

# COLORADO JURY INSTRUCTIONS

## CRIMINAL

### 2020



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**MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE  
OF THE COLORADO SUPREME COURT**



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State of Colorado



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# COLORADO SUPREME COURT

## ORDER

WHEREAS, the Colorado Supreme Court Model Criminal Jury Instructions Committee has formulated instructions concerning criminal cases necessitated by numerous amendments to the statutes of the State of Colorado since the previous edition of these instructions was published; and

WHEREAS, the Chair of the Committee has regularly informed the Court of the Committee's work;

NOW, THEREFORE, IT IS ORDERED that these jury instructions and comments are approved by this Court for use in jury trials in criminal cases in the State of Colorado, subject to the following qualifications:

These instructions are intended as guidelines and should be used in cases in which they are applicable. The Court does not specifically approve any of these instructions not yet tested in an adversary proceeding. They are not intended to be a complete set of instructions for each case and additional or different instructions may be required depending on the issues of fact and law presented at the trial. Until these instructions are tested in adversary proceedings, they are approved in principle.

DONE and signed this 1st day of September, 2014.

COLORADO SUPREME COURT

*Nancy E. Rice*

By

\_\_\_\_\_  
Nancy E. Rice, Chief Justice

**SUPREME COURT OF COLORADO  
OFFICE OF THE CHIEF JUSTICE**

**ORDER**

**Concerning the Reauthorization of the Model Criminal Jury Instructions  
Committee of the Colorado Supreme Court**

I hereby reauthorize the Model Criminal Jury Instructions Committee and charge it with periodically reviewing, correcting, updating, and improving Colorado Jury Instructions—Criminal.

I reappoint Justice Carlos Samour, Jr. as Chair; Judge John Daniel Dailey and Judge Rebecca R. Freyre as Vice-Chairs; and Judge Martin F. Egelhoff, Senior Judge Charles R. Greenacre, Judge Mark Randall, Judge Karen A. Romeo, and Senior Judge P. Dinsmore Tuttle as Members.

This Order shall apply retroactively to October 1, 2018, and shall remain in force until otherwise suspended by a superseding order from the Chief Justice.

DONE and signed this 8th day of August, 2019.

COLORADO SUPREME COURT

By

A handwritten signature in black ink, appearing to read "Nathan B. Coats", written over a horizontal line.

Nathan B. Coats, Chief Justice

## PREFACE

In 2011, then-Chief Justice Michael L. Bender established the Colorado Supreme Court's Model Criminal Jury Instructions Committee (the Committee) and charged it with publishing an updated edition of COLJI-Crim. The Committee thanks the former Chief Justice for providing the Committee with the staff and other resources necessary to accomplish this sizeable undertaking. The Committee is equally grateful to former Chief Justice Nancy E. Rice, former Chief Justice Nathan B. Coats, and current Chief Justice Brian D. Boatright, who all continued this support during their respective tenures.

The Committee has endeavored to draft model instructions that accurately state the law in neutral language. However, the precise format and wording for instructions and verdict forms have never been mandated as a matter of positive law in Colorado, and this publication is neither a restatement nor a comprehensive summary of the law.

The comments that follow the instructions include references to relevant legal authorities, cross-references to other instructions, and directions for addressing alternative scenarios. These comments include citations to relevant decisions of the United States Supreme Court and the Colorado Supreme Court that were announced prior to publication of this volume, as well as relevant decisions of the Colorado Court of Appeals that became final prior to publication (i.e., cases for which a mandate issued).

The Committee's drafting protocols are explained in greater detail in [Chapter A](#) (General Directions For Use of COLJI-Crim.), which includes a section with several [search tips](#).

The Committee intends to keep these jury instructions current by periodically publishing new editions or supplements. During the periods between these formal publications, the Committee Reporter will post online summaries of developments in the law related to criminal jury instructions based on legislative changes and decisions of the United States Supreme Court, the Colorado Supreme Court, and the Colorado Court of

Appeals. This list, which will be captioned as the “Reporter’s Online Update,” will be available on the [Committee’s web page](#).

Although the Committee expects that the Reporter’s Online Update will be a valuable research tool, the Committee emphasizes that it will be an informal publication that is not subject to review by the Committee. Thus, users should not assume that the Committee will make modifications based on information that appears in the Reporter’s Online Update.

In addition to these interim summaries of developments in the law related to criminal jury instructions, the Reporter’s Online Update will include notations documenting any errors that the Reporter learns of subsequent to publication. Accordingly, the Committee encourages users to alert the Reporter of errors at [mcjic@judicial.state.co.us](mailto:mcjic@judicial.state.co.us). However, here again, users should not assume that the Committee will make modifications based on recommended corrections that may appear in the Reporter’s Online Update.

The Committee invites users to submit recommendations for substantive improvements to the Reporter at the above e-mail address. Although such submissions will not be posted online as part of the Reporter’s Online Update, the Reporter will present all suggestions to the Committee for consideration.

Finally, the Committee wishes to express its appreciation for the suggestions of the Plain Language Jury Instructions Committee, a subcommittee of the Colorado Supreme Court’s Jury System Standing Committee: Judge James B. Breese (Chair), former Chief Justice Michael L. Bender, Justice Brian D. Boatright, Judge Catherine A. Lemon, Judge Tamara S. Russell, Ruth Falkenberg, Jay S. Grant, Esq., Robert S. Grant, Esq., Thomas J. Hammond, Esq., Professor Timothy Hurley, Professor Anthony Lozano, Miles Madorin, Esq., Penny McPherson, Blake Renner, Esq., Marjorie Seawell, and Penny Wagner.

In addition, the Committee thanks: Weld County Court Judge Dana Nichols and Diane Balkin, Esq. (who collaborated to review a preliminary draft of Chapter 9-2 (Cruelty to Animals)); Christopher T. Ryan, Clerk of

the Colorado Supreme Court, and staff (who provided the Committee with administrative and logistical support); Daniel Cordova, Supreme Court Law Librarian, and staff (who assisted the Committee with research); Bryan Lopez (who provided the cover photograph); Andrea Cole, Joan Cordutsky, Joseph DeStafney, Kristin Marburg, Melissa McClure, Catherine McDaugale, Sandy Mills, David Steiner, and J.J. Wallace, Associate Staff Attorneys for the Colorado Court of Appeals (who helped proofread the manuscript); Jenny Moore, Rules Research Attorney for the Colorado Supreme Court (who also helped proofread the manuscript); and Christine Kreger, of the Colorado State Library (who provided technical assistance).



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<a href="#"><u>3-3:04.INT</u></a>	FIRST DEGREE KIDNAPPING – INTERROGATORY (BODILY INJURY)
<a href="#"><u>3-3:05</u></a>	SECOND DEGREE KIDNAPPING (SEIZED AND CARRIED)
<a href="#"><u>3-3:06</u></a>	SECOND DEGREE KIDNAPPING (TAKING, ENTICING, OR DECOYING A MINOR)
<a href="#"><u>3-3:07.INT</u></a>	SECOND DEGREE KIDNAPPING – INTERROGATORY (VICTIM OF SEXUAL OFFENSE OR ROBBERY)
<a href="#"><u>3-3:08.INT</u></a>	SECOND DEGREE KIDNAPPING – INTERROGATORY (CONSIDERATION)
<a href="#"><u>3-3:09.INT</u></a>	SECOND DEGREE KIDNAPPING – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)
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<a href="#"><u>3-3:11.INT</u></a>	FALSE IMPRISONMENT – INTERROGATORY

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<a href="#"><u>3-3:13</u></a>	VIOLATION OF CUSTODY (COURT ORDER)
<a href="#"><u>3-3:14.INT</u></a>	VIOLATION OF CUSTODY – INTERROGATORY
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<a href="#"><u>3-3:16.SP</u></a>	ATTEMPTED ENTICEMENT OF A CHILD – SPECIAL INSTRUCTION
<a href="#"><u>3-3:17.INT</u></a>	ENTICEMENT OF A CHILD – INTERROGATORY
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<a href="#"><u>3-3:19.SP</u></a>	INTERNET LURING OF A CHILD – SPECIAL INSTRUCTION
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<a href="#"><u>3-4:10.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (FORCE OR VIOLENCE)

<a href="#"><u>3-4:11.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (THREAT OF HARM)
<a href="#"><u>3-4:12.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (RETALIATION)
<a href="#"><u>3-4:13.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (SUBSTANTIAL IMPAIRMENT)
<a href="#"><u>3-4:14.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (AIDED BY ANOTHER)
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<a href="#"><u>3-4:17.INT</u></a>	SEXUAL ASSAULT – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)
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<a href="#"><u>3-4:30.INT</u></a>	UNLAWFUL SEXUAL CONTACT – INTERROGATORY (AT-RISK PERSON)
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<a href="#"><u>3-4:37.INT</u></a>	SEXUAL ASSAULT ON A CHILD – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)
<a href="#"><u>3-4:38.INT</u></a>	SEXUAL ASSAULT ON A CHILD – INTERROGATORY (SEXUAL PENETRATION OR INTRUSION; CHILD UNDER TWELVE)
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<a href="#"><u>3-4:42.INT</u></a>	SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (PATTERN)
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- 3-4:45.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (AT-RISK VICTIM)**
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- 3-4:50.INT AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)**
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- 3-4:53.SP SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (INCLUDING AGGRAVATED) – SPECIAL INSTRUCTION (CONSENT IS NOT A DEFENSE)**
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- 3-4:55 INVASION OF PRIVACY FOR SEXUAL GRATIFICATION**
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- 3-5:01 HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE
- 3-5:02.INT HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE – INTERROGATORY (MINOR)
- 3-5:03 HUMAN TRAFFICKING FOR SEXUAL SERVITUDE
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- [3-6:04.SP](#) STALKING (SERIOUS EMOTIONAL DISTRESS) – SPECIAL INSTRUCTION (EVIDENCE OF TREATMENT NOT REQUIRED)
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- [3.5:01](#) UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE
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- [3.5:08](#) VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY
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- [3.5:10.SP](#) AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)
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<u>4-1:02.INT</u>	FIRST DEGREE ARSON – INTERROGATORY (EXPLOSIVE)
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<u>4-2:03</u>	SECOND DEGREE BURGLARY
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<u>4-2:05.INT</u>	SECOND DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)
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- [4-4:07.INT](#) THEFT – INTERROGATORY (FROM THE PERSON OF ANOTHER)
- [4-4:08.INT](#) THEFT – INTERROGATORY (MORTGAGE LENDING PROCESS)
- [4-4:09.INT](#) THEFT – INTERROGATORY (IN THE PRESENCE OF AN AT-RISK PERSON)
- [4-4:10.INT](#) THEFT – INTERROGATORY (POSITION OF TRUST FOR AN AT-RISK PERSON)
- [4-4:11.INT](#) THEFT – INTERROGATORY (FROM THE PERSON OF AN AT-RISK PERSON)

<a href="#"><u>4-4:12.INT</u></a>	<b>THEFT – INTERROGATORY (KNOWING THE VICTIM IS AN AT-RISK PERSON)</b>
<a href="#"><u>4-4:13.SP</u></a>	<b>THEFT – SPECIAL INSTRUCTION (CONCEALMENT)</b>
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<a href="#"><u>4-4:15</u></a>	<b>THEFT (FROM THE SAME PERSON PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT; AGGREGATED AND CHARGED IN THE SAME COUNT)</b>
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- [4-4:28](#) AGGRAVATED MOTOR VEHICLE THEFT IN THE SECOND DEGREE
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- [4-4:30.SP](#) THEFT – SPECIAL INSTRUCTION (ENGAGED IN THE BUSINESS)
- [4-4:31](#) THEFT OF MEDICAL RECORDS OR MEDICAL INFORMATION
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<a href="#"><u>4-5:08.INT</u></a>	SECOND DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND; INTENT TO COMMIT A FELONY)
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VIOLENCE OFFENDER)**

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DEATH OF AN AT-RISK PERSON**

**6.5:02                    CRIMINAL NEGLIGENCE RESULTING IN SERIOUS  
BODILY INJURY TO AN AT-RISK PERSON**

**6.5:03                    CRIMINAL NEGLIGENCE RESULTING IN BODILY  
INJURY TO AN AT-RISK PERSON**

**6.5:04                    CARETAKER NEGLIGENCE OR ENDANGERMENT OF  
AN AT-RISK PERSON**

**6.5:04.5                 UNLAWFUL ABANDONMENT OF AN AT-RISK  
PERSON**

**6.5:05                    CRIMINAL EXPLOITATION OF AN AT-RISK  
PERSON**

<a href="#"><u>6.5:06.INT</u></a>	CRIMINAL EXPLOITATION OF AN AT-RISK PERSON – INTERROGATORY (VALUE)
<a href="#"><u>6.5:06.4</u></a>	FALSE IMPRISONMENT OF AN AT-RISK PERSON (LOCKED ROOM)
<a href="#"><u>6.5:06.5</u></a>	FALSE IMPRISONMENT OF AN AT-RISK PERSON (PHYSICALLY RESTRAINING)
<a href="#"><u>6.5:06.6</u></a>	FALSE IMPRISONMENT OF AN AT-RISK PERSON (FORCE OR THREATS)
<a href="#"><u>6.5:07</u></a>	MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FAILURE TO REPORT)
<a href="#"><u>6.5:08</u></a>	MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FALSE REPORT)

## [CHAPTER 7-1 \(OBSCENITY\)](#)

<a href="#"><u>7-1:01</u></a>	WHOLESALE PROMOTION OF OBSCENITY
<a href="#"><u>7-1:02</u></a>	WHOLESALE PROMOTION OF OBSCENITY TO A MINOR
<a href="#"><u>7-1:03</u></a>	PROMOTION OF OBSCENITY
<a href="#"><u>7-1:04</u></a>	PROMOTION OF OBSCENITY TO A MINOR
<a href="#"><u>7-1:05.SP</u></a>	PROMOTION OF OBSCENITY – SPECIAL INSTRUCTION (SIX OR MORE ITEMS)
<a href="#"><u>7-1:06</u></a>	POSTING A PRIVATE IMAGE FOR HARASSMENT
<a href="#"><u>7-1:07</u></a>	POSTING A PRIVATE IMAGE FOR PECUNIARY GAIN
<a href="#"><u>7-1:08</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF ANOTHER)
<a href="#"><u>7-1:09</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF SELF)
<a href="#"><u>7-1:10.INT</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (AGGRAVATING CIRCUMSTANCES)
<a href="#"><u>7-1:11</u></a>	POSSESSING A PRIVATE IMAGE BY A JUVENILE
<a href="#"><u>7-1:12.INT</u></a>	POSSESSING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (SEPARATE IMAGES)

## CHAPTER 7-2 (PROSTITUTION)

<u>7-2:01</u>	PROSTITUTION
<u>7-2:02</u>	PROSTITUTION WITH KNOWLEDGE OF BEING INFECTED WITH HIV
<u>7-2:03</u>	SOLICITING ANOTHER FOR PROSTITUTION
<u>7-2:04</u>	SOLICITING FOR PROSTITUTION (ARRANGING)
<u>7-2:05</u>	SOLICITING FOR PROSTITUTION (DIRECTING)
<u>7-2:06</u>	PANDERING (INDUCING)
<u>7-2:07</u>	PANDERING (ARRANGING)
<u>7-2:08</u>	KEEPING A PLACE OF PROSTITUTION (USE)
<u>7-2:09</u>	KEEPING A PLACE OF PROSTITUTION (CONTINUED USE)
<u>7-2:10</u>	PATRONIZING A PROSTITUTE (ACT)
<u>7-2:11</u>	PATRONIZING A PROSTITUTE (PLACE)
<u>7-2:12</u>	PATRONIZING A PROSTITUTE WITH KNOWLEDGE OF BEING INFECTED
<u>7-2:13</u>	PIMPING
<u>7-2:14</u>	PROSTITUTE MAKING DISPLAY

## CHAPTER 7-3 (PUBLIC INDECENCY)

<u>7-3:01</u>	PUBLIC INDECENCY (SEXUAL INTERCOURSE)
<u>7-3:02</u>	PUBLIC INDECENCY (LEWD EXPOSURE)
<u>7-3:03</u>	PUBLIC INDECENCY (LEWD FONDLING OR CARESS)
<u>7-3:04</u>	PUBLIC INDECENCY (KNOWING EXPOSURE)
<u>7-3:05</u>	INDECENT EXPOSURE (KNOWING EXPOSURE)
<u>7-3:06</u>	INDECENT EXPOSURE (MASTURBATION)

## CHAPTER 7-4 (CHILD PROSTITUTION)

<u>7-4:01</u>	SOLICITING FOR CHILD PROSTITUTION (ANOTHER)
<u>7-4:02</u>	SOLICITING FOR CHILD PROSTITUTION (ARRANGING)

<a href="#"><u>7-4:03</u></a>	SOLICITING FOR CHILD PROSTITUTION (DIRECTING)
<a href="#"><u>7-4:04</u></a>	PANDERING OF A CHILD (INDUCING)
<a href="#"><u>7-4:05</u></a>	PANDERING OF A CHILD (ARRANGING)
<a href="#"><u>7-4:06</u></a>	PROCUREMENT OF A CHILD
<a href="#"><u>7-4:07</u></a>	KEEPING A PLACE OF CHILD PROSTITUTION (USE)
<a href="#"><u>7-4:08</u></a>	KEEPING A PLACE OF CHILD PROSTITUTION (CONTINUED USE)
<a href="#"><u>7-4:09</u></a>	PIMPING OF A CHILD
<a href="#"><u>7-4:10</u></a>	INDUCEMENT OF CHILD PROSTITUTION
<a href="#"><u>7-4:11</u></a>	PATRONIZING A PROSTITUTED CHILD (ACT)
<a href="#"><u>7-4:12</u></a>	PATRONIZING A PROSTITUTED CHILD (PLACE)
<a href="#"><u>7-4:13.SP</u></a>	CHILD PROSTITUTION CRIMES – SPECIAL INSTRUCTION (IGNORANCE OR REASONABLE BELIEF IS NOT A DEFENSE)

#### [CHAPTER 7-5 \(SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN\)](#)

<a href="#"><u>7-5:01</u></a>	SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN
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#### [CHAPTER 7-6 \(VISUAL REPRESENTATIONS CONTAINING ACTUAL VIOLENCE\)](#)

<a href="#"><u>7-6:01</u></a>	DISPENSING VIOLENT FILMS TO MINORS
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#### [CHAPTER 7-7 \(SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION\)](#)

<a href="#"><u>7-7:01</u></a>	SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION
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7-7:02.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (TYPE OF CONDUCT)

7-7:03.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (WORK STATUS)

CHAPTER 7-8 (CRIMINAL INVASION OF PRIVACY)

7-8:01 CRIMINAL INVASION OF PRIVACY

CHAPTER 7-9 (UNLAWFUL DISTRIBUTION OF SUICIDE RECORDINGS)

7-9:01 POSTING AN IMAGE OF SUICIDE OF A MINOR

CHAPTER 8-1 (OBSTRUCTION OF PUBLIC JUSTICE)

8-1:01 OBSTRUCTING GOVERNMENTAL OPERATIONS

8-1:02 RESISTING ARREST (FORCE OR VIOLENCE)

8-1:03 RESISTING ARREST (ANY MEANS)

8-1:04.SP RESISTING ARREST – SPECIAL INSTRUCTION (UNLAWFUL ARREST NOT A DEFENSE)

8-1:05 OBSTRUCTING A PEACE OFFICER, FIREFIGHTER, EMERGENCY MEDICAL SERVICES PROVIDER, RESCUE SPECIALIST, OR VOLUNTEER

8-1:06 OBSTRUCTING A PEACE OFFICER OR FIREFIGHTER (ANIMAL USED IN LAW ENFORCEMENT OR FIRE PREVENTION ACTIVITIES)

8-1:07.SP OBSTRUCTING A PEACE OFFICER – SPECIAL INSTRUCTION (OFFICER’S ILLEGAL ACTION NOT A DEFENSE)

