

9 GCA CRIMES AND CORRECTIONS
CH. 13 ATTEMPT, SOLICITATION, CONSPIRACY

CHAPTER 13
ATTEMPT, SOLICITATION, CONSPIRACY

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§ 13.10. Attempt: Defined.

A person is guilty of an attempt to commit a crime when, with intent to engage in conduct which would constitute such crime were the circumstances as he believes them to be, he performs or omits to perform an act which constitutes a substantial step toward commission of the crime.

SOURCE: M.P.C. §5.10(1); *Cal. § 800 (T.D. 2, 1968); Cal. 700 (1971); Mass. ch. 263, § 45(a); N.J. § 2C:5-18; § 2C:5-5; compare § 5.01(2).

CROSS-REFERENCES: cf. Guam Penal Code 216-217, 220-222, 451A, 466, 467; 9 GCA § 7.73.

COMMENT: A new Section. Section 13.10 provides for the first time a statutory definition of attempt. This Section does not cover the commission of, or attempt at, violations.

The focus of attention here is on the dangerousness of the defendant as person manifesting a disposition to commit a crime, rather than on the dangerousness of the defendant's conduct in itself. Accordingly, the statute by merely requiring "a substantial step towards commission of" a crime draws the definition of attempt well back into the area which some courts may characterize as mere preparation. For example, under this Section, the following acts if proven should permit the case to go to the jury:

- (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 where the crime will be committed;
- (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 especially designed for such unlawful use or which can serve no lawful

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purpose of the defendant under the circumstances compare former §§ 466 and 467 of the Guam Penal Code;

(f) Possession, collection or fabrication of materials to be employed in the commission of a crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the defendant under the circumstances.

Section 13.10 is also framed to make clear that the defendant need only act with the intent to be engage in conduct which constitutes a crime rather than a specific intent to commit the crime for which the attempt is charged. For a limited defense of the renunciation of attempt, see 9 GCA § 7.73.

§ 13.15. Same: Impossibility No Defense.

In a prosecution for an attempt, it is no defense that it was impossible to commit the crime.

SOURCE: M.P.C. § 5.10(1); *Calif. § 801 (T.D. 2 1968); Calif. § 705 (971); Mass. ch. 263 § 46(a); N.J. § 2C:5-1(a).

COMMENT: Section 13.15 states new law and reverses the old. Impossibility is no longer a defense to the charge of attempt to commit a crime. This Section would deny, for example, a defense to prosecution for attempted abortion on the ground that the women attempted to be aborted was not pregnant.

§ 13.20. Solicitation: Defined.

A person is guilty of solicitation to commit a felony when with intent to promote or facilitate its commission he commands, encourages or requests another person to perform or omit to perform an act which constitutes such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

SOURCE: G.P.C. § 653b; M.P.C. § 5.02(1); *Calif. § 805 (T.D.2 1968); Calif. § 710 (1971); Mass. ch. 263 § 47(a); N.J. § 2C:5-1(b)(7).

COMMENT: By § 13.20, the criminal liability formerly provided by § 653b of the Penal Code is expanded to include the solicitation of any felony. It should be noted that this Section does not make criminal a solicitation to commit a misdemeanor or petty misdemeanor.

§ 13.25. Same: Defenses Allowed and Disallowed.

(a) In any prosecution for solicitation, it is a defense that if the criminal object was achieved, the defendant would not be guilty of a crime under the law defining the crime or as an accomplice under Subsection (a) of § 4.75.

(b) In any prosecution for solicitation, it is no defense that;

(1) he person solicited would not be guilty of the crime which was the object of the solicitation because of his lack of criminal responsibility or other legal incapacity; or

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(2) the crime can be committed only by a particular class of persons to which either the solicitor or the person solicited does not belong.

SOURCE: M.P.C. § 5.04; *Cal. § 806 (T.D. 2 1968); Cal. § 715 (1971); Mass. ch. 263, § 47 (b)(c).

CROSS-REFERENCES: 9 GCA § 4.75; 9 GCA § 7.73.

COMMENT: A person who cannot be convicted of the substantive crime under the complicity provision should not be convicted of solicitation, such as a female in a statutory rape case.

On the other hand, Subsection (c) makes it clear that it is no defense to a charge of solicitation that the person solicited would be guilty of the crime which is the object of the solicitation because of his lack of criminal responsibility or because the crime could be committed only by a particular class of persons to which either the solicitor or the person solicited does not belong. This later situation would occur where the solicitor tries to get a bank official to falsify records (assuming that is a crime which can be committed by only a bank official). The solicitor could still be convicted of solicitation even though he could not be convicted of the crime of falsifying records.

§ 13.30. Conspiracy: Definition.

A person is guilty of conspiracy to commit a crime if:

(a) he agrees with one or more other persons that he or one of them will engage in conduct which constitutes such crime;

(b) he does so with the intention of engaging in, promoting or assisting in the conduct which constitutes such crime; and

(c) he or one of them performs an overt act in pursuance of the agreement.

