

## CHAPTER 27

### CIVIL CONSPIRACY

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## 27:1 ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant(s) (*name[s]*), on (his) (her) claim of civil conspiracy, you must find that all of the following have been proved by a preponderance of the evidence:

1. The defendant(s) (and at least one other person) agreed, by words or conduct, to (accomplish an unlawful goal) (or) (accomplish a goal through unlawful means);
2. (One or more unlawful acts were performed to accomplish the goal) (or) (one or more acts were performed to accomplish the unlawful goal);
3. The plaintiff had (injuries) (damages) (losses); and
4. The plaintiff's (injuries) (damages) (losses) were caused by the acts performed to accomplish the goal.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant(s).

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. Omit any numbered paragraph, the facts of which are not in dispute.
2. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted.
3. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular an instruction or instructions relating to causation. *See* Instructions 9:18 to 9:21.

5. For the definition of “unlawful means,” see Instruction 27:2 and for the definition of “unlawful goal,” see Instruction 27:3.

### Source and Authority

1. This instruction is supported by **Jet Courier Service, Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989); **Nelson v. Elway**, 908 P.2d 102 (Colo. 1995) (unlawful overt act not established); **Contract Maintenance Co. v. Local No. 105**, 160 Colo. 190, 415 P.2d 855 (1966); **Lockwood Grader Corp. v. Bockhaus**, 129 Colo. 339, 270 P.2d 193 (1954); **Walker v. Van Laningham**, 148 P.3d 391 (Colo. App. 2006); **Stauffer v. Stegemann**, 165 P.3d 713 (Colo. App. 2006); **Telluride Real Estate Co. v. Penthouse Affiliates, L.L.C.**, 996 P.2d 151 (Colo. App. 1999); **Magin v. DVCO Fuel Systems, Inc.**, 981 P.2d 673 (Colo. App. 1999); and **Electrolux Corp. v. Lawson**, 654 P.2d 340 (Colo. App. 1982).

2. The cases require an overt act, but do not suggest that an affirmative act covertly done does not constitute an “overt” act. A bad thought does not in itself suffice. The word “overt” has not been used in this instruction because that requirement is covered by the word “performed” in the second numbered paragraph.

3. Personal jurisdiction in Colorado for civil conspiracy requires an act by a Colorado resident co-conspirator before the Court could potentially have personal jurisdiction over foreign co-conspirator defendants. **Giduck v. Niblett**, 2014 COA 86, ¶ 25, 408 P.3d 856 (reserving for another day the question of whether a civil conspiracy could potentially establish personal jurisdiction in Colorado).

4. A claim for damages arising from a civil conspiracy may be pled as a separate claim, and liability may be imposed on a single defendant for conspiratorial acts with others who have not been joined in the action. In such a case, liability may be imposed upon a defendant for the fault of all other joint tortfeasors, regardless of whether they have settled with the plaintiff and not been joined in the action. **Pierce v. Wiglesworth**, 903 P.2d 656 (Colo. App. 1994).

5. To establish a claim for civil conspiracy, an express agreement is not necessary. However, there must be some indicia of an agreement. **Saint John’s Church v. Scott**, 194 P.3d 475 (Colo. App. 2008) (evidence of conspiracy to commit a public nuisance sufficient where two defendants were part of a small group with a long history of active demonstrations, both made plans to attend protest, both met with protest group about the demonstration, and one provided the other with signs for protest); **Double Oak Constr., L.L.C. v. Cornerstone Dev. Int’l, L.L.C.**, 97 P.3d 140 (Colo. App. 2003) (fraudulent conveyance); **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992).

6. A claim for civil conspiracy is a derivative cause of action; therefore, if the acts constituting the underlying wrong do not provide the basis for an independent cause of action, there is no cause of action for the conspiracy itself. **Double Oak Constr., L.L.C.**, 97 P.3d at

146; **Condo v. Conners**, 271 P.3d 524 (Colo. App. 2010) (absent evidence of tortious interference with contract, there was no unlawful overt act to support a claim of civil conspiracy), *aff'd*, 266 P.3d 1110 (Colo. 2011).