8-1:08 ACCESSORY TO CRIME

<a href="#"><u>8-1:09.INT</u></a>	ACCESSORY – INTERROGATORY (KNOWLEDGE OF CLASS ONE OR TWO FELONY OFFENSE OR CHARGE)
<a href="#"><u>8-1:10.INT</u></a>	ACCESSORY – INTERROGATORY (KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A CLASS ONE OR TWO FELONY)
<a href="#"><u>8-1:11.INT</u></a>	ACCESSORY – INTERROGATORY (KNOWLEDGE OF FELONY OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A FELONY)
<a href="#"><u>8-1:12.INT</u></a>	ACCESSORY – INTERROGATORY (KNOWLEDGE OF MISDEMEANOR OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A MISDEMEANOR)
<a href="#"><u>8-1:13</u></a>	REFUSAL TO PERMIT INSPECTION (REFUSAL TO PRODUCE OR MAKE AVAILABLE)
<a href="#"><u>8-1:14</u></a>	REFUSAL TO PERMIT INSPECTION (REFUSAL WHEN AVAILABLE FOR INSPECTION)
<a href="#"><u>8-1:15</u></a>	REFUSING TO AID A PEACE OFFICER
<a href="#"><u>8-1:16</u></a>	COMPOUNDING (PROSECUTION)
<a href="#"><u>8-1:17</u></a>	COMPOUNDING (REPORTING)
<a href="#"><u>8-1:18</u></a>	CONCEALING DEATH
<a href="#"><u>8-1:19</u></a>	FALSE REPORT OF EXPLOSIVES, WEAPONS, OR HARMFUL SUBSTANCES
<a href="#"><u>8-1:20</u></a>	FALSE REPORTING TO AUTHORITIES (CAUSING A FALSE ALARM)
<a href="#"><u>8-1:21.INT</u></a>	FALSE REPORTING TO AUTHORITIES (CAUSING A FALSE ALARM) – INTERROGATORY (DURING COMMISSION OF A CRIME)
<a href="#"><u>8-1:22</u></a>	FALSE REPORTING TO AUTHORITIES (PREVENTING ALARM)
<a href="#"><u>8-1:23</u></a>	FALSE REPORTING TO AUTHORITIES (DID NOT OCCUR)
<a href="#"><u>8-1:24</u></a>	FALSE REPORTING TO AUTHORITIES (PRETENDING)
<a href="#"><u>8-1:25</u></a>	FALSE REPORTING TO AUTHORITIES (FALSE IDENTIFYING INFORMATION)

<a href="#"><u>8-1:25.2</u></a>	FALSE REPORTING OF AN EMERGENCY
<a href="#"><u>8-1:25.3.SP</u></a>	FALSE REPORTING OF AN EMERGENCY – SPECIAL INSTRUCTION
<a href="#"><u>8-1:25.4.INT</u></a>	FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (EVACUATION)
<a href="#"><u>8-1:25.6.INT</u></a>	FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (BODILY INJURY)
<a href="#"><u>8-1:25.8.INT</u></a>	FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (SERIOUS BODILY INJURY)
<a href="#"><u>8-1:25.9.INT</u></a>	FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (DEATH)
<a href="#"><u>8-1:26</u></a>	IMPERSONATING A PEACE OFFICER
<a href="#"><u>8-1:27</u></a>	IMPERSONATING A PUBLIC SERVANT
<a href="#"><u>8-1:28.SP</u></a>	IMPERSONATING A PUBLIC SERVANT – SPECIAL INSTRUCTION (FICTITIOUS OFFICE)
<a href="#"><u>8-1:29</u></a>	ABUSE OF PUBLIC RECORDS (FALSITY)
<a href="#"><u>8-1:30</u></a>	ABUSE OF PUBLIC RECORDS (IMPAIRMENT)
<a href="#"><u>8-1:31</u></a>	ABUSE OF PUBLIC RECORDS (REFUSAL)
<a href="#"><u>8-1:32</u></a>	ABUSE OF PUBLIC RECORDS (ALTERATION)
<a href="#"><u>8-1:33</u></a>	DISARMING A PEACE OFFICER
<a href="#"><u>8-1:34</u></a>	UNLAWFUL SALE OF PUBLIC SERVICES (SALE)
<a href="#"><u>8-1:35</u></a>	UNLAWFUL SALE OF PUBLIC SERVICES (INTENT TO SELL)
<a href="#"><u>8-1:36</u></a>	UNLAWFUL SALE OF PUBLIC SERVICES (APPEND SERVICE)
<a href="#"><u>8-1:37</u></a>	UNLAWFUL SALE OF PUBLIC SERVICES (FALSE REPRESENTATION)

## **CHAPTER 8-2 (ESCAPE AND OFFENSES RELATING TO CUSTODY)**

<a href="#"><u>8-2:01</u></a>	AIDING ESCAPE
<a href="#"><u>8-2:02</u></a>	AIDING ESCAPE FROM AN INSTITUTION FOR THE CARE AND TREATMENT OF PERSONS WITH BEHAVIORAL OR MENTAL HEALTH DISORDERS
<a href="#"><u>8-2:03</u></a>	INDUCING PRISONERS TO ABSENT SELVES
<a href="#"><u>8-2:04</u></a>	INTRODUCING CONTRABAND IN THE FIRST DEGREE (INTRODUCTION INTO)

<a href="#"><u>8-2:05</u></a>	INTRODUCING CONTRABAND IN THE FIRST DEGREE (MAKING WHILE CONFINED)
<a href="#"><u>8-2:06</u></a>	INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCTION INTO)
<a href="#"><u>8-2:07</u></a>	INTRODUCING CONTRABAND IN THE SECOND DEGREE (MAKING WHILE CONFINED)
<a href="#"><u>8-2:08</u></a>	INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCING WHILE CONFINED)
<a href="#"><u>8-2:09</u></a>	POSSESSION OF CONTRABAND IN THE FIRST DEGREE
<a href="#"><u>8-2:10.INT</u></a>	POSSESSION OF CONTRABAND IN THE FIRST DEGREE – INTERROGATORY (DANGEROUS INSTRUMENT)
<a href="#"><u>8-2:11</u></a>	POSSESSION OF CONTRABAND IN THE SECOND DEGREE
<a href="#"><u>8-2:12</u></a>	AIDING ESCAPE FROM CIVIL PROCESS
<a href="#"><u>8-2:13</u></a>	ASSAULT DURING ESCAPE
<a href="#"><u>8-2:14</u></a>	HOLDING HOSTAGES
<a href="#"><u>8-2:15</u></a>	ESCAPE (FOLLOWING CONVICTION)
<a href="#"><u>8-2:16</u></a>	ESCAPE (HELD OR CHARGED)
<a href="#"><u>8-2:17</u></a>	ESCAPE (STAFF SECURE FACILITY)
<a href="#"><u>8-2:18</u></a>	ESCAPE (COMMITMENT)
<a href="#"><u>8-2:19.INT</u></a>	ESCAPE (COMMITMENT) – INTERROGATORY (LEAVING COLORADO)
<a href="#"><u>8-2:20</u></a>	ESCAPE (EXTRADITION)
<a href="#"><u>8-2:21</u></a>	ATTEMPT TO ESCAPE (FOLLOWING CONVICTION)
<a href="#"><u>8-2:22</u></a>	ATTEMPT TO ESCAPE (FOLLOWING CONVICTION; COMMUNITY CORRECTIONS OR INTENSIVE SUPERVISION PAROLE)
<a href="#"><u>8-2:23</u></a>	ATTEMPT TO ESCAPE (HELD OR CHARGED)
<a href="#"><u>8-2:24.SP</u></a>	ATTEMPT TO ESCAPE – SPECIAL INSTRUCTION (CONDITIONAL RELEASE; STAFF SECURE FACILITY)
<a href="#"><u>8-2:24.2+</u></a>	UNAUTHORIZED ABSENCE (LEAVING WITHOUT PERMISSION)
<a href="#"><u>8-2:24.4+</u></a>	UNAUTHORIZED ABSENCE (TAMPERING WITH MONITORING DEVICE)

<a href="#"><u>8-2:24.6.INT+</u></a>	UNAUTHORIZED ABSENCE – INTERROGATORY (TYPE OF CRIME)
<a href="#"><u>8-2:24.8.INT+</u></a>	UNAUTHORIZED ABSENCE – INTERROGATORY (PROTECTION ORDER)
<a href="#"><u>8-2:25</u></a>	ACTIVE PARTICIPATION IN A RIOT
<a href="#"><u>8-2:26.INT</u></a>	ACTIVE PARTICIPATION IN A RIOT – INTERROGATORY (DEADLY WEAPON OR DESTRUCTIVE DEVICE)
<a href="#"><u>8-2:27</u></a>	DISOBEYING AN ORDER RELATED TO A RIOT IN A DETENTION FACILITY
<a href="#"><u>8-2:28</u></a>	VIOLATION OF BAIL BOND CONDITIONS
<a href="#"><u>8-2:29</u></a>	UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (NON-RESIDENT)
<a href="#"><u>8-2:30</u></a>	UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (RESIDENT)

### [CHAPTER 8-3 \(BRIBERY AND CORRUPT INFLUENCES\)](#)

<a href="#"><u>8-3:01</u></a>	BRIBERY (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:02</u></a>	BRIBERY (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:03.SP</u></a>	BRIBERY – SPECIAL INSTRUCTION (LACK OF QUALIFICATION NOT A DEFENSE)
<a href="#"><u>8-3:04</u></a>	COMPENSATION FOR PAST OFFICIAL BEHAVIOR (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:05</u></a>	COMPENSATION FOR PAST OFFICIAL BEHAVIOR (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:06</u></a>	SOLICITING UNLAWFUL COMPENSATION
<a href="#"><u>8-3:07</u></a>	TRADING IN PUBLIC OFFICE (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:08</u></a>	TRADING IN PUBLIC OFFICE (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:09</u></a>	ATTEMPT TO INFLUENCE A PUBLIC SERVANT

- 8-3:10 DESIGNATION OF SUPPLIER  
8-3:11 FAILING TO DISCLOSE A CONFLICT OF INTEREST

#### CHAPTER 8-4 (ABUSE OF PUBLIC OFFICE)

- 8-4:01 MISUSE OF OFFICIAL INFORMATION (PECUNIARY INTEREST)  
8-4:02 MISUSE OF OFFICIAL INFORMATION (SPECULATE OR WAGER)  
8-4:03 MISUSE OF OFFICIAL INFORMATION (AID, ADVISE, OR ENCOURAGE)  
8-4:04 OFFICIAL OPPRESSION (SUBJECTING ANOTHER TO MISTREATMENT)  
8-4:05 OFFICIAL OPPRESSION (DENY COUNSEL)  
8-4:06 FIRST DEGREE OFFICIAL MISCONDUCT (COMMIT ACT)  
8-4:07 FIRST DEGREE OFFICIAL MISCONDUCT (REFRAIN FROM DUTY)  
8-4:08 FIRST DEGREE OFFICIAL MISCONDUCT (VIOLATE STATUTE)  
8-4:09 SECOND DEGREE OFFICIAL MISCONDUCT (REFRAIN FROM DUTY)  
8-4:10 SECOND DEGREE OFFICIAL MISCONDUCT (VIOLATE STATUTE)  
8-4:11 ISSUING A FALSE CERTIFICATE  
8-4:12 EMBEZZLEMENT OF PUBLIC PROPERTY  
8-4:13 DESIGNATION OF INSURER

#### CHAPTER 8-5 (PERJURY AND RELATED OFFENSES)

- 8-5:01 PERJURY IN THE FIRST DEGREE  
8-5:02.SP PERJURY IN THE FIRST DEGREE – SPECIAL INSTRUCTION (KNOWLEDGE OF MATERIALITY NOT AN ELEMENT; MISTAKEN BELIEF NOT A DEFENSE)  
8-5:03 PERJURY IN THE SECOND DEGREE

<a href="#"><u>8-5:04</u></a>	FALSE SWEARING
<a href="#"><u>8-5:05.SP</u></a>	PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (INCONSISTENT STATEMENTS)
<a href="#"><u>8-5:06.SP</u></a>	PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (IRREGULARITIES NO DEFENSE)

**CHAPTER 8-6 (OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS)**

<a href="#"><u>8-6:01</u></a>	BRIBE-RECEIVING BY A WITNESS (FALSE OR WITHHELD TESTIMONY)
<a href="#"><u>8-6:02</u></a>	BRIBE-RECEIVING BY A WITNESS (ATTEMPT TO AVOID LEGAL PROCESS)
<a href="#"><u>8-6:03</u></a>	BRIBE-RECEIVING BY A WITNESS (ABSENTING)
<a href="#"><u>8-6:04</u></a>	BRIBING A JUROR
<a href="#"><u>8-6:05</u></a>	BRIBE-RECEIVING BY A JUROR
<a href="#"><u>8-6:06</u></a>	INTIMIDATING A JUROR
<a href="#"><u>8-6:07</u></a>	JURY-TAMPERING (INFLUENCE)
<a href="#"><u>8-6:08</u></a>	JURY-TAMPERING (SELECTION)
<a href="#"><u>8-6:09.INT</u></a>	JURY-TAMPERING (CLASS ONE FELONY) – INTERROGATORY
<a href="#"><u>8-6:10</u></a>	TAMPERING WITH PHYSICAL EVIDENCE (IMPAIR)
<a href="#"><u>8-6:11</u></a>	TAMPERING WITH PHYSICAL EVIDENCE (INTRODUCE)
<a href="#"><u>8-6:11.5</u></a>	TAMPERING WITH A DECEASED HUMAN BODY
<a href="#"><u>8-6:12</u></a>	SIMULATING LEGAL PROCESS
<a href="#"><u>8-6:13</u></a>	FAILURE TO OBEY A JURY SUMMONS
<a href="#"><u>8-6:14</u></a>	WILLFUL MISREPRESENTATION OF MATERIAL FACT ON A JUROR QUESTIONNAIRE
<a href="#"><u>8-6:15</u></a>	WILLFUL HARASSMENT OF A JUROR BY AN EMPLOYER
<a href="#"><u>8-6:16</u></a>	RETALIATION AGAINST A JUDGE
<a href="#"><u>8-6:17</u></a>	RETALIATION AGAINST A PROSECUTOR (CREDIBLE THREAT)
<a href="#"><u>8-6:18</u></a>	RETALIATION AGAINST A PROSECUTOR (ACT OF HARM OR INJURY)

## CHAPTER 8-7 (VICTIMS AND WITNESSES PROTECTION)

<u>8-7:01</u>	BRIBING A WITNESS OR VICTIM (TESTIMONY)
<u>8-7:02</u>	BRIBING A WITNESS OR VICTIM (PROCESS)
<u>8-7:03</u>	BRIBING A WITNESS OR VICTIM (ABSENTING)
<u>8-7:04</u>	INTIMIDATING A WITNESS OR VICTIM
<u>8-7:05</u>	AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (ARMED WITH A DEADLY WEAPON)
<u>8-7:06</u>	AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (USE OF A DEADLY WEAPON)
<u>8-7:07.SP</u>	AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM – SPECIAL INSTRUCTION (DEADLY WEAPON)
<u>8-7:08</u>	RETALIATION AGAINST A WITNESS OR VICTIM
<u>8-7:09</u>	RETALIATION AGAINST A JUROR
<u>8-7:10</u>	TAMPERING WITH A WITNESS OR VICTIM (TESTIMONY)
<u>8-7:11</u>	TAMPERING WITH A WITNESS OR VICTIM (ABSENTING)
<u>8-7:12</u>	TAMPERING WITH A WITNESS OR VICTIM (PROCESS)

## CHAPTER 8-8 (OFFENSES RELATING TO USE OF FORCE BY PEACE OFFICERS)

<u>8-8:01</u>	FAILURE TO REPORT EXCESSIVE FORCE
<u>8-8:01.5+</u>	FAILURE TO INTERVENE
<u>8-8:01.6.SP+</u>	FAILURE TO INTERVENE – SPECIAL INSTRUCTION (CHAIN OF COMMAND)
<u>8-8:02</u>	FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE)
<u>8-8:03.SP</u>	FAILURE TO REPORT EXCESSIVE FORCE AND FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE) – SPECIAL INSTRUCTION (EXCESSIVE FORCE; INCAPABLE OF RESISTING)

## CHAPTER 9-1 (OFFENSES AGAINST PUBLIC PEACE AND ORDER)

<u>9-1:01</u>	INCITING A RIOT (INCITE OR URGE)
<u>9-1:02</u>	INCITING A RIOT (FURTHERANCE)
<u>9-1:03.INT</u>	INCITING A RIOT – INTERROGATORY (INJURY OR DAMAGE)
<u>9-1:04</u>	ARMING RIOTERS (SUPPLY)
<u>9-1:05</u>	ARMING RIOTERS (TEACH)
<u>9-1:06</u>	ENGAGING IN A RIOT
<u>9-1:07.INT</u>	ENGAGING IN A RIOT – INTERROGATORY
<u>9-1:08.SP</u>	INCITING OR ENGAGING IN A RIOT – SPECIAL INSTRUCTION (ATTEMPT, CONSPIRACY, AND SOLICITATION)
<u>9-1:09</u>	DISOBEDIENCE OF A PUBLIC SAFETY ORDER UNDER RIOT CONDITIONS
<u>9-1:10</u>	DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE)
<u>9-1:11</u>	DISORDERLY CONDUCT (UNREASONABLE NOISE)
<u>9-1:12.INT</u>	DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE; UNREASONABLE NOISE) – INTERROGATORY (FUNERAL)
<u>9-1:13</u>	DISORDERLY CONDUCT (FIGHTING IN PUBLIC)
<u>9-1:14</u>	DISORDERLY CONDUCT (DISCHARGE OF A FIREARM IN A PUBLIC PLACE)
<u>9-1:15</u>	DISORDERLY CONDUCT (DEADLY WEAPON; DISPLAY OR REPRESENTATION)
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- [13:48.SP](#) ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL OR MARIJUANA, OR ILLEGAL POSSESSION OF MARIJUANA PARAPHERNALIA, BY AN UNDERAGE PERSON – SPECIAL INSTRUCTION (INFERENCES AS TO POSSESSION, CONSUMPTION, AND CONTENTS)
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- [18:02.INT](#) UNLAWFUL POSSESSION OF A CONTROLLED  
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- 18:15 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN SIX OUNCES, BUT NOT MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN THREE OUNCES, BUT NOT MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)**
- 18:16 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN ONE OUNCE, BUT NOT MORE THAN SIX OUNCES OF MARIJUANA; OR MORE THAN ONE-HALF OUNCE, BUT NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE)**
- 18:17 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (NOT MORE THAN ONE OUNCE OF MARIJUANA, OR NOT MORE THAN ONE-HALF OUNCE OF MARIJUANA CONCENTRATE)**
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- [18:32](#) UNLAWFUL CULTIVATION OF SALVIA DIVINORUM
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- [18:43.INT](#) ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (DEADLY WEAPON OR FIREARM)
- [18:44.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, SALE, OR POSSESSION FOR THE PURPOSES OF SALE OF ANY CONTROLLED SUBSTANCE – INTERROGATORY (USE OF A CHILD)

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## CHAPTER A

### GENERAL DIRECTIONS FOR USE OF COLJI-Crim. (2020)

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## **SCOPE OF COVERAGE**

This publication includes several sections of model instructions that are generally applicable, model instructions for all offenses from Title 18, selected affirmative defense instructions from Title 18, and selected offenses and defenses from Title 42. In cases where the Committee has not drafted an affirmative defense instruction for a particular offense, the Committee has noted this in a Comment.

The instructions reflect all relevant statutory revisions that were made during the 2020 legislative session.

Although the Committee has not drafted model instructions for every offense and defense in the Colorado Criminal Code, the instructions in this volume encompass a sufficiently wide array of offenses and defenses that users should find them to be helpful templates when drafting instructions for other offenses and defenses.

## **CORRELATION WITH EARLIER EDITIONS**

The numbering and lettering of the chapters in this edition of COLJI-Crim. is similar to the format that was used in COLJI-Crim. (2008). The instructions in Chapter B through Chapter I cover general matters, evidentiary issues, defenses, and definitions of terms. The elemental instructions for the Title 18 offenses are located in Chapter 3-1 through Chapter 23, with numbering before the colon that is derived from the number of the relevant Article and Part (this method of numbering is also utilized in Chapter 1.3 (crime of violence sentence enhancement interrogatories)). The numbers that appear after the colons are not derived from statute; they denote the order of the instruction within the chapter. For example, Chapter 3-4 (Unlawful Sexual Behavior) includes the instructions for all offenses in Title 18, Article 3, Part 4, and Instruction 3-4:39.INT (sexual assault on a child – interrogatory (at-risk victim)) is numbered in a manner that identifies it as the thirty-ninth instruction in Chapter 3-4.

