendant strictly liable for the defendant's inchoate activities by imposing liability where unforeseeable circumstances thwart prevention of the substantive offense. If the defendant's renunciation is effective but for circumstances not reasonably foreseeable, that is all that may be asked. Moreover, to impose strict criminal liability in such situations would be to ignore the rationales for allowing the defense of renunciation. If the defendant's renunciation is effective under all foreseeable circumstances, the defendant has evidenced a sufficient lack of firmness in the defendant's criminal purpose, and the law has succeeded as far as is rationally possible in encouraging the defendant to abandon such purpose.

In the solicitation situation, it is recognized that there is a further important need to ensure that the person solicited is aware of the renunciation. The requirement of reasonable effort as it is used in the Code, probably would require such notification in almost all cases, but the obvious and necessary nature of such notification has led to the insertion of this special requirement in other codes.[3] Moreover, a person who seeks to withdraw and notifies the police without also notifying the person solicited, acts in a sense as the "entrapper" of the solicited person.

The requirement and definition of voluntary and complete renunciation are principally to ensure the good faith of the defendant in abandoning the defendant's criminal purpose. As defined, the renunciation must be such that it indicates that the defendant no longer represents a substantial danger to society.

Hawaii has previously not developed statutory or common-law doctrine of renunciation in the inchoate area. This section of the Code represents a valuable addition to Hawaii law in this area.

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§705-530 Commentary:

1. M.P.C., Tentative Draft No. 10, comments at 72 (1960).

2. Id.

3. Prop. Mich. Rev. Cr. Code §1010(2); see also M.P.C. §5.02(3), where notification is an alternative method of prevention.

" **§705-531 Multiple convictions.** A person may not be convicted of more than one offense defined by this chapter for conduct designed to commit or culminate in the commission of the same substantive crime. [L 1972, c 9, pt of §1]

COMMENTARY ON §705-531

This section reflects a position which underlies much of this chapter: that the danger which is represented by inchoate crimes lies in the possibility that the substantive will be carried to fruition because of disposition of the defendant. Hence any number of stages preparatory to the commission of a given offense, if taken together, still only constitute a single danger: that the crime contemplated will be committed. Such a rationale precludes cumulating convictions of attempt, solicitation, and conspiracy to commit the same offense. Section 705-531 precludes conviction of more than one inchoate crime for conduct intended to result in the commission of the same offense.

There was nothing in previous Hawaii law to prevent prosecution of multiple inchoate offenses for conduct intended to result in the commission of a single crime.

Case Notes

"Convicted" means guilty verdict, not sentence and judgment; under this section and §701-109, defendant cannot be found guilty of being an accomplice to an attempted crime and of conspiracy to commit the same crime. 5 H. App. 651, 706 P.2d 1326 (1985).

Under this section and §701-109, defendant cannot be found guilty of conspiracy to commit crime and the crime itself. 5 H. App. 670, 706 P.2d 1331 (1985).