7. Courts have generally held that an attorney acting within the scope of his employment cannot conspire with his client unless the attorney has also acted for his sole personal benefit. However, other courts have recognized additional bases for a viable civil conspiracy claim, such as when an attorney engages in fraud or breaches an independent duty to a third person. **Semler v. Hellerstein**, 2016 COA 143, ¶ 32 (affirming dismissal of civil conspiracy claim because the plaintiff failed to allege that the defendant lawyer “acted for his own personal gain or otherwise acted outside the scope of his legal representation”), *cert. granted on other grounds*, March 20, 2017.

8. Section 13-21-111.5(4), C.R.S., provides that defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act shall be jointly liable to a plaintiff, rather than only individually liable for their proportion of personal fault. Section 13-21-111.5(4), however, does not list all of the elements of the independent tort of civil conspiracy. **Resolution Tr. Corp. v. Heiserman**, 898 P.2d 1049 (Colo. 1995). The statutory term “tortious act” includes any conduct other than breach of contract that constitutes a civil wrong and causes injury or damages. *Id.*

## 27:2 UNLAWFUL MEANS — DEFINED

**“Unlawful means” (are) (include)** *(insert an appropriate description of the specific acts the plaintiff alleges were used to accomplish the conspiracy of which there is sufficient evidence and which would be unlawful under the applicable law).*

**The fact that this definition of “unlawful means” is being given to you does not mean that the court is instructing you to find that unlawful means were used. The question of whether or not such means were used is a question of fact for you to determine.**

### Notes on Use

1. This instruction must be given whenever the phrase “unlawful means” is included in Instruction 27:1.
2. What constitutes “unlawful means” is a question of law for the court.

### Source and Authority

1. No Colorado decision provides a comprehensive definition of “unlawful means.” Several cases, however, have held specific acts, such as a breach of a duty of loyalty, to be “unlawful.” **Jet Courier Serv., Inc. v. Mulei**, 771 P.2d 486 (Colo. 1989); *see also* **Espinoza v. O’Dell**, 633 P.2d 455 (Colo. 1981) (interference or violation of civil rights); **Julius Hyman & Co. v. Velsicol Corp.**, 123 Colo. 563, 233 P.2d 977 (1951) (wrongful use of trade secrets); **Zimmerman v. Hinderlider**, 112 Colo. 277, 148 P.2d 813 (1944) (destruction of decreed reservoir rights).

2. An alleged conspiracy to defraud, cheat, and wrong the plaintiff by procuring a judgment was held to state a cause of action in **Dixon v. Bowen**, 85 Colo. 194, 274 P. 824 (1929), as was a conspiracy to cancel a corporation’s contracts and deplete the corporation’s assets in **Schreiber v. Burton**, 81 Colo. 370, 256 P. 1 (1927). *See also* **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992) (tort of “negligent entrustment”).

### **27:3 UNLAWFUL GOAL — DEFINED**

**“Unlawful goal” means** *(insert an appropriate description of the goal of the alleged conspiracy of which there is sufficient evidence and which would be unlawful under the applicable law).*

**The fact that this definition of “unlawful goal” is being given to you does not mean the court is instructing you to find that the defendant(s) sought to accomplish an unlawful goal. The question of whether the defendant(s) sought to accomplish such a goal is a question of fact for you to determine.**

#### **Notes on Use**

1. This instruction must be given whenever the phrase “unlawful goal” is included in Instruction 27:1.
2. What constitutes an “unlawful goal” is a question of law for the court.

#### **Source and Authority**

No Colorado decision provides a comprehensive definition of “unlawful goal.” For an indication of various goals which have been considered unlawful, however, see the cases cited in the Source and Authority to Instruction 27:2.