The numbering for Chapter 42 (vehicle and traffic offenses) is an

exception (as it was in COLJI-Crim. (2008)). It is numbered based on the Title that contains statutes defining vehicle and traffic offenses. Further, because the chapter includes only selected offenses from Title 42, the numbering of the individual instructions, after the colons, is based solely on their sequence within the chapter (and not according to the Article or Part number of the underlying statutes).

Due to the extensive revisions in this edition, it was not feasible to maintain the 2008 numbering and lettering for individual instructions. Although a handful of instructions in this edition happen to have the same numbers or letters as the corresponding instructions that appeared in COLJI-Crim. (2008), most do not. Accordingly, when conducting historical research to compare an instruction from this volume with an earlier version, take care to use the statute number or other source of authority as a search term (a method of research that should be familiar to most users, since COLJI-Crim. (2008) was a complete departure from the organizational framework of COLJI-Crim. (1983)).

## **ORGANIZATION WITHIN CHAPTERS**

Interrogatories and special instructions are sequentially numbered like the other instructions, but they are also identified with suffixes (e.g., “3-1:08.INT” and “3-1:15.SP”).

The Committee has positioned the interrogatories and special instructions in each chapter immediately after the elemental instruction(s) to which they apply. Therefore, the comments to the elemental instructions do not include citations directing users to the relevant special instructions and interrogatories (except where a comment for an elemental instruction includes a discussion of a particular interrogatory or special instruction).

## **CULPABLE MENTAL STATES**

Where a culpable mental state for an offense is specified by statute, the Committee has segregated it as a separate element to make clear that it modifies *all* elements that follow. See § 18-1-503(4), C.R.S. 2020 (“When a

statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears.”); *People v. Rodriguez*, 914 P.2d 230, 272 (Colo. 1996) (“‘knowingly,’ when offset from other elements, modifies all succeeding conduct elements”); *People v. Bossert*, 722 P.2d 998 (Colo. 1986) (no error if “knowingly” element set out in instruction as first element and all others described under number two); *People v. Stephens*, 837 P.2d 231 (Colo. App. 1992) (no error if “knowingly” element listed as number 3 and each later element assigned separate number). Further, out of an abundance of caution, the Committee adopted the following drafting protocol to guide its application of section 18-1-503(4): “a clear intent to limit the application of a mens rea should not be inferred merely because an offense is defined in such a way that the mens rea does not appear at the beginning of a statutory provision.”

Where the statutory definition of an offense does not include a culpable mental state, the issue of whether to impute a mental state is frequently the subject of litigation. *See, e.g., People v. Manzo*, 144 P.3d 551, 552 (Colo. 2006) (leaving the scene of an accident with serious bodily injury constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state); *Gorman v. People*, 19 P.3d 662, 665 (Colo. 2000) (“We have held that legislative silence on the element of intent in a criminal statute is not to be construed as an indication that no culpable mental state is required. *See People v. Moore*, 674 P.2d 354, 358 (Colo. 1984). Rather, the requisite mental state may be implied from the statute.”); *People v. Bridges*, 620 P.2d 1, 3 (Colo. 1980) (“We conclude that the mental state ‘knowingly’ is implied by the statute and is required for the offense of engaging in a riot.”). Therefore, unlike in previous editions of COLJI-Crim., the Committee has refrained from adding the culpable mental state of “knowingly” to any elemental instruction that does not include a mens rea as part of the statutory definition of the offense (unless the imputation has been recognized by case law, in which case the relevant authority is discussed in a comment). Nevertheless, where the Committee has concluded that it is debatable whether a mental state should be imputed to an offense, it has noted that possibility by including the following citation in a comment:

*see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## TERM DEFINITIONS

Definitional instructions for terms that have statutory definitions are located in [Chapter F](#).

Citations to definitional instructions located in Chapter F are included in the comments for the instructions in other chapters. However, citations for instructions defining subsidiary terms (i.e., statutorily-defined terms that are used in the statutory definitions of other terms) are included only in comments for instructions which use the subsidiary terms. For example, Instruction 3-2:01 defines the offense of assault in the first degree with a deadly weapon, in violation of section 18-3-202(1)(a), C.R.S. 2020. Accordingly, the comment to Instruction 3-2:01 includes a citation referring users to Instruction F:88 (defining “deadly weapon”), and, because Instruction F:88 uses the term “firearm” as part of the definition of a “deadly weapon,” the comment for Instruction F:88 includes a citation referring users to Instruction F:154 (defining “firearm”).

When utilizing the definitional instructions, note that some terms have more than one statutory definition. For example, there are four definitions of the term “masturbation.” *See* § 18-6-403(2)(f), C.R.S. 2020 (defining “masturbation” for purposes of sexual exploitation of children); § 18-7-201(2)(c), C.R.S. 2020 (defining “masturbation” for purposes of prostitution); § 18-7-302(5), C.R.S. 2020 (defining “masturbation” for purposes of indecent exposure); § 18-7-401(5), C.R.S. 2020 (defining “masturbation” for purposes of child prostitution). Accordingly, the citations to definitional instructions direct users to the correct instruction. *See* Instruction F:216 (defining “masturbation” (sexual exploitation of children)); Instruction F:217 (defining “masturbation” (prostitution));

Instruction F:218 (defining “masturbation” (indecent exposure));  
Instruction F:219 (defining “masturbation” (child prostitution)).

Where the Committee has concluded that a term that is not defined by statute may be unfamiliar to jurors, it has included a comment noting the absence of a statutory definition. Many of these comments are followed by citations to other relevant sources of authority, primarily dictionaries, that trial judges may wish to consider when deciding whether to exercise their discretion to draft supplemental definitional instructions. However, the Committee emphasizes that it has not adopted these dictionary definitions as model instructions, and courts should be cautious when drafting definitional instructions based on extra-statutory sources. *See, e.g., People v. Mascarenas*, 972 P.2d 717, 724 (Colo. App. 1998) (“choosing one of the varying and not entirely consistent dictionary definitions of ‘dominion’ could have amounted to an expression of opinion by the court on a matter that was properly determinable by the jury”).

## DEFENSES

Model instructions defining defenses are located in [Chapter H](#), which is divided into two sections: [\(I\)](#) defenses that are generally applicable; and [\(II\)](#) defenses to inchoate offenses and specific crimes. In addition, there are several “Chapter Comments” at the beginning of the chapter that discuss organizational matters, relevant legal principles, and the reasoning underlying certain drafting decisions of the Committee.

As in previous editions of COLJI-Crim., this publication does not include a model “theory of defense” instruction. For guidance in drafting such an instruction, the Committee recommends that users refer to *Colorado Practice Series*, Vol. 15, Robert J. Dieter, *Colorado Criminal Practice and Procedure*, § 18.119 (2004) (“Instructions – Theory of Defense”). *See also People v. Joosten*, 2018 COA 115, ¶¶ 4, 33, 441 P.3d 14, 16, 19 (holding that, where the defendant tendered a theory of the case instruction which argued that he did not commit burglary “because he was invited in or had the privilege to enter the apartment,” the trial court erred “when it refused Joosten’s tendered instruction, or alternatively, when it failed to work with

Joosten’s counsel to craft a permissible instruction”).

## **BRACKETED MATERIAL**

The Committee has used brackets sparingly to identify alternative language within instructions, interrogatories, and verdict forms. For example, where a single statutory subsection defines more than one way to commit an offense, the Committee has not enclosed the alternatives within brackets unless the Committee perceived a clear disjunctive separation point that warranted distinct numbering of the alternative element(s). *See, e.g.,* Instruction 3-2:25.INT (assault in the third degree – interrogatory (at-risk adult or juvenile)); Instruction 9-1:36 (harassment (communication)). But the fact that the Committee has enclosed two or more alternatives within brackets does not necessarily mean that there may not be situations where the court should instruct the jury regarding more than one of the bracketed alternatives.

Similarly, where the Committee has not bracketed alternative ways of committing an offense, it may be appropriate to delete one or more unbracketed alternative for which there is no evidentiary support. For example, in a case where the defendant is charged with possession of burglary tools in violation of section 18-4-205(1), C.R.S. 2020, it would be appropriate to excise the word “explosive” from the third element of Instruction 4-2:08 if it is undisputed that the only tool in the defendant’s possession was a screwdriver.

In summary, the Committee’s bracketing decisions are, like all other aspects of these model instructions, purely advisory.

## **SENTENCING PROVISIONS**

The use of interrogatories in this edition is in accord with Colorado Supreme Court precedent explaining how to distinguish an element from a sentencing factor.

For example, the supreme court has held that a statutory

circumstance which reduces a defendant's sentence for an offense reflects a binding legislative choice to create a mitigating factor, and not to add an element to the offense. *See Rowe v. People*, 856 P.2d 486, 492-93 (Colo. 1993) (endorsing COLJI-Crim. 10:20 (1983), a separate heat of passion interrogatory for first and second degree assault that informed the jury that it was to consider the interrogatory only if it first found the defendant guilty of the assault).

Similarly, the supreme court has made clear that "a sentence enhancement provision is not an element of the offense charged. A defendant still may be convicted of the underlying offense without any proof of the sentence enhancer, and this would not be possible if we were dealing with an essential element of the offense." *Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993). Consequently, a sentence enhancer that turns on a factual determination distinct from the elements of offense should be determined by means of an interrogatory, as indicated throughout this publication.

However, some sentence enhancement provisions that are based on determinations concerning prior convictions need not be submitted to the jury. *See Misenhelter v. People*, 234 P.3d 657, 660 (Colo. 2010) (explaining the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)).

The model special verdict form, Instruction E:28, is designed to ensure that the jury's response to each "verdict question" corresponds to a guilty verdict for a charged offense. *Cf. Sanchez v. People*, 2014 CO 29, ¶¶ 2, 17, 325 P.3d 553, 554-59 (jury's findings with respect to a sentence enhancer were not a constitutionally proper basis for inferring that it had found the defendant guilty of a substantive offense). Thus, where a defendant is charged with multiple counts of the same offense, the model special verdict form will prevent the jury from answering a verdict question for a sentence enhancement factor without clearly identifying the specific guilty verdict to which it applies (conversely, this same protection exists with regard to a verdict question that asks about a mitigation factor, such as heat of passion). Nevertheless, in a case involving evidence of an uncharged act that is similar to a charged offense, the Committee recommends modifying

the verdict question to include language that explicitly links the jury's response to the verdict question to its guilty verdict for a charged offense. For example, in a case where the defendant is charged with first degree arson and evidence of a second, uncharged act of arson is admitted pursuant to CRE 404(b), the court could modify Instruction 4-1:02.INT by inserting the following italicized language: "*Did the defendant commit the offense of first degree arson, for which you have found him [her] guilty in Instruction \_\_\_, by the use of an explosive?*".

Finally, although some of the comments include references to the sentencing classification levels for particular offenses, the Committee has included such information solely for the purpose of providing guidance with respect to instructional issues. *See, e.g.*, Instruction 3-1:16.INT, Comment 1. The Committee strongly discourages users from relying on this publication at sentencing.

## **CROSS-REFERENCING**

The Committee recognizes that cross-references to other numbered instructions can serve as useful guideposts for jurors (e.g., a first degree burglary instruction that identifies the crime that the defendant allegedly intended to commit with the following language: "robbery, as defined in Instruction 23"). However, because an incorrect cross-reference may inject error into otherwise accurate instructions, the Committee has not included entries for such cross-references except where the Committee has determined that such cross-referencing is necessary to help the jury understand the interrelationship of instructions. *See, e.g.*, Instruction H:29.SP (explaining that this special instruction is provided for purposes of one or more particular affirmative defense instructions, which are to be identified by specifying the relevant instruction number(s)).

## **SEARCH TIPS**

This publication is navigable using the main hyperlinked [Table of Contents](#), the individual hyperlinked tables of contents (located at the

beginning of each chapter), and the [Summary of Contents](#).

To use a hyperlink, maneuver the mouse pointer over a hyperlinked entry. In Microsoft Word<sup>®</sup>, a small pop-up box will prompt you to press the Ctrl key while clicking on the link. Doing so will take you directly to the corresponding bookmarked location. Clicking the link directly works the same way in Adobe Reader<sup>®</sup>, though that program does not include a prompting pop-up box.

To search within the document in Microsoft Word<sup>®</sup>, use the “Find” function (Ctrl + F). To search within the document in Adobe Reader<sup>®</sup>, use the “Find” box in the navigation bar (or use Ctrl + F). In both programs, craft your search terms as narrowly as possible (e.g., by using statutory citations, case names, or key words).

Use the “Find” function to return to the [Summary of Contents](#) from anywhere in the document by entering three hash tags (#) as your search term. Alternatively, in Microsoft Word<sup>®</sup>, use the Ctrl + Home keystroke combination to return to the beginning of the document, place the mouse over the photograph (which is hyperlinked to the [Summary of Contents](#)), and use the Ctrl + mouse click keystroke combination.

Use the “Find” function to return to the main [Table of Contents](#) from anywhere in the document by entering three asterisks (\*) as your search term.

To go directly to a particular page in Microsoft Word<sup>®</sup>, press F5 and enter the page number (once this function is open, it can also be used to move forward or backward through the sections). In Adobe Acrobat<sup>®</sup>, enter the page number in the box that is part of the tool bar.

## MISCELLANEOUS

1. The captions and comments are designed to assist users. They should be omitted from the set of instructions that the court provides to the jury.

2. Avoid using indefinite pronouns, formal titles, or words which can be construed as connoting prejudgment of the evidence (e.g., the term “victim,” which presupposes the commission of a crime).
3. Although the term “bailiff” is used in several of the model instructions, it may be appropriate (depending on the court’s staffing) to substitute the term “court clerk” or “law clerk.”
4. These instructions were drafted using Microsoft Word 2010<sup>®</sup>. The PDF version of this volume was created using Adobe Acrobat 8 Professional<sup>®</sup>.
5. In 2016, the Committee deleted the following sentence from comment 2 above: “When possible, draft instructions using the proper names of all parties and witnesses.”

## CITATION

The publication should be cited as:

COLJI-Crim. (2020).

Individual instructions should be cited as:

COLJI-Crim. \_\_\_\_:\_\_\_\_ (2020).

Individual comments should be cited as:

COLJI-Crim. \_\_\_\_:\_\_\_\_, Comment \_\_\_\_ (2020).

The Committee has utilized the following abbreviated form of citation when citing to materials located within this publication:

*See* Instruction \_\_\_\_:\_\_\_\_.

However, this shortened form of citation should not be used in briefs, orders, opinions, or other documents where it is important to identify the title and edition of the publication.

## NOTATION OF REVISIONS AND NEW MATERIAL

COLJI-Crim. (2020) contains expanded Comments, revisions based on 2020 legislation, corrections to substantive errors that appeared in COLJI-Crim. (2019), and corrections to non-substantive formatting irregularities. The Committee has highlighted each substantive revision by means of the “+” symbol (which can be used as a search term by those who wish to survey the 2020 revisions). However, the Committee has not highlighted formatting revisions that are inconsequential. Furthermore, the Committee has removed the “+” symbol that appeared in the prior year’s notations, but it has retained the comment explaining prior changes for clarity.

Where the text of a model instruction has been altered, the “+” symbol appears at the point of the revision, and again in the new separate Comment which explains the change. *See, e.g.*, Instruction F:45.5, Comment 4. (“+ In 2020, the Committee modified this instruction – including changing its title from ‘caseworker’ to ‘human services worker’ – pursuant to a legislative amendment. *See* Ch. 77, sec. 1, § 18-9-313(1)(a), 2020 Colo. Sess. Laws 315, 315-16.”).

Where a Comment has been added, corrected, or significantly expanded, the “+” symbol appears at the point of the revision, and again in the new separate Comment which explains the reason for the change. *See, e.g.*, Instruction F:226, Comment 2 (“+ In 2020, the Committee updated the statutory citation in Comment 1 pursuant to new legislation. *See* Ch. 279, sec. 2, § 16-8-101.5(2)(c), 2020 Colo. Sess. Laws 1364, 1365.”).

## CHAPTER B

### CRIMINAL JURY ORIENTATION, EXAMINATION AND SELECTION PROCESS

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## **B:01 INTRODUCTORY REMARKS, JUROR QUALIFICATIONS, AND JURY SELECTION**

Good Morning, Ladies and Gentlemen:

Welcome to [Courtroom] [Division] No. [ ] of the [ ] Court. I am Judge [ ].

I want to thank all of you for your service. Jury service is both a right and a responsibility of citizenship in this country. We deeply appreciate your participation in this important aspect of our democratic society.

Before we begin the trial, I want to tell you what will be happening. Let me start by introducing the people involved.

This is a criminal case. It was filed on behalf of the People of the State of Colorado by the District Attorney's office. We will sometimes refer to the District Attorney as the "Prosecution" or the "People." The District Attorney's Office is represented by [ ] in this case. The "Defendant" is [ ].

[He [she] is represented by [ ].]

[He [she] has decided to represent himself [herself] instead of being represented by a lawyer. It is his [her] right to do this. His [her] decision to represent himself [herself] has nothing to do with whether he [she] is guilty or not. His [her] choice to represent himself [herself] cannot be considered by the jury for any purpose and should not influence the jury's decision in any way. It must not result in either prejudice against the defendant or sympathy for the defendant.]

[The person seated beside the defendant is [insert name of counsel], who is an advisory attorney. An advisory attorney serves as a resource to help the defendant with legal matters during trial, but will not address the Court or the jury during the trial.]

The charge[s] against the Defendant [is] [are] contained in what is

called an [information] [indictment] [complaint].

[The [information] [indictment] [complaint] in this case reads as follows:]

[The following is a summary of the charges in this case:]

[Note to court: Crim. P. 24(a)(2)(v) states that “the judge shall explain . . . in plain and clear language . . . [the] elements of charged offenses.”]

The charge itself is not evidence of anything. It is not proof the defendant committed any crime. No juror should assume the defendant committed a crime just because he [she] was charged with doing so.

The Defendant has pleaded “not guilty” to the charge[s]. By pleading “not guilty,” the defendant says that he [she] did not commit the crime[s] charged. The defendant is presumed to be innocent. Therefore, the prosecution has the burden of proving the charge[s] beyond a reasonable doubt. At the end of the trial, the jury will decide whether the prosecution has proven, beyond a reasonable doubt, that the defendant is guilty of the crime[s] charged.

We will select [ ] jurors [and [ ] alternate[s]] to be the jury. These jurors will consider all of the evidence presented during the trial. The jurors will then decide what has been proved, based on all of the evidence.

Then, based upon the law which I will explain to you, the jury will decide whether the prosecution has proved any charges beyond a reasonable doubt.

Before we begin with the jury selection process, I want to explain a few other matters.

[If you are selected to be on the jury, you will be able to go home each evening, but you will have to follow certain rules. I will explain those rules later.]

[If you are selected to be on the jury, you will be sequestered and

have to follow certain rules. I will explain those rules later.]

If you are excused from being a juror in this case, you may have to return to the main jury room, if we still need jurors in other courtrooms.

In a few minutes I will be asking all of you some questions. These questions are not intended to embarrass you, but to find out if you are qualified to be a juror.

If any of you need to answer a question about a sensitive matter that you prefer to discuss privately, please let me know and we will have a more private discussion.

Since there will be questions asked of each of you, it is necessary that I place you under oath to tell the truth. Please stand and raise your right hand. Answer "I do" if you agree with the oath or affirmation.

Do you solemnly swear or affirm under penalty of law to answer truthfully the questions asked by the Court or counsel concerning your service as a juror in this case?

Thank you. Please be seated.

I first need to determine if you are legally qualified to serve on a criminal jury in this district.

Please raise your hand if you think any of these apply to you.

Are any of you not a citizen of the United States?

Are any of you not a resident of [ ]?

Are any of you not at least eighteen years old?

Are any of you not able to read, speak and understand the English Language?

Are any of you not able to serve on a jury because of a physical or mental disability?

Are any of you solely responsible for the daily care of an individual with a permanent disability who lives with you?

Have any of you served on a jury within the last twelve months, or are any of you scheduled for jury service within the next twelve months?

[Note to court: Rule on any challenges for cause.]

There are certain other situations that may require me to excuse you as jurors.