SOURCE: Guam §§ 182-185; M.P.C. § 5.03 (1), (5); *Cal. § 8.10 (T.D.2 1968); Cal. § 720 (1971); Mass. ch. 263, § 48; N.J. § 2C:5-2(a)(d).

CROSS-REFERENCES: 9 GCA § 1.16 (a)(3),(4).

COMMENT: Section 13.30 eliminates all of the conspiratorial objectives of former §§ 182 of the Penal Code except the commission of a crime. In this it is consistent with the Model Penal Code and probably makes little, if any, change in the actual application of the former statute. The overt act requirement is in accord with former § 184 of the Penal Code.

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§ 13.35 Same: Multiple Criminal Objectives.

If a person conspires to commit a number of crimes, he may be convicted of only one conspiracy so long as those multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

SOURCE: M.P.C. § 503(3); *Cal. § 811 (T.D.2 1968); Cal. § 703(a) (1971); N.J. § 2C:5-2(c).

CROSS-REFERENCES: 9 GCA § 13.10.

COMMENT: A new Section. This Section helps to avoid the accumulation of penalties and to mediate the potential harshness of a conspiracy prosecution which moves prosecution back to stages of preparation.

§ 13.40. Same: Scope.

If a person is guilty of conspiring with one co-conspirator to commit a crime and knows or contemplates that his co-conspirator has conspired or may conspire with another to commit the same crime, he is guilty of conspiring with any such other person to commit that crime, whether or not he knows of his identity.

SOURCE: M.P.C. § 5.03 (2); Cal. § 812 (T.D. 2 1968); Mass. ch. 263, § 48(b); N.J. § 2C:5-2(b).

COMMENT: A new Section. Section 13.40 is similar to, although somewhat broader than, Model Penal Code § 5.03(2). The importance of this Section lies in the fact that determining the scope of a conspiracy may affect the answer to such critical issues as defining each defendant's liability, the propriety of joint prosecution, admissibility against a defendant of the hearsay acts and declaration of others, satisfaction of the overt act requirement, or Statute of Limitations.

§ 13.45. Same: Defenses Allowed and Disallowed.

(a) In any prosecution for conspiracy, it is a defense that if the criminal object was achieved, the defendant would not be guilty of a crime under the law defining the crime or as an accomplice under Subsection (a) of § 4.75.

(b) In any prosecution of conspiracy, it is no defense that:

(1) a co-conspirator would not be guilty of conspiracy or the crime which was its object because of his lack of criminal responsibility or other legal incapacity, or because of his lack of culpability required for the crime;

(2) the crime can be committed only by a particular class of persons to which either the defendant or a co-conspirator does not belong;

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(3) a co-conspirator has legal immunity from prosecution, or has not been prosecuted for or convicted of the conspiracy or a crime based upon the conduct in question, or has previously been acquitted; or

(4) the agreement of a purported co-conspirator was feigned.

SOURCE: M.P.C. § 5.04; *Cal. § 813 (T.D.2 1968); Cal. § 725 (1971); Mass. ch. 263, § 48(b), (e); N.J. § 2C:5-3.

CROSS-REFERENCES: 9 GCA §§ 7.73 and 13.25.

§ 13.50. Same: Duration.

For purposes of 8 GCA § 10.60:

(a) conspiracy terminates when the crime or crimes which are its object is or are committed or the agreement is abandoned by the defendant and his co-conspirators.

(b) If a defendant abandons the agreement, the conspiracy is terminated as to him only when he advises those with whom he conspired of his abandonment or informs the law enforcement authorities of the existence of the conspiracy and his participation.

SOURCE: M.P.C. § 5.03(7); *Cal. § 814 (T.D.2 1968); Mass. ch. 263, § 48(c); N.J. § 2C:5-2(f).

CROSS-REFERENCES: 8 GCA § 10.60.

COMMENT: This Section defines a termination of a conspiracy for purposes of the Statute of Limitations.

§ 13.60. Attempt, Solicitation, Conspiracy: Degree of Offense Stated.

(a) Except as otherwise provided in this Section attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious crime which is attempted or solicited or is an object of the conspiracy.

(b) Attempted murder, and solicitation and conspiracy to commit murder are felonies of the first degree.

(c) A conspiracy to commit a misdemeanor involving danger to the person or to commit a series or number of misdemeanors pursuant to a common scheme or plan is a felony of the third degree.

SOURCE: G.P.C. §§ 182, 524, 664; M.P.C. § 5.05; *Cal. § 820 (T.D.2 1968); Cal. § 735 (1971); Mass. ch. 263, § 48(g); N.J. § 2C:5-4.

CROSS-REFERENCES: 9 GCA § 16.30(c); § 80.32.