Before asking about these situations, I will give you more information about this case.

This case involves allegations of: [     ].

[Note to court: Describe the allegations using a method that complies with Crim. P. 24(a)(2)(iv) (“When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language . . . [t]he nature of the case using applicable instructions if available or, alternatively a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements.”).]

The witnesses who may testify are: [     ].

Please raise your hand if you think that any of these apply to you:

Do any of you believe you may be related to the defendant or the attorneys?

Do any of you know anyone involved in this case, including the defendant, the alleged victim, the attorneys, the witnesses, me, or my court staff?

Do any of you know each other?

Have any of you ever had any business or financial dealings with the defendant, the alleged victim, or the attorneys, including any employment relationship?

Have any of you ever been involved in legal proceedings of any kind with anyone involved in this case?

Did any of you personally see, hear, or read anything about this case in the media or on the internet, including computers, other electronic devices or through other tools of technology?

Were any of you involved in the prosecution of this case?

Do any of you work for a public law enforcement agency or for a public defender's office?

[Note to court: Rule on any challenges for cause.]

I will now go over a few basic rules of law that apply in all criminal cases. These rules are important because they come from our state and federal constitutions and are the backbone of our American system of justice. They assure that both sides receive a fair trial. All jurors must be able to follow these rules.

[Note to court: The next series of paragraphs is designed to comply with Crim. P. 24(a)(2)(v), which requires that the court explain – in addition to the elements of the charges – “[g]eneral legal principles applicable to the case including the presumption of innocence, burden of proof, [and the] definition of reasonable doubt.” Because this provision also states that the court is to explain “other matters that jurors will be required to consider and apply in deciding the issues,” consider including definitions of culpable mental states, affirmative defenses (including insanity, if pled), key terms, etc.]

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a

reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

Every defendant has a constitutional right not to testify. The decision not to testify cannot be used as an inference of guilt and cannot prejudice the defendant. It is not evidence, does not prove anything, and you must not consider it for any purpose.

Sympathy and prejudice have no place in a criminal trial. The guilt or innocence of the defendant must not be decided as a result of either sympathy or prejudice for or against the prosecution or the defendant.

This case must be decided only on the evidence presented at trial and the law as I instruct you.

You may have to decide what testimony to believe. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

Consider each witness's knowledge, motive, state of mind, demeanor, and manner while on the stand. Consider the witness's means of knowledge, ability to observe, and strength of memory. Consider also any relationship each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence which affects the credibility of the witness's testimony. You may believe all of the testimony of a witness, or part of it, or none of it.

Do all of you understand these principles?

Are there any of you who could not follow these principles if you become a juror?

If you cannot follow these principles, you must say so now.

[Note to court: Rule on any challenges for cause.]

I want to ask one more very important question. Jurors are valuable because of their life experiences. However, sometimes those life experiences leave a juror feeling they could not be fair in a particular case. Do any of you believe that you could not be a fair juror in this case, for any reason?

[Note to court: Rule on any challenges for cause.]

I expect that this case will probably last until [    ].

The trial may last longer than that. I always have to qualify my time estimate because there are so many things that might affect our schedule. This includes jury deliberations. Once the trial is finished and I turn the case over to the jury to decide, there is no stopwatch on your deliberations. You will have as much or as little time as you need to reach a unanimous decision.

During trial, we will start each day promptly at [    ], we will take one [    ] minute break in the morning and one in the afternoon, and we will usually break for lunch between [    ] and [    ].

Recognizing that all of you will be significantly inconvenienced by jury service, would any of you experience an extreme hardship?

[Note to court: Address claims of hardship based on the statutes summarized in Comment 1.]

In a moment, some of you will be called to the jury box. At that time, the attorneys and I will ask additional questions.

I want to impress on you that there are no “right” or “wrong” answers to the questions you will be asked. What is important is that you be completely honest in all your answers.

Please remember to answer all questions honestly and completely.

Each of you must listen carefully to all questions and answers, even when we are talking to someone else.

By listening to what we ask others, you will be better prepared to answer when you will be questioned. This will help shorten the jury selection process.

[Note to court: Conduct voir dire using a method that complies with Crim. P. 24(a)(3), (4).]

Do any of you feel that you may not be able to be fair and impartial toward the prosecution, the defendant, the attorneys, or any of the witnesses?

Do any of you feel you may not be able to follow the law for any reason?

Do any of you feel you might be disqualified from being a juror for any other reason?

[Note to court: Rule on any challenges for cause.]

Now, each side may now excuse up to [ ] jurors, without stating a reason. Therefore, do not be embarrassed or consider it any reflection upon you if you are one of those excused.

[Note to court: After the parties exercise their peremptory challenges, read a list of the jurors who have been selected to serve.]

Ladies and gentlemen, you have been selected as the jurors to try the case of “The People of the State of Colorado versus [ ].” You now have duties in addition to your obligation to answer our questions truthfully, so I must now administer an additional oath to you. Please stand and raise

your right hands:

Do you solemnly swear or affirm under penalty of law that you will well and truly try the matter before the court, and render a true verdict, according to the evidence and the law as I instruct you? If so, please say, “I do.”

## COMMENT

1. See Crim. P. 24 (trial jurors); § 16-10-103(1), C.R.S. 2020 (challenge of jurors for cause); § 13-71-105, C.R.S. 2020 (qualifications for juror service); § 13-71-119(2), C.R.S. 2020 (excusing prospective jurors for “extreme hardship”); § 13-71-121, C.R.S. 2020 (excusing jurors for “hardship or inconvenience” in trials that are expected to take more than three days); *see also* § 13-71-119.5(2)(a)(II), C.R.S. 2020 (a prospective juror may seek to be “excused temporarily from service as a juror if his or her jury service would cause undue or extreme physical hardship to him or her or to another person under his or her direct care or supervision,” but he or she “shall take all actions necessary to obtain a determination on the request before the date on which the person is scheduled to appear for jury duty”).

2. This model instruction is not a rigid script. Like many of the other generally applicable instructions that explain trial procedures, it should be regarded as a template that trial judges can use as a starting point when drafting instructions that reflect their own preferred practices.

3. For example, the model instruction does not include language explaining the role of alternate jurors, how or why they are selected, or why they may not be identified until the end of the trial. The Committee recognizes that trial judges (1) utilize a variety of methods to select and discharge alternate jurors; and (2) have differing views concerning what information, if any, prospective jurors should be provided during jury selection about alternate jurors.

4. In cases where the defendant enters a plea of “not guilty by reason of insanity,” modify the paragraph that explains the defendant’s plea as follows:

The Defendant has pleaded “not guilty by reason of insanity” to the charge[s]. By pleading “not guilty by reason of insanity,” the defendant says that he [she] is not legally responsible for the offense[s] charged because he [she] was insane at the time of the commission of the act[s]. The defendant is presumed to be innocent. Therefore, it is the prosecution’s burden to prove beyond a reasonable doubt: (1) each element of [the] [each] crime charged; and (2) that the defendant was sane at the time of the commission of the act[s]. At the end of the trial, the jury will decide whether the prosecution has proven, beyond a reasonable doubt, the defendant’s guilt and sanity.

5. See *People v. Smith*, 848 P.2d 365, 371 (Colo. 1993) (“Although this court has held that the procedure of administering an oath to a jury charged with trying a case has been judicially recognized and is implicitly required, we have not articulated any guidelines as to when such an oath must be administered.”); *Hollis v. People*, 630 P.2d 68, 69 (Colo. 1981) (“While there is no explicit statute or rule requiring the administration of an oath to a jury in this state, the need for such an oath had been judicially recognized. See *Minich v. People*, 9 P. 4 (Colo. 1885). See also, e.g., *People v. Freeman*, 583 P.2d 921 (Colo. 1978). As well, our rules of criminal procedure implicitly require that a jury will be sworn to try a case.” (internal citations omitted)); see also C.R.C.P. 47(i) (“As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance: That you and each of you will well and truly try the matter at issue between \_\_\_\_\_, the plaintiff, and \_\_\_\_\_, the defendant, and a true verdict render, according to the evidence.”).

6. See *People v. Kinney*, 148 P.3d 318, 320 (Colo. App. 2006) (trial court did not abuse its discretion in excusing a prospective juror based on a finding of hardship, pursuant to section 13-71-121, where the prospective juror “told the court she was a teacher, could not get a substitute for more than three days, and was scheduled to do a type of assessment testing that a substitute could not handle”), *rev’d on other grounds*, 187 P.3d 548 (Colo. 2008); *People v. Isom*, 140 P.3d 100, 103 (Colo. App. 2005) (because the trial was expected to last more than three days, the court had discretionary authority to excuse a prospective juror for “hardship or inconvenience”

under section 13-71-121, and the court did not abuse that discretion by excusing a prospective juror who stated that he had purchased a nonrefundable airfare for a business trip and was scheduled to leave before the end of trial); *see also People v. Reese*, 670 P.2d 11, 14 (Colo. App. 1983) (holding, under the “undue hardship” standard of the since-repealed section 13-71-112(1), that the trial court did not abuse its discretion by excusing a prospective juror for whom jury service would have caused an undue financial burden).

7. In 2018, the Committee corrected an erroneous citation to Crim. P. 24.

## **B:02 ADMONITION PRIOR TO RECESS DURING JURY SELECTION**

Before we take our break, let me remind you that you must not discuss anything about this case with each other or with anyone else, and you must not try to find out any information about this case from any source other than what you see and hear in this courtroom. Do not look up anything about the case on the internet or engage in any electronic communications about it with anyone.

## **B:03 INSTRUCTION PRIOR TO OPENING STATEMENTS (GENERAL)**

Before we begin the trial, I would like to tell you about what will be happening here.

The first step in the trial will be the opening statements. The attorneys may make opening statements if they choose to do so. [Defendant[’s attorney] may reserve opening statement until later in the trial, or he [she] may decide not to make an opening statement at all.]

An opening statement is not evidence. Its purpose is to give you a framework to help you understand the evidence as it is presented.

Next, the prosecution will offer evidence. Evidence is what the witnesses say under oath, and items allowed as exhibits.

After the prosecution’s evidence, the defense may present evidence, but is not required to do so. I want to remind you that the defendant is presumed to be innocent. The prosecution must prove the defendant guilty beyond a reasonable doubt. The defendant does not have to prove his [her] innocence or call any witnesses or introduce any evidence.

After all the evidence has been presented, I will tell you the rules of law which you must use in reaching your verdict. These rules of law are called jury instructions. I will read them to you and you will be allowed to take them with you to the jury room during your deliberations.

It is my job to decide what rules of law apply to the case. You must follow all of the rules as I explain them to you. You cannot follow some and ignore others. Even if you disagree or do not understand the reasons for some of the rules, you must follow them. You will then apply these rules to the facts you have determined from the evidence. In this way you will decide whether the prosecution has proven the guilt of the defendant beyond a reasonable doubt.

After you have heard all the evidence and the jury instructions, the prosecution and the defense may make their closing arguments. Because

the prosecution has the burden of proof, it will have the opportunity to reply to any closing argument made by the defense. Like opening statements, closing arguments are not evidence. Their purpose is to remind you of the evidence that was presented during the trial and to argue why you should return a verdict of either not guilty or guilty.

After the closing arguments, you will then go to the jury room to deliberate on a verdict. Your role as jurors is to decide what the facts are, and your decision must be based only upon the evidence that was presented during the trial.

At times during the trial, the attorneys may make objections. This means that the attorney is asking me to decide a particular legal issue.

It is proper for an attorney to object to things which he or she believes should not be presented as evidence. When an objection is made, I have two choices. I can disagree and overrule the objection, or I can agree and sustain the objection.

Do not concern yourselves with the reasons for my decisions about any objections. You must not let yourself be influenced in any way by the objections or my rulings on the objections.

If I overrule an objection to a question, the witness may answer. If I sustain an objection to a question, the witness may not answer. You must not consider the question for any purpose or guess how the witness might have answered.

If I overrule an objection to an exhibit, it will be allowed into evidence. If I sustain an objection to an exhibit, it will not be allowed into evidence and you must not consider it for any purpose.

At times I may instruct you to disregard statements you have already heard or things you have already seen. You must treat them as if you had never heard or seen them. You must not consider them for any purpose.

During the trial I may need to talk with the attorneys out of your hearing about questions of law. Sometimes you may be asked to leave the

courtroom or wait in the jury room while we discuss these things. We will try to limit these interruptions as much as possible. As a judge, I do not have any opinions either for or against anyone involved in this case. You must not think that I do, based on any rulings that I make or anything that I say or do during this trial.

#### COMMENT

1. *See* Crim. P. 24(a)(5) (“Once the jury is impaneled, the judge shall again explain in more detail the general principles of law applicable to criminal cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.”).

## **B:04 INSTRUCTION PRIOR TO OPENING STATEMENTS (NOTEBOOKS)**

You have received [writing materials] [notebooks]. You may use these [writing materials] [notebooks] to take notes during the trial. However, you are not required to do so.

If you take notes, you should not allow the note taking to detract from your close attention to the testimony and conduct of each witness and all other evidence received during the trial.

Whether or not you take notes, you should rely on your memory as much as possible. The notes you take are to refresh your own memory. You should not give additional weight to the comments of any juror based upon the quantity or quality of his or her note taking.

These [writing materials] [notebooks] may only be used in the courtroom or jury room, and may not be taken anywhere else.

To identify your [writing materials] [notebook], please write your name[s] on [it] [them]. No one else will read your notes. At the end of the case, these notes will be returned to the Court and destroyed.

### COMMENT

1. *See* Crim. P. 16(IV)(f) (“Juror notebooks shall be available during all felony trials and deliberations to aid jurors in the performance of their duties. The parties shall confer about the items to be included in juror notebooks and, by the pre-trial conference or other date set by the court, shall make a joint submission to the court of items to be included in a juror notebook. In non-felony trials, juror notebooks shall be optional.”); *see also* “Implementation Plan: Jury Reform in Colorado,” p. 12, Appendix D (Proposed Criminal Jury Instruction 1:05) (Mar. 12, 1998).
2. *See Frasco v. People*, 165 P.3d 701, 703-05 (Colo. 2007) (although Crim. P. 57(b) directs criminal courts to look to the Rules of Civil Procedure when no Rule of Criminal Procedure exists, and C.R.C.P. 47(m) states that

“[u]pon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence,” trial courts retain discretionary control over jury access to trial exhibits during their deliberations “[d]espite . . . evolving views in this jurisdiction about the nature of jury deliberations and the expanded allowance of questioning and note-taking by jurors”).

3. See *People v. Willcoxon*, 80 P.3d 817, 820 (Colo. App. 2002) (although the trial court erred by allowing the jurors to take the juror notebooks home because this procedure is not expressly authorized by Crim. P. 16(IV)(f), the error was not structural, and reversal was not required, because any harm to defendant could be measured by determining: (1) whether the jurors were admonished not to show the juror notebooks to anyone, or discuss the case or the contents of the juror notebooks with anyone; (2) whether there is evidence that jurors did anything improper as a result of taking juror notebooks home, such as using extrinsic information to assist in deliberations; and (3) whether taking the juror notebooks home prompted jurors to discuss the case prior to jury deliberations), *overruled on other grounds by People v. Adams*, 2016 CO 74, 384 P.3d 345.

## **B:05 INSTRUCTION PRIOR TO OPENING STATEMENTS (JUROR QUESTIONS)**

Rules governing jury trials do not allow jurors to ask questions directly of a witness. However, if you have a question you would like to ask a witness during the trial, write your question down, but do not sign it. Before the witness is permitted to leave, I will ask if anyone has a question for the witness. [Occasionally, I forget to ask. If that should happen and any of you have a question, please signal the bailiff or me before the witness leaves the stand.]

I may discuss the question with the attorneys. If I decide the question is proper, it will be asked when appropriate. Keep in mind, however, that the rules of evidence or other rules of law may prevent some questions from being asked. I will apply the same legal standards to your questions as I do to the questions asked by the attorneys.

If a particular question is not asked, do not guess why or what the answer might have been. If I don't ask a proposed question it is not a reflection on the person proposing it, and you should not attach any significance to it.

### COMMENT

1. See Crim. P. 24(g) ("Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause."); see also CJI-Civ. 1:16 (2014).
2. See *Medina v. People*, 114 P.3d 845, 853-55 (Colo. 2005) (permitting the jury to ask questions through the judge did not violate defendant's due process rights); *People v. Stevenson*, 228 P.3d 161, 170 (Colo. App. 2009) (trial court did not abuse its discretion in allowing juror's question, and concluding that it was not precluded by the parties' evidentiary stipulation); *People v. Zamarripa-Diaz*, 187 P.3d 1120, 1124 (Colo. App. 2008)

(although a trial court is not obligated to do so under Crim. P. 24(g), “it would be better practice that a trial court consult with counsel prior to asking the jurors’ questions”).

## **B:06 ADMONITION ABOUT CONDUCT DURING TRIAL**

Now that you have been selected to be jurors, there are rules you must follow. These are the same rules jurors have always had to follow. During the trial, this courtroom is a place partially isolated from the outside world. Your decision must be made inside this place and you must follow its rules. You must decide this case based only on the evidence and law presented in the courtroom. You must avoid any other information about the case from any other source. These rules are designed to make sure there is a fair trial.

There are two basic rules:

1. You must not communicate with others or among yourselves about the trial as it is going on.
2. You must not do any independent investigation or research about the case.

I will go over these rules in great detail because they are very important. I will also explain the reasons for these rules. If you learn anyone has violated these rules you must report that to me or my staff at once.

You must not discuss the case among yourselves in any way during the course of the trial. You may not discuss the case among yourselves until after you have heard all the evidence and you begin to deliberate on a verdict. In fairness, you must keep an open mind throughout the trial, and you should reach your decision only during your deliberations at the end of the trial.

Do not permit anyone else to discuss the case with you, or near you. If anyone, including one of your fellow jurors, attempts to do so, report that fact immediately.

Do not talk with any witness, or with the defendant, or with any of the attorneys in the case. You cannot talk to them and they cannot talk to you, even casually.

Do not communicate about the case with anyone else in any way, including in person, by telephone, cell phone, smart phone, iPhone<sup>®</sup>, Blackberry<sup>®</sup>, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet<sup>®</sup>, blog, or post information about this case, or about your experience as a juror on this case, on any website, list serve, chat room, blog, or website such as Facebook<sup>®</sup>, My Space<sup>®</sup>, LinkedIn<sup>®</sup>, YouTube<sup>®</sup>, or Twitter<sup>®</sup>.

[Note to court: If necessary, modify this list to reflect any developments in communication technology.]

You must not read, review, or accept any communications in any form from anyone regarding this case or cases like this.

You are permitted, however, to explain to family, friends, and employers that you are on a jury and to inform them of how long the trial will last. You cannot say anything else about any aspect of your experience until you are released from jury service.

While each of you want as much information as possible before deciding the case, you cannot be investigators outside the courtroom. Attempting to get further information outside the courtroom would be unfair to the parties and would be a direct and serious violation of your oath.

Do not attempt to gather any information on your own. Do not read or research about this case or this kind of case from any other source, including the internet. Many of us routinely use the internet to research topics of interest. But you may not do that in this case. You may not use Google<sup>®</sup>, Bing<sup>®</sup>, Yahoo<sup>®</sup>, or any other type of internet search engine to learn about any person, place or thing that is involved in this case. This includes the defendant, the attorneys, the witnesses, your fellow jurors, and the court personnel. This applies whether you are here, at home, or anywhere else. Do not read about this case in the newspapers or on the internet, or listen to any radio or television broadcasts about the trial. The law even prohibits you from consulting a dictionary.

Do not attempt to visit any places mentioned in this case. Finally, do not in any other way try to learn about this case or this kind of case outside the courtroom.

Why aren't you allowed to do these things? Evidence presented to a jury in court must meet at least three legal standards:

First, it must be allowable under the Rules of Evidence. The Rules of Evidence are designed to eliminate information that is not reasonably reliable.

Second, in a courtroom, witnesses are placed under oath to tell the truth, under penalty of perjury. A witness who lies can be prosecuted and sentenced to jail.

Third, all witnesses' testimony is subject to cross examination, which means questioning by the other side. Cross examination can help you determine whether testimony is credible or evidence is reliable. By contrast, information you might obtain on your own would not have been subject to the Rules of Evidence, would not be under oath, and would not have been cross-examined. Therefore, it may not be credible or reliable. Furthermore, if you secretly obtain information on your own, the prosecution and defense would not know you had done this, and would not have a fair opportunity to show that such information may be false, inaccurate, or incomplete. Trials must not be decided based upon secret information.

Breaking any of these rules would violate your oath as a juror and would subject you to punishment for contempt of court. If you violate any of these rules, you and your fellow jurors might have to come back to court after this trial to testify about your conduct. Furthermore, violating your oath could require a new trial before a new jury. Your misconduct will have wasted all the time you, your fellow jurors, the Court, the attorneys, and parties have spent in this trial.

After the trial is over and you have been discharged as jurors, you will be free to discuss any aspect of this case with anyone and you may do any research that you like. But no such communication with others or

research about this case may occur until then.

We are all depending upon you to uphold the oath that you have taken to follow the rules as jurors and we are confident you will do so.

#### COMMENT

1. See *People v. Flockhart*, 2013 CO 42, ¶¶ 12-15, 304 P.3d 227, 231-32 (in a criminal case, it is error to instruct the jurors that they may discuss the case prior to deliberations; such an instruction is not authorized by rule or existing law).

## CHAPTER C

### GENERAL INSTRUCTIONS

<a href="#"><u>C:01</u></a>	OATH FOR WITNESSES
<a href="#"><u>C:02</u></a>	OATH FOR INTERPRETER
<a href="#"><u>C:03</u></a>	COURT'S QUESTIONING OF WITNESSES
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<a href="#"><u>C:10</u></a>	ADMONITION ABOUT CONDUCT DURING TRIAL
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<a href="#"><u>C:15</u></a>	OATH FOR BAILIFF PRIOR TO DELIBERATIONS

## **C:01 OATH FOR WITNESSES**

Do you solemnly swear or affirm under penalty of law that the testimony you will give before this court shall be the truth, the whole truth and nothing but the truth?

## **C:02 OATH FOR INTERPRETER**

Do you solemnly swear or affirm under penalty of law that you will accurately, impartially, and to the best of your ability translate from English into [    ], the oaths that are administered and the questions asked the witness(es), and will accurately translate from [    ] into English, the answers given?

## **C:03 COURT'S QUESTIONING OF WITNESSES**

During the course of the trial I may ask a question of a witness. If I do, that does not indicate in any way that I have an opinion about the facts in the case. My questions are intended only to clarify the testimony. The answers that witnesses give to my questions are, therefore, of no greater value or weight than any other answer that may be given.

## **C:04 BENCH CONFERENCES**

During the trial I may need to talk with the lawyers out of your hearing about questions of law.

Sometimes you may be asked to leave the courtroom while we discuss these things. We will try to limit these interruptions as much as possible.

**C:05 EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE  
ONLY**

COMMENT

1. *See* Instruction D:02.
2. In 2018, the Committee moved this instruction to Instruction D:02.

**C:06 EVIDENCE NOT ADMISSIBLE AGAINST ALL  
DEFENDANTS**

COMMENT

1. *See* Instruction D:03.
2. In 2018, the Committee moved this instruction to Instruction D:03.

## **C:07 ORDER TO DISREGARD EVIDENCE**

### COMMENT

1. *See* Instruction D:04.5.
2. In 2018, the Committee moved this instruction to Instruction D:04.5.

## **C:08 OATH FOR BAILIFF PRIOR TO JURY VIEWING**

Do you solemnly swear or affirm under penalty of law that you will: take this jury in your charge and take them to the location involved in this case for their inspection; not permit any person to speak to them or speak to them yourself in relation to the matters in issue; and, after they have completed their inspection, return with them into court?

## **C:09 DIRECTIONS PRIOR TO JURY VIEWING**

The Court has concluded that you should now view [insert appropriate description of the subject or scene] as a group, and you are to go with the bailiff(s). While you are there or in transit do not discuss this case among yourselves and do not ask any questions of the attorneys or of the people who may be there. The purpose of the viewing is to assist you in understanding and applying the testimony you hear and the exhibits introduced at this trial.

## **C:10 ADMONITION ABOUT CONDUCT DURING TRIAL**

I want to remind you that there are rules you must follow. These are the same rules jurors have always had to follow. During the trial, this courtroom is a place partially isolated from the outside world. Your decision must be made inside this place and you must follow its rules. You must decide this case based only on the evidence presented in the courtroom and the law as I instruct you. You must avoid any other information about the case from any other source. These rules are designed to make sure there is a fair trial.

There are two basic rules:

1. You must not communicate with others or among yourselves about the trial as it is going on.
2. You must not do any independent investigation or research about the case.

I will go over these rules in great detail because they are very important. I will also explain the reasons for these rules. If you learn anyone has violated these rules you must report that to me or my staff at once.

You must not discuss the case among yourselves in any way during the course of the trial. You may not discuss the case among yourselves until after you have heard all the evidence and you begin to deliberate on a verdict. In fairness, you must keep an open mind throughout the trial, and you may not form any opinions about the case or reach your decision until I tell you that you may start deliberating on a verdict.

Do not permit anyone else to discuss the case with you, or near you. If anyone, including one of your fellow jurors, attempts to do so, report that fact immediately.

Do not talk with any witness, the defendant, or any of the attorneys who are involved in the case. You cannot talk to them and they cannot talk to you, even casually.

Do not communicate about the case with anyone else in any way, including in person, by telephone, cell phone, smart phone, iPhone®, Blackberry®, computer, the internet, or any internet service. This means you must not e-mail, text, instant message, Tweet®, blog, or post information about this case, or about your experience as a juror on this case, on any website, list serve, chat room, blog, or website such as Facebook®, My Space®, LinkedIn®, YouTube®, or Twitter®.

[Note to court: Modify this list to reflect changes in communication technology.]

You must not read, review, or accept any communications in any form from anyone regarding this case or cases like this. Therefore, you may not mention that this is a criminal case or the charges that have been filed.

You are permitted, however, to explain to family, friends, and employers that you are on a jury and to inform them of how long the trial will last. You cannot say anything else though, about any aspect of your experience until you are released from jury service.

While each of you want as much information as possible before deciding the case, you cannot be investigators outside the courtroom. Attempting to get further information outside the courtroom would be unfair to the parties and would be a direct and serious violation of your oath.

Do not attempt to gather any information on your own. Do not read or research about this case or this kind of case from any other source, including the internet. Many of us routinely use the internet to research topics of interest. But you may not do that in this case. You may not use Google®, Bing®, Yahoo®, or any other type of internet search engine to learn about any person, place or thing that is involved in this case. This includes the defendant, the attorneys, the witnesses, your fellow jurors, and the court personnel. This applies whether you are here, at home, or anywhere else. Do not read about this case in the newspapers or on the internet, or listen to any radio or television broadcasts about the trial. The law even prohibits you from consulting a dictionary.

Do not attempt to visit any places mentioned in this case. Finally, do not in any other way try to learn about this case or this kind of case outside the courtroom.

Why aren't you allowed to do these things? Evidence presented to a jury in court must meet at least three legal standards:

First, it must be allowable under the Rules of Evidence. The Rules of Evidence are designed to eliminate information that is not reasonably reliable.

Second, in a courtroom, witnesses are placed under oath to tell the truth, under penalty of perjury.

Third, all witnesses' testimony is subject to cross examination, which means questioning by attorneys from the other side of the case. Cross examination can help you determine whether testimony is credible or evidence is reliable. By contrast, information you might obtain on your own would not have been subject to the Rules of Evidence, would not be under oath, and would not have been cross-examined. Therefore, it may not be credible or reliable. Furthermore, if you secretly obtain information on your own, the prosecution and defense would not know you had done this, and would not have a fair opportunity to show that such information may be false, inaccurate, or incomplete. Trials must not be decided based upon secret information.

Breaking any of these rules would violate your oath as a juror and would subject you to punishment for contempt of court. If you violate any of these rules, you and your fellow jurors might have to come back to court after this trial to testify about your conduct. Furthermore, violating your oath could require a new trial before a new jury. Your misconduct will have wasted all the time you, your fellow jurors, the Court, the attorneys, and parties have spent in this trial.

After the trial is over and you have been discharged as jurors, you will be free to discuss any aspect of this case with anyone and you may do any research that you like. But no such communication with others or research about this case may occur until then.

We are all depending upon you to uphold the oath that you have taken to follow the rules as jurors and we are confident you will do so.

#### COMMENT

1. This instruction is nearly identical to Instruction B:06. The introductory language is slightly different to reflect the fact that, if the court elects to give this instruction again after jury selection, the jury will have already heard the admonition once before.

## **C:11 OATH FOR BAILIFF PRIOR TO FIRST RECESS**

Do you solemnly swear or affirm under penalty of law that at this and all other recesses, you will keep this jury together; you will not permit any person to speak to them; you will not speak to them yourself in relation to this trial; and you will return with them as ordered?

## **C:12 ADMONITION AT RECESS**

We will now take a break.

I want to remind you that until the trial is completed you must not discuss this case with anyone either in person, using the internet, or by any other means.

This includes members of your family, people involved in the trial, other jurors, or anyone else.

If someone approaches you and tries to discuss the trial with you, or if you see or hear anything about it, even accidentally, let me know about it immediately.

You must not conduct any research, undertake any investigation, or otherwise obtain information about the case from an outside source. You must not read or listen to any news reports or internet information or other electronic sources about the trial. Your verdict must be based solely on the evidence presented in the courtroom and the law as I instruct you.

Finally, it is especially important that you do not form or express any opinion on the case until your deliberations at the end of the trial.

## **C:13 JURORS' CONDUCT DURING TRIAL – DISCUSSIONS OUTSIDE PRESENCE OF ENTIRE JURY**

Members of the jury, you may discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

## **C:14 PRE-TRIAL PUBLICITY AND PUBLICITY DURING TRIAL**

If there has been or is any news coverage of this case you must completely disregard it. Your decision in this case must be made solely on the evidence presented at the trial.

## **C:15 OATH FOR BAILIFF PRIOR TO DELIBERATIONS**

Do you solemnly swear or affirm under penalty of law that you will keep this jury together as ordered, that you will not permit any person to speak to them, that you will not speak to them yourself unless by order of the Court or to ask them if they have agreed upon a verdict, and that when they have agreed upon a verdict you will return with them into Court?



## CHAPTER D

### EVIDENTIARY INSTRUCTIONS

- [D:01](#) DIRECT AND CIRCUMSTANTIAL EVIDENCE – NO DISTINCTION
- [D:02](#) EVIDENCE LIMITED AS TO PURPOSE (CONTEMPORANEOUS)
- [D:03](#) EVIDENCE NOT ADMISSIBLE AGAINST ALL DEFENDANTS (CONTEMPORANEOUS)
- [D:04](#) LIMITING INSTRUCTION FOR EVIDENCE OF THE DEFENDANT’S MENTAL PROCESSES ACQUIRED DURING A COURT-ORDERED EXAMINATION
- [D:04.5](#) ORDER TO DISREGARD EVIDENCE
- [D:05](#) ACCOMPLICE TESTIMONY – UNCORROBORATED
- [D:06](#) CONVICTION OF FELONY – WITNESS OR DEFENDANT
- [D:07](#) REPUTATION FOR TRUTH AND VERACITY
- [D:08](#) JUDICIAL NOTICE (CONTEMPORANEOUS)
- [D:09](#) STIPULATION AS TO TESTIMONY
- [D:10](#) STIPULATION AS TO FACTS
- [D:11](#) INFERENCES – GENERAL
- [D:12](#) OUT OF COURT STATEMENTS – CHILD DECLARANT
- [D:13+](#) GENDER IDENTITY, GENDER EXPRESSION, OR SEXUAL ORIENTATION – BIAS PROHIBITED

## D:01 DIRECT AND CIRCUMSTANTIAL EVIDENCE – NO DISTINCTION

A fact may be proven by either direct or circumstantial evidence. Under the law, both are acceptable ways to prove something. Neither is necessarily more reliable than the other.

Direct evidence is based on first-hand observation of the fact in question. [For example, a witness's testimony that he [she] looked out a window and saw snow falling might be offered as direct evidence that it had snowed.]

Circumstantial evidence is indirect. It is based on observations of related facts that may lead you to reach a conclusion about the fact in question. [For example, a witness's testimony that he [she] looked out a window and saw snow covering the ground might be offered as circumstantial evidence that it had snowed.]

### COMMENT

1. See *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973) (“we now cast aside as outmoded and as confusing the requirement that the prosecution's evidence, when wholly circumstantial, must exclude every reasonable hypotheses other than that of guilt and no longer require such an instruction or such a test to be applied”).

## D:02 EVIDENCE LIMITED AS TO PURPOSE (CONTEMPORANEOUS)

The evidence you are about to [hear] [see] [insert a description of the evidence] is being presented for [insert description of purpose(s) for which the evidence is being admitted] only. You may not consider it for any other reason.

### COMMENT

1. See *People v. Garner*, 806 P.2d 366, 374 (Colo. 1991) (“If the other-crime evidence is admitted [pursuant to CRE 404(b)], the court should instruct the jury, pursuant to CRE 105, on the limited purpose for which such evidence is admitted at the time of admission. Although the Colorado Rules of Evidence do not address whether, as we previously held in [*Stull v. People*, 344 P.2d 455, 458 (Colo. 1959)], the limited-purpose instruction should be repeated in the court’s written instructions to the jury, we conclude that, in order to safeguard against the potential for the jury’s misuse of the other-crime evidence, the trial court should repeat the limited-purpose instruction in its general charge to the jury at the conclusion of the evidence. For reasons stated in *Stull*, the court should refer to the other-crime evidence as a ‘transaction,’ ‘act,’ or ‘conduct’ and should avoid such terms as ‘offense’ or ‘crime.’”); *Perez v. People*, 2015 CO 45, ¶ 31, 351 P.3d 97, 405–06 (holding that the trial court’s improper admission of prejudicial 404(b) evidence as to one count necessarily tainted the jury’s determination of the remaining two counts because “(1) all three counts for which [the defendant] was convicted include a similar element regarding sexual conduct, and (2) the prosecutor’s statements and arguments repeatedly urged the jury to consider the 404(b) evidence beyond its limited scope and implied that it was relevant to all counts”).

2. See § 16-10-301(3), C.R.S. 2020 (when evidence of similar acts or transactions is admitted in a prosecution for one of the statutorily-enumerated sexual offenses: “The trial court shall, at the time of the reception into evidence of similar acts or transactions and again in the general charge to the jury, direct the jury as to the limited purpose for

which the evidence is admitted and for which the jury may consider it. The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words ‘similar act or transaction’ and shall at no time refer to ‘similar offenses’, ‘similar crimes’, or other terms which have the same connotations.”).

3. See § 18-6-801.5(5), C.R.S. 2020 (“Upon admitting evidence of other acts or transactions [involving domestic violence] into evidence pursuant to this section and again in the general charge to the jury, the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it.”).

4. This instruction should be given contemporaneously with admission of the evidence; Instruction E:07.2 should be given at the close of the case.

5. + This instruction is unnecessary if the evidence admitted is *res gestae*. See *Griffiths*, 251 P.3d 462, 467 (Colo. App. 2010) (“[R]es gestae evidence is not subject to CRE 404(b), which excludes evidence of prior criminality or bad acts, and can be admitted without a limiting instruction.”); cf. *People v. Yachik*, 2020 COA 100, ¶¶ 11, 17, 43, 469 P.3d 582, 585–86, 590 (considering a sexual assault case where the trial court erroneously admitted evidence as *res gestae* – specifically, that the defendant had previously abused the victim – and issued a limiting instruction explaining that the evidence “has been admitted for the limited purpose of providing the jury with a full and complete understanding of the events surrounding the charged crimes and the context in which the charged crimes occurred”; holding that the limiting instruction was deficient because it “did not instruct the jury that defendant could not be convicted because he was physically abusive, and it did not limit the use of the evidence to explain why [the victim] did not report the sexual assaults”).

6. In 2015, the Committee revised Comment 1 by adding a citation to *Perez v. People*.

7. This instruction previously appeared as Instruction C:05; in 2018, the Committee moved it here.

8. + In 2020, the Committee added Comment 5.

## D:03 EVIDENCE NOT ADMISSIBLE AGAINST ALL DEFENDANTS (CONTEMPORANEOUS)

The prosecution will now present evidence against defendant[s] [ ] [and [ ]].

You are instructed that you must not consider such evidence against the other defendant[s], [ ] [and [ ]].

### COMMENT

1. See *People v. Vigil*, 678 P.2d 554, 558 (Colo. App. 1983) (court erred by not instructing the jury, either at the time the co-defendant's statements were admitted or in its charge to the jury, that statements were not to be considered as proof of defendant's guilt).
2. See *Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1090 (Colo. 2011) (explaining that, although in *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court created a very narrow exception to the almost invariable assumption of the law that jurors follow instructions when it held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confessions of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant, the Court thereafter limited *Bruton* to its facts when it held, in *Richardson v. Marsh*, 481 U.S. 200, 206 (1987), that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction, when the confession is redacted to eliminate not only the defendant's name, but any reference to the defendant's existence).
3. This instruction should be given contemporaneously with admission of the evidence; Instruction E:07.5 should be given at the close of the case.
4. This instruction previously appeared as Instruction C:06; in 2018, the Committee moved it here.

## D:04 LIMITING INSTRUCTION FOR EVIDENCE OF THE DEFENDANT'S MENTAL PROCESSES ACQUIRED DURING A COURT-ORDERED EXAMINATION

You are about to hear evidence that you may consider as to the question of the defendant's mental condition with respect to [a charged crime] [the crime(s) of (insert name of offense(s))]. You shall not consider it for any other purpose.

### COMMENT

1. See §§ 16-8-107(1)(a), 16-8-107(1.5)(a), C.R.S. 2020.
2. The above model limiting instruction is suitable both for: (1) evidence that is offered "to rebut evidence of [the defendant's] mental condition introduced by the defendant to show incapacity to form a culpable mental state," pursuant to section 16-8-107(1)(a); and (2) with respect to offenses committed on or after July 1, 1999, evidence that is admissible "as to the defendant's mental condition," pursuant to section 16-8-107(1.5)(a). See *People v. Herdman*, 2012 COA 89, ¶ 25, 310 P.3d 170, 177 (the term "mental condition," as used in section 16-8-107(1.5)(a), does not refer exclusively to insanity); *People v. Herrera*, 87 P.3d 240, 245 (Colo. App. 2003) ("The reference in § 16-8-107(1.5)(a) to . . . the defendant's 'mental condition,' . . . is, in our view, equivalent to the reference in § 16-8-107(1)(a) to a defendant's 'capacity to form a culpable mental state.'").

## **D:04.5 ORDER TO DISREGARD EVIDENCE**

You are ordered to disregard [the witness's last answer] [the exhibit].

You must not consider [testimony] [evidence] which you are ordered to disregard.

You must treat it as if you had never heard it or seen it.

### **COMMENT**

1. This instruction previously appeared as Instruction C:07; in 2018, the Committee moved it here.

## D:05 ACCOMPLICE TESTIMONY – UNCORROBORATED

The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. There is no evidence other than the testimony of this witness which tends to establish the participation of the defendant in the crime.

While you may convict upon this testimony alone, you should act upon it with great caution. Give it careful examination in the light of other evidence in the case. You are not to convict upon this testimony alone, unless you are convinced beyond a reasonable doubt that it is true.

### COMMENT

1. See *People v. Montoya*, 942 P.2d 1287, 1293 (Colo. App. 1996) (“COLJI-Crim. 4:06 (1983) – warning the jury to act with care and caution when considering accomplice testimony – is to be given *only* when the prosecution’s case is based on uncorroborated testimony of an accomplice. The propriety of a trial court’s refusal to give this instruction thus turns on whether corroborating evidence of the accomplice’s testimony exists in the record. . . . Evidence to corroborate an accomplice may be direct or circumstantial. It should identify the defendant and show his connection with the offense, rather than merely tending to prove that an offense has been committed. Accomplice testimony, however, need not be corroborated in every part; corroboration of one element of the testimony is sufficient.”).

2. See *People v. Martinez*, 531 P.2d 964, 965 (Colo. 1975) (“In Colorado, an accomplice is not per se an unworthy witness. His status as an accomplice goes to credibility, but not to competency. This is true even though the accomplice has been promised immunity from prosecution by appearing as a witness against the defendant. *Barr v. People*, 30 Colo. 522, 71 P. 392 (1903). If the jury is instructed to review the testimony with great caution, it may convict upon the uncorroborated testimony of an accomplice which is clear and convincing and shows guilt beyond a reasonable doubt.”).

## D:06 CONVICTION OF FELONY – WITNESS OR DEFENDANT

The credibility of a witness may be challenged by showing that the witness has been convicted of a felony. A previous felony conviction is one factor you may consider in determining the credibility of a witness. It is up to you to determine what weight, if any, is to be given to such a conviction.

[The credibility of statements made by a person who did not testify in court may be challenged by showing that the person has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of that person. You must determine the weight to be given to any prior conviction when considering the credibility of that person's statement.]

[The defendant is to be tried for the crime charged in this case, and no other. You may consider testimony of a previous conviction only in determining the credibility of the defendant as a witness, and for no other purpose. When the defendant testifies, his [her] credibility is to be determined in the same manner as any other witness.]

### COMMENT

1. See § 13-90-101, C.R.S. 2020 (“In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony.”); *cf. Lee v. People*, 460 P.2d 796, 798-99 (Colo. 1969) (final sentence of statute, which prohibits the impeachment of witnesses in a civil case by evidence of a previous conviction of a felony more than five years before the time the witness testified, does not violate equal protection because it was reasonable “for the Legislature to permit a more searching inquiry into the credibility of witnesses in a criminal trial where the burden

is on the People to prove the guilt of the defendant beyond a reasonable doubt”).

2. See CRE 806 (“When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.”).

3. See *People v. Wright*, 678 P.2d 1072, 1074 (Colo. App. 1984) (entry and subsequent expungement of a conviction pursuant to Missouri’s deferred judgment and sentence statute, which was analogous to Colorado’s deferred judgment statute, was not an existing conviction for purposes of testimonial impeachment under section 13-90-101).

4. *People v. Hamilton*, 2019 COA 101, ¶¶ 89, 93, 101-07, 452 P.3d 184, 200-02 (holding that, where the court instructed the jury that it may only consider a prior conviction as it relates to the defendant’s credibility but *also* instructed the jury that it “should not necessarily presume that because [the defendant] was found guilty by a previous jury that [he] was factually guilty but rather that a previous jury determined that the state proved his guilt beyond a reasonable doubt,” the court erred in giving the additional conviction language because that language (1) “made no reference to credibility,” (2) “unnecessarily highlighted [the defendant’s] prior conviction,” (3) failed to ensure that the jury “did not give improper weight to the other acts evidence presented at trial and did not speculate whether [the defendant] had been convicted on a charge for which he had been acquitted,” and (4) “was confusing and illogical”).

5. In 2019, the Committee added Comment 4.

## D:07 REPUTATION FOR TRUTH AND VERACITY

The credibility of a witness may be discredited or supported by testimony about his [her] reputation for truthfulness or by the opinion of another witness. It is entirely your decision to determine what weight shall be given such testimony.

### COMMENT

1. See CRE 608(a) (“The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”).
2. See *People v. Wittrein*, 221 P.3d 1076, 1081 (Colo. 2009) (“In Colorado, neither lay nor expert witnesses may give opinion testimony that another witness was telling the truth on a specific occasion.”).

## D:08 JUDICIAL NOTICE (CONTEMPORANEOUS)

A party may ask the Court to take judicial notice of certain facts. When the Court takes judicial notice of a fact, it means that the Court has allowed the fact into evidence without requiring proof of it. You may, but are not required to, accept any fact judicially noticed by the Court. It is entirely your decision to determine what weight, if any, shall be given to the evidence.

In this case, the Court has taken judicial notice of the following fact[s]:

[list the judicially noticed fact(s)].

### COMMENT

1. See CRE 201(g) (“In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.”).
2. This instruction should be given contemporaneously with the judicially noticed fact. In addition, the court should provide a follow-up instruction on judicial notice at the close of evidence. See Instruction E:07.8.
3. In 2018, the Committee revised this instruction consistent with the Colorado Supreme Court’s opinion in *Doyle v. People*, 2015 CO 10, 343 P.3d 961.

## D:09 STIPULATION AS TO TESTIMONY

The parties have agreed that if [insert name] were called as a witness he [she] would testify as set forth in the stipulation. You should consider that stipulated testimony in the same way you consider testimony given here in court, and you should judge it in the same manner in which you judge the testimony of any witness who appeared and testified before you.

### COMMENT

1. *See Martin v. People*, 738 P.2d 789, 798 (Colo. 1987) (“If the defendant offers to stipulate to a fact and the prosecution’s case is not thereby weakened, the trial court may, after employing the appropriate balancing test, require the prosecution to accept the stipulation.”).

## **D:10 STIPULATION AS TO FACTS**

The parties have agreed as to the existence of [a] certain fact[s]. You may regard [that] [those] fact[s] as proven.

[Specifically, the parties have stipulated to the following facts:]

## D:11 INFERENCES – GENERAL

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (provision of statute proscribing driving while license revoked authorized only a permissible inference that defendant had knowledge of fact of revocation from proof of registered mailing of notice, rather than creating a conclusive presumption or mandatory burden-shifting presumption with respect to that element of the offense; the statutory term “prima facie proof” is functionally equivalent to a permissible inference); *Barnes v. People*, 735 P.2d 869, 872–74 (Colo. 1987) (“a mandatory presumption may not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime”; driving under the influence statute, which provided that it shall be presumed that defendant was under influence of alcohol if there was 0.10 or more grams of alcohol per 100 milliliters of blood, as shown by chemical analysis of defendant’s blood, authorized only permissible inference that defendant was under the influence of alcohol); *People v. Felgar*, 58 P.3d 1122, 1124–25 (Colo. App. 2002) (instruction establishing mandatory presumption concerning the defendant’s knowledge violated due process, even though the instruction tracked the statutory language).

2. In some circumstances, an instruction describing an evidentiary inference may be based on precedent. For example, in cases where evidence of the defendant’s unexplained, exclusive possession of recently stolen goods is relevant (e.g., theft, robbery, burglary), refer to the

instruction in the appendix to *Wells v. People*, 592 P.2d 1321 (Colo. 1979). See also *People v. Hampton*, 758 P.2d 1344, 1355 (Colo. 1988) (“In *Wells*, we . . . appended to our opinion a recommended instruction for use in future jury trials.”).

3. Both the United States Supreme Court and the Colorado Supreme Court have used the terms “permissive inference” and “permissible inference” interchangeably. See, e.g., *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 157 (1979) (using both terms within the same paragraph); *People in Matter of R.M.D.*, 829 P.2d 852, 854 (Colo. 1992) (same). Further, it does not appear that any appellate court has ever analyzed whether there is a meaningful distinction between the two terms. Accordingly, the Committee has elected, for the sake of clarity and consistency, to use the term “permissible inference” throughout the model instructions.

## D:12 OUT OF COURT STATEMENTS – CHILD DECLARANT

In this case, you heard evidence of [an] out of court statement[s] [allegedly] made by [insert name of child].

You are instructed that it is for you to determine the weight and credit to be given any such statement[s]. In making this determination you shall consider the age and maturity of the child, the nature of the [alleged] statement[s], the circumstances under which the statement[s] [was] [were] [allegedly] made, and any other evidence that has been admitted that you choose to consider for this purpose.

### COMMENT

1. *See* § 13-25-129(6), C.R.S. 2020 (“If a statement is admitted pursuant to this section, the court shall instruct the jury in the final written instructions that during the proceeding the jury heard evidence repeating a child’s out-of-court statement and that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, the jury shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.”).
2. *See People v. Burgess*, 946 P.2d 565, 567–68 (Colo. App. 1997) (“The supreme court had construed the pre-amendment version of [section 13-25-129] to require that a cautionary instruction be given contemporaneously with the hearsay testimony and also in the final written instructions to the jury. . . . We conclude that, by amending the statute, the General Assembly intended to eliminate the contemporaneous instruction requirement that previously had been established in decisional law.”).
3. The admissibility of statements pursuant to section 13-25-129 may be limited due to constitutional confrontation clause issues, at least where such statements are “testimonial” and the child does not testify. *See Crawford v. Washington*, 541 U.S. 46 (2007) (admitting testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the accused’s confrontation

right under the Sixth Amendment to the United States Constitution); *People v. Moreno*, 160 P.3d 242 (Colo. 2007) (“To the extent that the statute allows for the admission of out-of-court testimonial statements without the defendant being afforded an opportunity to cross-examine the declarant, it is now clear that the statute violates the confrontation guaranty of the Sixth Amendment.”); *People v. Vigil*, 127 P.3d 916, 929–30 (Colo. 2006) (explaining what type of statements are “testimonial” for purposes of the Sixth Amendment); *People v. Argoramirez*, 102 P.3d 1015, 1017–18 (Colo. 2004) (prior videotaped statements made by children to law enforcement official could be introduced into evidence when children testified at trial without violating confrontation clause; *Crawford* does not affect the analysis for admission of out-of-court statements where the declarant testifies at trial).

4. The words “allegedly” and “alleged” are enclosed within brackets because they should not be used when statements are admitted by means of a video-recording.

5. In 2019, the Committee updated the statutory citation in Comment 1 to reflect a legislative amendment. See Ch. 42, sec. 1, § 13-25-129, 2019 Colo. Sess. Laws 144, 145.

## **+ D:13 GENDER IDENTITY, GENDER EXPRESSION, OR SEXUAL ORIENTATION – BIAS PROHIBITED**

You are about to hear evidence relating to [a victim's] [the defendant's] [a witness's] actual or perceived gender identity, gender expression, or sexual orientation. You are instructed that you must not allow bias or any kind of prejudice based upon gender identity, gender expression, or sexual orientation to influence your decision.

[Additionally, this evidence is being presented for [insert description of purpose(s) for which the evidence is being admitted] only. You may not consider it for any other reason.]

### COMMENT

1. *See* § 18-1-714(4), C.R.S. 2020.
2. *See* Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. Section 18-1-714(5) provides as follows: “This section does not apply when evidence of a victim’s actual or perceived gender identity, gender expression, or sexual orientation is offered in a criminal prosecution for a bias-motivated crime as described in section 18-9-121. In such prosecutions, the rules of evidence shall govern the admissibility of evidence of a victim’s actual or perceived gender identity, gender expression, or sexual orientation.”
4. The court should only give the second paragraph of the instruction where the evidence is being admitted for a limited purpose. *See* § 18-1-714(4) (“If admitted for a limited purpose, the court shall further instruct the jury as to the limited purpose or purposes for which the evidence is admitted and for which the jury may consider it.”
5. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 279, sec. 4, § 18-1-714(4), 2020 Colo. Sess. Laws 1364, 1367–68.

## CHAPTER E

### FINAL CHARGE TO JURY, GENERAL INSTRUCTIONS, AND VERDICT FORMS

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## **E:01 DUTIES OF JUDGE AND JURY**

Members of the jury, the evidence in this case has been completed. In a moment, I will read to you jury instructions that contain the rules of law you must apply to reach your verdict. You will have copies of what I read to take with you to the jury room. But first, I want to mention a few things you need to keep in mind when you are discussing this case in the jury room.

Until you have returned a verdict, you must not do any research about this case or this kind of case using any source, including dictionaries, reference materials, the internet or any other electronic means. You must not communicate in any way with anyone else about this case or this kind of case until you have returned a verdict in court. This includes your family and friends. If you have a cell phone or other electronic device, you must keep it turned off during jury deliberations.

[Note to court: Consider giving a more detailed admonishment like that in Instruction B:06 (admonition about conduct during trial). Also, consider having the jurors surrender their electronic devices during deliberations.]

It is my job to decide what rules of law apply to the case. While the attorneys may comment on some of these rules, you must follow the instructions I give you. Even if you disagree with or do not understand the reasons for some of the rules of law, you must follow them. No single instruction describes all the law which must be applied; the instructions must be considered together as a whole.

During the trial, you received all of the evidence that you may properly consider in deciding the case. Your decision must be made by applying the rules of law that I give you to the evidence presented at trial. Remember, you must not be influenced by sympathy, bias or prejudice in reaching your decision.

[You should not allow bias or any kind of prejudice based upon gender to influence your decision.]

If you decide that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, it will be my job to decide what the punishment will be. In making your decision, you must not consider punishment at all. At times during the trial, attorneys made objections. Do not draw any conclusions from the objections or from my rulings on the objections. These only related to legal questions I had to decide and should not influence your thinking. If I told you not to consider a particular statement that was made during the trial, you must not consider it in your deliberations.

[I have asked questions of witnesses during the trial. That did not mean I had any opinion about the facts in the case.]

Finally, you should consider all the evidence in light of your experience in life.

#### COMMENT

1. *See* § 18-3-408, C.R.S. 2020 (“In any criminal prosecution under sections 18-3-402 to 18-3-405, [sexual assault, unlawful sexual contact, and sexual assault on a child,] or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall . . . be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.”).

## **E:02 THE CHARGE AGAINST THE DEFENDANT**

The charge against the defendant is not evidence. The charge against the defendant is just an accusation. The fact that the defendant has been accused is not evidence that the defendant committed any crime.

The defendant is charged with committing the crime[s] of [ ], in [ ] County, Colorado, on or about [ ]. The defendant has pleaded not guilty [by reason of insanity].

## **E:03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND REASONABLE DOUBT**

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find the defendant guilty of that crime. If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime.

### **COMMENT**

1. See *Johnson v. People*, 2019 CO 17, ¶¶ 4, 13, 18, 436 P.3d 529, 530, 532, 534 (noting that “[t]he U.S. Supreme Court has cautioned that further attempts by courts or parties to define ‘reasonable doubt’ do not provide clarity”; holding that, when the trial court defined the phrase “hesitate to act” in the reasonable doubt instruction as “what it means is that after you evaluate all the evidence and you evaluate whether or not any doubts are reasonable or not . . . you would find Ms. Johnson guilty only if, after hearing all of that evidence, you just can’t bring yourself to do it,” the instruction was extraneous and nonsensical); + see also *People v. Flynn*, 2019

COA 105, ¶¶ 36–38, 42, 49, 456 P.3d 75, 83–85 (holding that, where the court used several hypotheticals to explain the concept of reasonable doubt to the jury, the court’s comments did not lower the burden of proof because they were made only once and the court “repeatedly referred back to the appropriate standard definition of reasonable doubt”; nevertheless noting that “such instructions run the risk of confusing the jurors and may even lower the burden of proof or diminish the presumption of innocence”).

2. In 2019, the Committee added Comment 1.
3. + In 2020, the Committee added the citation to *Flynn* in Comment 1.

## **E:04 NUMBER OF WITNESSES**

The number of witnesses testifying for or against a certain fact does not, by itself, prove or disprove that fact.

## **E:05 CREDIBILITY OF WITNESSES**

You are the sole judges of the credibility of each witness and the weight to be given to the witness's testimony. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

For each witness, consider that person's knowledge, motive, state of mind, demeanor, and manner while testifying. Consider the witness's ability to observe, the strength of that person's memory, and how that person obtained his or her knowledge. Consider any relationship the witness may have to either side of the case, and how each witness might be affected by the verdict. Consider how the testimony of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate each witness's testimony.

You may believe all of the testimony of a witness, part of it, or none of it.

## E:06 EXPERT WITNESSES

You are not bound by the testimony of [a] witness[es] who [has] [have] testified as [an] expert[s]; the credibility of an expert's testimony is to be considered as that of any other witness. You may believe all of an expert witness's testimony, part of it, or none of it.

The weight you give the testimony is entirely your decision.

### COMMENT

1. See *Hampton v. People*, 465 P.2d 394, 400 (Colo. 1970) ("The weight to be accorded expert testimony is a question solely for the jury. Such testimony is subject to the test of cross-examination as any other testimony and the jurors are not bound by it and may accept or reject it as they see fit.").

## E:07 TESTIMONY OF DEFENDANT – NOT COMPELLED

Every defendant has a constitutional right not to testify. The decision not to testify cannot be used as an inference of guilt and cannot prejudice the defendant. It is not evidence, does not prove anything, and must not be considered for any purpose.

### COMMENT

1. An instruction concerning the defendant's right not to testify must be given if the defendant requests it. See *Carter v. Commonwealth of Kentucky*, 450 U.S. 288, 305 (1981) (“[T]he failure to limit the jurors’ speculation on the meaning of [the defendant’s decision to remain silent and not testify], when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant’s failure to testify.”); *People v. Crawford*, 632 P.2d 626, 627–28 (Colo. App. 1981) (trial court’s refusal to give, at close of trial, defendant’s tendered instruction that a defendant never has the burden of testifying or offering any evidence constituted reversible error, even though the jury panel was told by the court that defendant was not “obliged” to offer evidence, that the burden is always on the prosecution to prove every element of the offense charged beyond a reasonable doubt, and that the law never imposes on the defendant in any criminal case the burden of calling any witnesses or introducing any evidence).

## E:07.2 EVIDENCE LIMITED AS TO PURPOSE (CLOSING)

The court admitted certain evidence for a limited purpose.

You are again instructed that you cannot consider that evidence except for the limited purpose I told you about when it was admitted.

### COMMENT

1. In most cases, the court should avoid unduly highlighting the evidence and provide this general reminder without summarizing the evidence or restating the limited purpose for which it was admitted. However, it may be appropriate to provide greater specificity in cases where the court admits multiple items of evidence for different purposes.

2. + This instruction is unnecessary if the evidence admitted is *res gestae*. See *Griffiths*, 251 P.3d 462, 467 (Colo. App. 2010) (“[R]es gestae evidence is not subject to CRE 404(b), which excludes evidence of prior criminality or bad acts, and can be admitted without a limiting instruction.”); cf. *People v. Yachik*, 2020 COA 100, ¶¶ 11, 17, 43, 469 P.3d 582, 585–86, 590 (considering a sexual assault case where the trial court erroneously admitted evidence as *res gestae* – specifically, that the defendant had previously abused the victim – and issued a limiting instruction explaining that the evidence “has been admitted for the limited purpose of providing the jury with a full and complete understanding of the events surrounding the charged crimes and the context in which the charged crimes occurred”; holding that the limiting instruction was deficient because it “did not instruct the jury that defendant could not be convicted because he was physically abusive, and it did not limit the use of the evidence to explain why [the victim] did not report the sexual assaults”).

3. This instruction previously appeared as Instruction D:02; in 2018, the Committee moved it here.

4. + In 2020, the Committee added Comment 2.

## **E:07.5 EVIDENCE NOT ADMISSIBLE AGAINST ALL DEFENDANTS (CLOSING)**

The court admitted certain evidence concerning defendant[s] [insert name(s) of defendant(s)] but not concerning defendant[s] [insert name(s) of defendant(s)]. You are again instructed that you cannot consider it against defendant[s] [insert name of defendant(s)].

You must reach your verdict[s] as to each defendant as if he [she] were being tried separately.

### **COMMENT**

1. This instruction previously appeared as Instruction D:03; in 2018, the Committee moved it here.

## E:07.8 JUDICIAL NOTICE (CLOSING)

The Court has taken judicial notice of [a] certain fact[s]. You may or may not accept [that] [those] fact[s] as true. It is entirely your decision to determine what weight, if any, shall be given to the evidence.

### COMMENT

1. *See* Instruction D:08, Comment 2. The Committee recommends that, in addition to giving Instruction D:08 at the time the fact is judicially noticed, the court give this follow-up instruction at the close of evidence.
2. The Committee added this instruction in 2018.

## **E:08 JURORS' CONDUCT DURING TRIAL – DISCUSSIONS OUTSIDE PRESENCE OF ENTIRE JURY**

Members of the jury, you may discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

## E:09 QUESTIONS DURING DELIBERATIONS

Once you begin your deliberations, if you have a question, your foreperson should write it on a piece of paper, sign it and give it to the bailiff, who will bring it to me.

The Court will then determine the appropriate way to answer the question.

However, there may be some questions that, under the law, the Court is not permitted to answer. Please do not speculate about what the answer to your question might have been or why the Court is not able to answer a particular question.

Finally, please be sure to keep the original question and response. Do not destroy them as they are part of the official record in this case, and must be returned to me when you return the instructions and verdict forms at the end of the case.

### COMMENT

1. See "Implementation Plan: Jury Reform in Colorado," Appendix D (Mar. 12, 1998); "With Respect to the Jury: A Proposal For Jury Reform, Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries" (adopted "in principle" by the Colorado Supreme Court, February 1997).

## E:10 JUROR QUESTIONS OF WITNESSES

During this trial you were permitted to submit written questions to witnesses. If a particular question was not asked, do not guess why the question was not asked or what the answer might have been. My decision not to ask a question submitted by a juror is not a reflection on the person asking it, and you should not attach any significance to the failure to ask a question. By making legal rulings on the admissibility of questions, I did not intend to suggest or express any opinion about the question. My decision whether or not to allow a question is based on the applicable rules of evidence and other rules of law, and not on the facts of this particular case. It is my responsibility to assure that all parties receive a fair trial according to the law and the rules of evidence.

The fact that certain questions were not asked must not affect your consideration of the evidence in any way. Do not give greater weight to questions, or answers to questions, that are submitted by yourself or your fellow jurors. In making your decision, you must consider all of the evidence that has been presented.

### COMMENT

1. See Crim. P. 24(g) (“Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.”).
2. See *Medina v. People*, 114 P.3d 845, 853-55 (Colo. 2005) (permitting the jury to ask questions through the judge did not violate defendant’s due process rights); *People v. Stevenson*, 228 P.3d 161, 170 (Colo. App. 2009) (trial court did not abuse its discretion in allowing juror’s question, and concluding that it was not precluded by the parties’ evidentiary stipulation); *People v. Zamarripa-Diaz*, 187 P.3d 1120, 1123 (Colo. App. 2008) (a trial court’s alleged error in not consulting with defense counsel before

asking juror-posed questions does not constitute structural error; such claims are subject to review under the harmless error standard).

## E:11 SERIES OF ACTS IN A SINGLE COUNT

In order to convict the defendant of [insert name of crime], you must either unanimously agree that the defendant committed the same act or acts, or that he [she] committed all of the acts alleged.

### COMMENT

1. This instruction is for ensuring jury unanimity with respect to the charged *act(s)* forming the basis for a finding of guilt. See *Thomas v. People*, 803 P.2d 144, 153-54 (Colo. 1990) (“We . . . hold that when the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance. If the prosecutor decides not to designate a particular instance, the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged. Necessarily, the determination whether there is a reasonable likelihood that jurors may disagree on which acts the defendant committed requires the exercise of discretion by the trial court. In some instances, special verdicts may be advisable to provide assurance that a verdict is supported by unanimous jury agreement.”). Typically, this issue arises because of the “difficulty of applying the specification requirement to certain cases involving evidence of a continuing pattern of sexual abuse of very young children.” *Id.* at 152.

Do not use this instruction to impose a requirement for jury unanimity with respect to *alternative factual theories*. See *Schad v. Arizona*, 501 U.S. 624, 632 (1991) (plurality opinion) (“We see no reason . . . why the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense should not apply equally to alternative means of satisfying the element of *mens rea*.”); *People v. Dunaway*, 88 P.3d 619, 622 (Colo. 2004) (“[W]hen a jury instruction includes two alternative factual theories of the same charged offense and the jury returns a general verdict of guilt, due process does not require reversal of that conviction merely

because the evidence only supports one of the theories beyond a reasonable doubt.”); *People v. Hall*, 60 P.3d 728, 731 (Colo. App. 2002) (holding, based on the plurality opinion in *Schad v. Arizona*, *supra*, that the defendant’s due process rights were not violated where “the trial court did not instruct the jury it had to determine unanimously whether [the defendant] had committed the murder as the principal or as a complicitor”); *People v. Vigil*, 2015 COA 88M, ¶ 44, 459 P.3d 553, 564 (“Because the prosecution presented a single theory of burglary, the jury was not required to unanimously agree on *which* building was burglarized. Instead, the jury only needed to agree that [the defendant] burglarized a building on the charged date at the charged place.”).

2. See *People v. Davis*, 2017 COA 40M, ¶¶ 15, 21, \_\_\_ P.3d \_\_\_ (“[C]ommitting a number of crimes, or engaging in a number of noncriminal overt acts, does not necessarily mean there is more than one conspiracy. . . . Though the prosecution alleged numerous overt acts in furtherance of the single conspiracy, that did not require unanimous agreement by the jurors as to the precise overt act [the] defendant committed.”).

3. + See *People v. Archuleta*, 2020 CO 63M, ¶¶ 28, 33, 467 P.3d 307, 312–13 (holding that, although the prosecution “noted for the jury that the crime of child abuse can be committed in three ways and that Archuleta’s conduct here ‘could be one of these, two of these, all three,’” she was nevertheless not entitled to a modified unanimity instruction because “the record reflects that the prosecution tried this case as involving one pattern or transaction of abuse resulting in [the child’s] death”); *People v. Dyer*, 2019 COA 161, ¶ 56, 457 P.3d 783, 794 (holding that, where the prosecution charged the defendant with committing child abuse by engaging in a continuing course of conduct, the court did not need to give a modified unanimity instruction because “the jurors did not need to agree on the acts or omissions constituting the course of conduct”).

4. In 2019, the Committee added the citation to *Vigil* in Comment 1, and it added Comment 2.

5. + In 2020, the Committee added Comment 3.

## E:12 MULTIPLE COUNTS (STANDARD CASE)

In this case a separate offense is charged against [one or more of] [each of] the defendant[s] in each count of the [information] [indictment]. Each count charges a separate and distinct offense and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find [all or some of] the defendant[s] guilty or not guilty of one of the offenses charged, should not control your verdict as to any other offense charged against [any of] the [other] defendant(s).

The defendant[s] may be found guilty or not guilty of any one or all of the offenses charged.

### COMMENT

1. In the scenario where charges feature inconsistent elements, *see People v. Delgado*, 2019 CO 82, ¶¶ 27–30, 450 P.3d 703, the court should use Instruction E:12.5 (multiple counts – inconsistent elements) in place of this instruction.
2. In 2019, the Committee added Comment 1.

## E:12.5 MULTIPLE COUNTS (INCONSISTENT ELEMENTS)

In this case a separate offense is charged against [one or more of] [each of] the defendant[s] in each count of the [information] [indictment]. Each count charges a separate and distinct offense and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. However, a defendant may not be found guilty of multiple crimes when one or more elements of those crimes are mutually exclusive. In this case, one or more elements of [Crime 1] and [Crime 2] are mutually exclusive. Therefore, while you may find the defendant guilty of either [Crime 1] or [Crime 2], you may not find [him] [her] guilty of both [Crime 1] and [Crime 2].

### COMMENT

1. In *People v. Delgado*, 2019 CO 82, ¶¶ 27–30, 450 P.3d 703, 707–08, the court held that because robbery requires a taking “by the use of force, threats, or intimidation” whereas theft requires a taking “by means other than the use of force, threat, or intimidation,” the elements of the two crimes “are mutually exclusive when they are predicated on a single taking,” meaning the defendant could not have been guilty of both robbery and theft. The court then directed trial courts to avoid the potential for inconsistent verdicts in such a case by “instruct[ing] the jury that a defendant may not be convicted of multiple crimes when the elements of those crimes are mutually exclusive,” meaning that “the court should have instructed the jury that Delgado could be convicted of robbery or theft, but not both.” *Id.* at ¶ 30, 450 P.3d at 708. Accordingly, the court should give this instruction instead of Instruction E:12 whenever it determines, as a matter of law, that the prosecution is pursuing guilty verdicts on crimes that feature one or more mutually exclusive elements.

2. + See *People v. Rigsby*, 2020 CO 74, ¶¶ 22–23, 25, 32–34, 471 P.3d 1068, 1075, 1077 (noting that section 18-1-501(3), C.R.S., establishes that (1) “acting recklessly necessarily includes acting with criminal negligence,” (2) “[a]cting knowingly necessarily includes acting recklessly and acting with criminal negligence,” and (3) “[a]nd acting with intent necessarily

includes acting knowingly, acting recklessly, and acting with criminal negligence”; further stating that “even if there is a *logical* inconsistency between acting with intent and acting with criminal negligence, and between acting recklessly and acting with criminal negligence, no *legal* inconsistency exists in either scenario based on section 18-1-503(3)”; accordingly holding that, where the jury found Rigsby guilty of three different assault counts – second-degree assault with a mental state of intent, second-degree assault with a mental state of recklessness, and third-degree assault with a mental state of criminal negligence – the verdicts were “legally consistent” and thus not mutually exclusive; noting that it was “inconsequential” that the jury was not instructed on section 18-1-503(3)); *see also* *People v. Struckmeyer*, 2020 CO 76, ¶ 7, 474 P.3d 57, 59 (applying *Rigsby*, and holding that guilty verdicts for child abuse (knowingly or recklessly) and child abuse (criminal negligence), even if logically inconsistent, are not *legally* inconsistent because, “[b]y proving that Struckmeyer acted knowingly or recklessly, the People necessarily established that he acted with criminal negligence”).

3. The Committee added this instruction in 2019.
4. + In 2020, the Committee added Comment 2.

## E:13 MULTIPLE DEFENDANTS

In this case, you must decide separately whether each of the [two] [several] defendants is guilty or not guilty. If you cannot agree upon a verdict as to [both] [all] the defendants, but do agree as to one [or more] of them, you must render a verdict as to the one [or more] upon which you do agree.

It is your duty to give separate personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts and culpable state of mind, and any other evidence in this case which may be applicable to him [her]. You must state your finding as to each defendant uninfluenced by your verdict as to [the other] [any other] defendant.

### COMMENT

1. See Instruction F:80 (defining “culpable state of mind”).

## **E:14 LESSER-INCLUDED OFFENSES**

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he [she] may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged if the evidence is sufficient to establish his [her] guilt of the lesser offense beyond a reasonable doubt.

The offense of [insert name of offense(s) here], as charged in the information in this case necessarily includes the lesser offense[s] of [insert name(s) of lesser-included offense(s) here].

[Using the appropriate elemental instruction for each lesser-included offense as a guide, insert a definition of each such offense here, leaving out the last two paragraphs of the inserted instruction (i.e., the paragraphs that begin with the words: “After considering all the evidence”). List the lesser-included offenses from highest to lowest degree if submitting more than one lesser-included offense.]

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser-included offense which is necessarily included in any offense charged in the information; the law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser-included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide that the prosecution has failed to prove one or more elements of the crime charged and one or more elements of the lesser-included offenses, you should find the defendant not guilty of these offenses, and you should so state in your verdict.

While you may find the defendant not guilty of the crimes charged

and the lesser-included offense[s], you may not find the defendant guilty of more than one of the following offenses:

[Insert the charged offense and all lesser-included offenses.]

#### COMMENT

1. See § 18-1-408(5)(a)–(c), C.R.S. 2020 (establishing several methods for identifying a lesser-included offense); *Reyna-Abarca v. People*, 2017 CO 15, ¶¶ 54–67, 390 P.3d 816, 824–27 (rejecting the court’s prior reasoning in *Boulies v. People*, 770 P.2d 1274 (Colo. 1989), and *Meads v. People*, 78 P.3d 290 (Colo. 2003), and instead adopting the strict elements test from *Schmuck v. United States*, 489 U.S. 705 (1989), and holding that “an offense is a lesser included offense of another offense if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense”); *People v. Rock*, 2017 CO 84, ¶¶ 15–20, 402 P.3d 472, 477–79 (explaining application of *Reyna-Abarca* test where a lesser offense may be committed in alternative ways, and holding that (1) if a lesser offense “is necessarily established by establishing the elements of a greater offense,” the lesser offense is included in the greater offense, and (2) “any set of elements sufficient for commission of that lesser offense that is necessarily established by establishing the statutory elements of a greater offense constitutes an included offense”); *Page v. People*, 2017 CO 88, ¶¶ 13, 19, 402 P.3d 468, 471–72 (applying *Reyna-Abarca* and *Rock* to find that unlawful sexual contact is a lesser-included offense of sexual assault).

2. Use a separate copy of this instruction for each pairing of a charged offense with one or more lesser-included offenses.

3. In 2017, the Committee updated the case citations in Comment 1, citing to more recent cases.

**E:15 SPECIAL VERDICT FORM (LESSER-INCLUDED OFFENSES)**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ].

People of the State of Colorado

v.

[insert name of defendant]

JURY VERDICT, Count No.[ ]

CHARGE OF [insert name of offense here]

I.\* We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. \_\_\_\_, [insert name of offense], and the lesser-included offense[s] of [insert name(s) of lesser-included offense(s)].

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FOREPERSON

II.\*\* We, the jury, find the defendant, [insert name], GUILTY of:

[ ] [insert principal crime charged]

OR

[ ] [insert lesser-included offense, and include a separate entry and corresponding box for each lesser-included offense.]

---

FOREPERSON

\* If you find the defendant NOT GUILTY of the charged offense and the lesser-included offense[s], the foreperson should sign section I above.

\*\* If you find the defendant guilty of the crime charged or [one of] the lesser-included offense[s], the foreperson should complete only this GUILTY verdict by placing, in ink, an “X” in the appropriate square. ONLY ONE SQUARE may be filled in, with the remainder to remain unmarked. The foreperson should then sign only section II above.

## COMMENT

1. Instructions E:14 and E:15 enable the jury to find the defendant not guilty of the greater and lesser offenses as a collective matter. However, a trial court has discretion to modify the instruction and the special verdict form (or to use separate verdict forms) to give the jury “the option of considering the charge and its lesser-included offenses on an individual basis, and acquitting the defendant on some or all of them.” *People v. Richardson*, 184 P.3d 755, 762 (Colo. 2008); *see also Blueford v. Arkansas*, 132 S. Ct. 2044 (2012) (where jurors became deadlocked using instructions that limited their options to convicting on one of the offenses or acquitting on all offenses, the foreperson’s earlier disclosure that they were unanimous against guilt on two of the charges lacked the finality necessary to amount to an acquittal on those offenses for purposes of the Double Jeopardy Clause).

Although there are numerous ways to draft such an instruction and verdict form(s), the Committee has prepared an example of how a court could explain the available options in a case where a charged offense, such as first degree murder, has multiple lesser-included offenses.

First, the court would include the following language in the instruction:

A. If you have unanimously agreed that the defendant is NOT GUILTY of the charged offense and ALL of the lesser-included offenses, you will select ONLY Special Verdict Form A and the Foreperson will sign that form as the Court has stated.

B. If you have unanimously agreed that the Defendant is GUILTY of the crime charged or of a lesser-included offense, the Foreperson will complete ONLY Special Verdict Form B by placing, in ink, an "X" in the appropriate square and sign the form as the Court has stated.

C. If you complete either Special Verdict Form A or Special Verdict Form B, you should ignore Special Verdict Form C. However, if, based on your deliberations, you cannot complete either Special Verdict Form A or Special Verdict Form B, then please read Special Verdict Form C and, if you unanimously agree that the Defendant is NOT GUILTY of any offense(s), have the Foreperson place, in ink, an "X" in the appropriate square(s) and sign the form as the Court has stated.

Consistent with the foregoing directions, the court would then include the following language in the special verdict forms (with signature lines for the foreperson, and captions, both of which have been omitted here for the sake of brevity):

#### Verdict Form A

We, the jury, find the Defendant, [insert name], NOT GUILTY of First Degree Murder, and the lesser-included offenses of Second Degree Murder, Reckless Manslaughter, and Criminally Negligent Homicide.

#### Verdict Form B

We, the jury, find the Defendant, [insert name], GUILTY\* of:

- First Degree Murder
- Second Degree Murder
- Manslaughter
- Criminally Negligent Homicide

\*ONLY ONE SQUARE may be filled in, with the remainder to remain unmarked.

### Verdict Form C

We, the jury, find the Defendant, [insert name], NOT GUILTY\* of:

- First Degree Murder
- Second Degree Murder
- Manslaughter
- Criminally Negligent Homicide

\*ONE OR MORE SQUARES may be filled in, as applicable (but do not fill in all of the squares, because if you find the defendant not guilty of all of the offenses you should leave this special verdict form blank and, instead, complete Special Verdict Form A).

## E:16 STIPULATION FOR SEALED VERDICT

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ]

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### STIPULATION FOR SEALED VERDICT

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People of the State of Colorado

v.

[insert name], Defendant.

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Pursuant to Rule 31(a)(2), Crim. P. and section 16-10-108 C.R.S. 2020, it is stipulated and agreed that in the above-entitled case the Court may instruct the jury that if they reach a verdict during the recess or adjournment of the Court they may seal their verdict which shall be retained by their foreperson to be delivered to the Court at the opening of Court, and that after so sealing their verdict they may separate, to meet in the jury box at the opening of Court. It is further stipulated that such a verdict may be received by the Court as the lawful verdict of the jury.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Prosecutor

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Attorney for the Defendant

## COMMENT

1. See § 16-10-108, C.R.S. 2020 (“The jury shall return its verdict in open court, but a sealed verdict may be received as provided by rule of the supreme court of Colorado.”); Crim. P. 31(a)(2) (“When they have agreed upon a verdict, the bailiff shall return the jury into court. However, in any case except where the punishment may be death or life imprisonment, the court, upon stipulation of counsel for all parties, may order that if the jury should agree upon a verdict during the recess or adjournment of court for the day, it shall seal its verdict, to be retained by the [foreperson] and delivered by the jury to the judge at the opening of the court, and that thereupon the jury may separate, to meet in the jury box at the opening of court. Such a sealed verdict may be received by the court as the lawful verdict of the jury.”).

2. In *People v. Herrera*, 512 P.2d 1160, 1161 (Colo. 1973), the Colorado Supreme Court held that it was not error to use the sealed verdict procedure in a case where the defendant was charged with aggravated robbery (an offense then carrying a “penalty . . . [of imprisonment for] not less than four years, or for life”) because “the term ‘death or life imprisonment’ does not embrace offenses which have a sentence of less than life imprisonment as a minimum and a maximum of either life imprisonment or death.” Although *Herrera* was decided under an earlier version of the statute (then codified as § 39-7-20), the provision that was subject to interpretation (which has since been deleted by amendment) mirrored the language of Crim P. 31(a)(2).

## E:17 ORDER FOR SEALED VERDICT

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ]

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### ORDER FOR SEALED VERDICT

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People of the State of Colorado

v.

[insert name], Defendant.

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You are instructed that should you agree upon a verdict during the recess or adjournment of court for the day, your verdict shall be reduced to writing, and your foreperson shall sign it, enclose it in an envelope, seal the envelope and retain it, so sealed, to be delivered by the jury to the Court at the opening of court. After so sealing your verdict you may separate, to meet in the jury box at the opening of court. You will not disclose the result of your deliberations until your verdict is read in open court.

---

Judge

Date

## E:18 SUPPLEMENTAL INSTRUCTION – WHEN JURORS FAIL TO AGREE

Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts that you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching a verdict, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not advocates. You are judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

### COMMENT

1. This is known as a “modified-Allen” instruction, a label that is somewhat ambiguous in Colorado because there are two relevant cases involving criminal defendants with the last name of “Allen.”

The first decision is *Allen v. United States*, 164 U.S. 492 (1896), in which the United States Supreme Court held that it was not error to charge the jury, on their return for further instructions, that it is their duty to decide the case, if they can conscientiously do so; that they should listen to each other’s arguments with a disposition to be convinced; that, if the much larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one; and that, if a majority is for acquittal, the minority should consider whether they may not reasonably doubt their judgment.

The original *Allen* instruction had a “stormy career” in appellate jurisprudence, *United States v. Silvern*, 484 F.2d 879, 880 (7th Cir. 1973), and, on September 22, 1971, the Chief Justice of the Colorado Supreme Court issued the following directive for trial judges to utilize a four-part “modified-*Allen*” instruction adopted by other jurisdictions, in accordance with the recommendation of the A.B.A. Standards Relating to Trial by Jury, § 15.4 (1968) (now Standard 15-4.4), and the model instruction set forth in *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98 (1961):

IT IS HEREBY ORDERED that the “*Allen*” Instruction, otherwise known as the Third Degree Instruction, be no longer given to juries in trials conducted in this state. If it appears that a jury has been unable to agree, the trial court may in its discretion require the jury to continue its deliberations and may give an instruction which informs the jury that:

- 1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;
- 2) Each juror must decide the case for himself, but only after impartial consideration with his fellow jurors;
- 3) In the course of deliberation, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; and
- 4) No juror should surrender his honest conviction as to the weight and effect of the acts solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

A jury shall be discharged by the trial judge without having agreed upon a verdict if it appears to the trial judge that there is no reasonable probability of agreement.

Although the foregoing directive sets forth all components of the “modified-*Allen*” instruction, the potential for confusion concerning the

genesis of this term exists because, twelve years later, in *Allen v. People*, 660 P.2d 896, 898-99 n.2 (Colo. 1983), the Colorado Supreme Court disapproved of “time-fuse” instructions (in which the court informs the jury that it will declare a mistrial if a verdict is not returned by a specific time), explaining that such instructions “may have a coercive effect, like that of the [original] *Allen* charge.”

More recently, in *Gibbons v. People*, 2014 CO 67, ¶ 20, 328 P.3d 95, 99-100, the supreme court held that “the interrelationship of the two *Allen* cases can be summarized as follows: the four-part modified-*Allen* instruction does not include a time-fuse admonition, and Colorado’s *Allen* decision discourages a trial court from adding one.”

The court in *Gibbons* further held that, when giving a modified-*Allen* instruction, the trial court has discretion, but is not required, to advise the jury that, if it appears to the court that a unanimous decision cannot be reached, the court will discharge the jurors and declare a mistrial. *Gibbons*, ¶ 33, 328 P.3d at 101-02 (“The trial court has discretion to instruct a deadlocked jury about the possibility of a mistrial when, considering the content of the instruction and the context in which it is given, the instruction will not have a coercive effect on the jury. The court should consider exercising its discretion in rare circumstances, for example when a jury has actually indicated a mistaken belief in indefinite deliberations.”).

2. As set forth in the Chief Justice Directive, the decision whether to give a modified-*Allen* instruction is a matter of trial court discretion. See *People v. Schwartz*, 678 P.2d 1000, 1012 (Colo. 1984). In order to properly exercise that discretion, “[t]he trial court must first determine whether there is a likelihood of progress towards a unanimous verdict upon further deliberations.” *Id.*

But when inquiring as to the progress of a jury’s deliberations:

It is better practice to not ask a jury numerically how they are divided but rather to make inquiry as to whether any progress has been made toward reaching an agreement and what the likelihood is for such future progress. Also, the judge should . . . try to carefully avoid any

disclosure as to whether the divided jury is for conviction or acquittal.

*Lowe v. People*, 488 P.2d 559, 561 (Colo. 1971) (reversal required because “[t]he probable result [of the court’s inquiry] was to bring all the eleven jurors’ efforts to bear on the one juror to act against his true beliefs and to abandon a sincere conscientious position”).

3. Due to a 2000 statutory amendment, the procedure for dealing with a jury impasse in a case involving one or more lesser-included offenses has changed. See § 18-1-408(8), C.R.S. 2020 (“Without the consent of the prosecution, no jury shall be instructed to return a guilty verdict on a lesser offense if any juror remains convinced by the facts and law that the defendant is guilty of a greater offense submitted for the jury’s consideration, the retrial of which would be barred by conviction of the lesser offense.”).

Prior to the enactment of section 18-1-408(8), the supreme court had outlined the following procedure for trial courts to use with seemingly deadlocked juries in cases involving lesser-included offenses:

The court should first ask the jury whether there is a likelihood of progress towards a unanimous verdict upon further deliberation. An affirmative response should require further deliberation without any additional instruction. If the jury indicates that the deadlock is such that progress towards a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses, or instead, whether the division centers only on the particular degree of guilt. In the event the jury impasse relates solely to the issue of guilt as to any one of the offenses and nonguilt as to all offenses, the court in its discretion may give Colo. J.I. (Crim.) 38:14 (1983), which is patterned after ABA Standards for Criminal Justice 15-4.4 (2d ed. 1980) and the 1971 directive of the Chief Justice. If, however, the jury deadlock centers solely on a particular degree of guilt, rather than on the issue of guilt or nonguilt, then the court should consider an additional instruction charging the jury to return a guilty verdict on the lesser offense as long as every essential element of the lesser offense is

necessarily included in the greater offense and all jurors unanimously agree on the defendant's guilt as to either the lesser or greater offenses submitted to them for their consideration.

*People v. Lewis*, 676 P.2d 682, 689 (Colo. 1984) (footnotes omitted).

However, in *People v. Richardson*, 184 P.3d 755, 761-62 (Colo. 2008), the Court acknowledged that:

Contrary to *Lewis*'s guidelines, section 18-1-408(8) expressly prohibits the trial court from alleviating jury deadlock over the degree of guilt by instructing the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense. Rather, if any juror remains convinced by the facts and the law that the defendant is guilty of a greater offense, the jury cannot be instructed, without the prosecution's consent, to return a verdict on a lesser-included offense. Because *Lewis* instructions are not constitutionally required, the General Assembly may prohibit or alter them. Therefore, we hold that section 18-1-408(8) abrogates the part of *Lewis* that allows the trial court to instruct the jury, without the prosecution's consent, to return a guilty verdict on a lesser-included offense if the jury has reached consensus as to the defendant's guilt but is deadlocked as to the degree of guilt.

4. Significantly, although *Richardson* states that the General Assembly abrogated the portion of *Lewis* having to do with the trial court's ability to instruct the jury to return a verdict as to a lesser-included offense, nothing in *Richardson* suggests that section 18-1-408(8) abrogated the first portion of *Lewis*, in which the Court advised trial courts that:

If the jury indicates that the deadlock is such that progress towards a unanimous verdict is unlikely, the court should then inquire whether the jury is divided over guilt as to any one of the offenses and nonguilt as to all offenses, or instead, whether the division centers only on the particular degree of guilt.

*Lewis*, 676 P.2d at 689. Accordingly, depending on the circumstances, such an inquiry may still be appropriate if: (1) the trial court has provided the

jurors with a verdict form that enables them to return a verdict of acquittal as to one or more charges, even if they are deadlocked as to a lesser-included offense, *see* Instruction E:15, Comment 1; or (2) the facts of the case are such that the court concludes that the inquiry will help it decide whether there is manifest necessity to declare a mistrial.

## E:19 RETURN OF JURY AFTER POLLING

In the polling of the jury one of your members provided an answer which indicates that you may not have reached a unanimous verdict. For this reason, the Court asks you to return to the jury room for further consideration of your verdict. Whenever you have reached a unanimous verdict, you may return it into Court. If you are not unanimous, then you should continue your deliberations.

After you return to the jury room any member is free to change his vote on any issue submitted to you. Each juror is free to change his vote until the jury is discharged.

### COMMENT

1. See Crim. P. 31(d) (“When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court’s own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.”).
2. “[M]atters relating to the manner of conducting a jury poll are generally committed to the discretion of the trial court.” *People v. Phillips*, 91 P.3d 476, 479 (Colo. App. 2004); see *People v. Barnard*, 12 P.3d 290, 295 (Colo. App. 2000) (trial court did not abuse its discretion in determining that the verdict was not unanimous when one juror, in answering the court’s question whether this was her verdict, stated, “Yes, under duress.”). However, the court “may not engage in extensive questioning as to why a juror rejects the verdict.” *People v. Juarez*, 271 P.3d 537, 544 (Colo. App. 2011).
3. See *Rail v. People*, 2019 CO 99, ¶¶ 11–12, 30, 454 P.3d 1033, 1035, 1038 (holding that, where the jury reached inconsistent verdicts – finding the defendant guilty of sexual assault on a child and stating that the prosecution had proved specific instances of such assault as a pattern of abuse, but further finding on a separate interrogatory that the prosecution had *not* proved those same instances – the inconsistency did not require

reversal because “ambiguity was resolved during polling when the jury confirmed both its guilty verdict and its unanimous finding that the State had proved all the alleged incidents of sexual contact beyond a reasonable doubt”).

4. In 2019, the Committee added Comment 3.

## **E:20 INSTRUCTION TO DISCHARGED EXTRA JUROR(S)**

At this time, I have to announce who the alternate[s] is [are] in this case. The alternate[s] in this case is [are] the juror[s] sitting in seat number[s] [ ], and that is [identify juror(s) by name]. I want to remind you that I chose the seat number[s] for the alternate juror[s] randomly before I even knew who was summoned for jury service in this case. This is by no means a reflection on your performance as a juror. You just happened to land in a seat number that I randomly designated before trial for the alternate juror[s]. In a moment, I will give you an opportunity to retrieve any personal belongings you may have in the jury room and you will be excused with the thanks of the Court.

### COMMENT

1. When discharging alternate jurors, administer the mandatory discharge instruction outside the presence of the other jurors. *See* Instruction E:25.
2. *See* § 16-10-105, C.R.S. 2020 (“An alternate juror shall be discharged when the jury retires to consider its verdict or at such time as determined by the court.”); Crim. P. 24(e) (“An alternate juror shall not be discharged until the jury renders its verdict or until such time as determined by the court.”).

**E:21 ORDER DISCHARGING EXTRA JUROR**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ]

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ORDER DISCHARGING EXTRA JUROR(S)

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People of the State of Colorado

v.

[insert name], Defendant.

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At this day it appears to the Court that the matters at issue herein are ready for the consideration of the jury and that the regular jurors herein called have been and now are all present as required;

IT IS ORDERED by the Court that [ ] [and ], the extra juror[s] hereto called, be and hereby [is] [are] discharged from further consideration of this cause.

BY THE COURT

\_\_\_\_\_  
Judge

Done in open Court this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

## **E:22 INSTRUCTION TO EXTRA JUROR RELEASED SUBJECT TO RECALL**

At this time, I have to announce who the alternate[s] is [are] in this case. The alternate[s] in this case is [are] the juror[s] sitting in seat number[s] [ ], and that is [identify juror(s) by name]. I want to remind you that I chose the seat number[s] for the alternate juror[s] randomly before I even knew who was summoned for jury service in this case. This is by no means a reflection on your performance as a juror. You just happened to land in the [a] seat number I randomly designated before trial for the alternate juror[s]. In a moment, I will give you an opportunity to retrieve any personal belongings you may have in the jury room and you will be excused temporarily with the thanks of the Court.

I am not discharging you from your jury service yet. I'm simply excusing you temporarily. Please continue to follow all of the instructions I have been giving you throughout the trial because there is a chance that if one of the jurors deliberating unexpectedly becomes unavailable, I may be in a position to call on you to replace that juror. You may go about your life as you were doing before you first reported for jury service, but you must continue to follow all of my instructions until my staff notifies you that you are discharged. All of my instructions will continue to apply to you until my staff notifies you otherwise.

Do you understand?

Do you agree to follow my instructions?

Please make sure we have good contact information for you so that we can get in touch with you. Thank you again.

### **COMMENT**

1. *See* § 16-10-105, C.R.S. 2020 (“An alternate juror shall be discharged when the jury retires to consider its verdict or at such time as determined by the court.”); Crim. P. 24(e) (“An alternate juror shall not be discharged

until the jury renders its verdict or until such time as determined by the court.”).

2. See *Carrillo v. People*, 974 P.2d 478, 488-90 (Colo. 1999) (noting that “whether the legislature has granted trial courts the authority to substitute alternate jurors once deliberations have begun is unclear”; declining to resolve two conflicting Court of Appeals’ opinions concerning whether the trial court possesses such statutory authority; and reaffirming precedent indicating that a mid-deliberation substitution raises a presumption of prejudice to the defendant’s right to a fair trial, which may be overcome by an adequate showing that procedural precautions taken by the trial court obviated the danger of prejudice to the defendant); see also *Garcia v. People* 997 P.2d 1, 6 (Colo. 2000) (“We did not determine in *Carrillo* whether or not dismissing a juror and substituting an alternate juror during the course of deliberations violates our current statute and rule, as that issue was not relevant to the outcome of the case. See *Carrillo*, 974 P.2d at 488, 490. Whether or not a trial court has the power to order such a substitution, the substitution raises a presumption of prejudice to the defendant. See *id.* at 490. Since we simply follow the principles announced in *Burnette* and *Carrillo*, we need not and do not decide the issue left open in *Carrillo*.”); *People v. Burnette*, 775 P.2d 583, 590–91 (Colo. 1989) (presumption of prejudice arising from mid-deliberation substitution of an alternate juror for a regular juror was not rebutted because the court did not: (1) initially instruct the conditionally released alternate that he was not to discuss the case with others or form an opinion based on information that he acquired while he was conditionally released; (2) question the recalled alternate about his activities while conditionally released, and about his ability to serve on the jury; (3) inquire of the regular jurors whether they would be capable of disregarding their previous deliberations and any opinions they may have formed, and whether they could be receptive if the alternate juror asserted a non-conforming view; and (4) obtain assurances, from both the alternate and regular jurors, that the substitution would not impair the ability of the reconstituted jury to render a fair verdict).

3. When unconditionally discharging an alternate juror who was initially discharged subject to recall, administer the final discharge instruction. See Instruction E:25.

## E:23 FINAL CONCLUDING INSTRUCTION

The bailiff will now escort you to the jury room, where you will select one of your members to be your foreperson. Your foreperson will preside over your deliberations and shall sign any verdict form [and verdict question form] that you may agree on, according to the rules that I am about to explain.

The verdict [for each charge] must represent the considered judgment of each juror, and it must be unanimous. In other words, all of you must agree to all parts of it. [This requirement also applies to any determination[s] that you make in response to [a] verdict question[s] which you conclude should be answered.]

Only one verdict shall be returned signed [for each count][for each defendant] [for each count, for each defendant]. The verdict form[s] [, verdict question form[s],] and these instructions shall remain in the possession of your foreperson until I ask for them in open court. Upon reaching a verdict [and, if required by your verdict[s], answering any verdict question[s],] you will inform the bailiff, who in turn will notify me, and you will remain in the jury room until I call you into the courtroom.

You will be provided with [insert number] verdict forms. [You also will be provided with [insert number] verdict question form[s] with directions that explain under what circumstances you should complete [that] [those] form[s].]

When you have unanimously agreed upon your verdict[s] you will select the option on [the] [each] form which reflects your verdict, and the foreperson will sign the verdict form[s] as I have stated. [Similarly, if you conclude that [the] [any] verdict question[s] should be answered, you will select the option on [the] [each] verdict question form which reflects your unanimous decision, and the foreperson will sign [the] [each] verdict question form as I have stated.]

I will now read to you the verdict [and verdict question[s]] form[s]. You must not draw any inferences based on the order in which I read them.

The verdict [and verdict question [s] form[s] you will receive read[s] as follows:

#### COMMENT

1. *See People v. Poe*, 2012 COA 166, ¶ 10, 316 P.3d 13, 15 (no error in trial court's closing instruction, which "merely expanded on the model instructions, which instruct jurors to keep an open mind and reach a considered decision during final deliberations").

**E:24 VERDICT FORM – GENERAL**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ].

People of the State of Colorado  
v.

[insert name of defendant]

JURY VERDICT, Count No. [ ]

CHARGE OF [insert name of offense here]

I.\* We, the jury, find the defendant, [insert name of defendant],  
NOT GUILTY of Count No. [ ], [insert name of offense].

---

FOREPERSON

II.\* We, the jury, find the defendant, [ ], GUILTY of Count No. [ ],  
[insert name of offense].

---

FOREPERSON

\* The foreperson should sign *only one* of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY then II. above should be signed.

## **E:25 MANDATORY INSTRUCTION UPON DISCHARGE**

You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may now discuss this case with the lawyers, the defendant, or other persons involved in the case. For your guidance the Court instructs you that whether you talk to anyone is entirely your own decision. It is proper for others to discuss the case with you and you may talk with them but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.

### **COMMENT**

1. When unconditionally discharging one or more alternate jurors before the jury has reached a verdict, administer this instruction outside the presence of the other jurors.
2. Remember to administer this instruction when unconditionally discharging alternate jurors who were initially discharged subject to recall. After reading this instruction to the alternate(s), enter a discharge order. *See* Instruction E:26.

**E:26 ORDER DISCHARGING EXTRA JUROR(S) RELEASED  
SUBJECT TO RECALL**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ]

---

ORDER DISCHARGING EXTRA JUROR(S)

---

People of the State of Colorado

v.

[insert name], Defendant.

---

At this day it appears to the Court that the [twelve] [six] regular jurors in this case have reached a verdict.

IT IS ORDERED by the Court that [ ] [and ], the extra juror[s] hereto called, be and hereby [is] [are] discharged from further consideration of this cause.

BY THE COURT

---

Judge

Done in open Court this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

## E:27 FORM FOR INTERROGATORY

If you find the defendant not guilty of [insert offense[s]], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert offense[s]], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

[Insert question]? (Answer “Yes” or “No”)

The [restate question as a proposition] only if:

1. [insert condition][.] [, and]
- [2. [insert additional condition, if any].]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**E:28 SPECIAL VERDICT FORM FOR INTERROGATORY  
(WITH FORMAT FOR MULTIPLE INTERROGATORIES)**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ].  
People of the State of Colorado

v.

[insert name of defendant]

JURY VERDICT, Count No. [ ]

CHARGE OF [insert name of offense here]

- I. We, the jury, find the defendant, [ ], NOT GUILTY of Count No. [ ], [insert name of offense].

---

FOREPERSON\*

- II. We, the jury, find the defendant, [ ], GUILTY of Count No. [ ], [insert name of offense].

---

FOREPERSON\*

We further find, with respect to the verdict question[s] for this count, as follows:

1. [Insert question from interrogatory. For example: Did the defendant cause submission through force or violence?]

Yes

No

2. [Insert question from interrogatory. For example: Did the defendant cause submission by threat?]

Yes            No

---

FOREPERSON\*

\* The foreperson should use ink to sign on one of the two lines indicating a verdict of “not guilty” or “guilty.” If the verdict is “guilty,” the foreperson should use ink to mark the appropriate space[s] indicating the answer[s] to [the] [each] verdict question[s], and then sign on the line following [the] [each] verdict question.

#### COMMENT

1. Because the above format provides separate “Yes” and “No” options for answering each interrogatory, it is not necessary to include a footnote explaining that only one of these items may be selected from each pairing. However, it may be necessary to include additional directional footnoting when asking the jury to answer: (1) separate interrogatories for a sentence mitigator and a sentence enhancer (e.g., first degree assault, committed under a heat of passion, against an at-risk person, *see* §§ 18-3-202(2)(a), 18-6.5-103(3)(a), C.R.S. 2020); or (2) interrogatories that address mutually exclusive sentence enhancement factors (e.g., the valuation parameters for stolen property, *see* § 18-4-401(2), C.R.S. 2020 (valuation provisions for theft)).
2. In 2016, the Committee replaced the phrase “at-risk adult” with “at-risk person” in Comment 1 pursuant to a legislative amendment. *See* Ch. 172, sec. 3, § 18-6.5-103(3)(a), 2016 Colo. Sess. Laws 545, 548.



## CHAPTER F

### DEFINITIONS

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## CHAPTER COMMENTS

1. All definitional instructions in this chapter are derived from statute or the state constitution.
2. The instructions that are based on definitions from section 18-1-901(3), C.R.S. 2020, “apply wherever the same term is used in the same sense in another section [of the Criminal Code] unless the definition is specifically limited or the context indicates that it is inapplicable.” § 18-1-901(1), C.R.S. 2020; *see also* § 18-1-901(2), C.R.S. 2020 (the definitions of terms relating to principles of criminal culpability in section 18-1-501, C.R.S. 2020 are generally applicable). Each of these instructions uses the prefatory word that appears in the corresponding subsection of the statute (i.e., that a certain term either “means” or “includes” that which follows). *Compare* Instruction F:165 (“‘Governmental function’ includes. . .”), *with* Instruction F:30 (“‘Benefit’ means. . .”). This distinction may have significance, depending on the facts of a particular case. *See Colorado Common Cause v. Meyer*, 758 P.2d 153, 164 (Colo. 1988) (“The word ‘includes’ has been found by the overwhelming majority of jurisdictions to be a term of extension or enlargement when used in a statutory definition.”).
3. In a few instructions, the Committee has made minor alterations to statutory language which, in the Committee’s judgment, do not alter the meaning of the defined terms (e.g., changing “shall not” to “does not” in Instruction F:68 (defining “consent”)). Nevertheless, the Committee recommends that, as with all model jury instructions, users conduct their own research to determine whether a definition is accurate.
4. Where the Committee has concluded that a definition should not be used in a certain context because the term has a different meaning, this determination is noted. For example, Instruction F:70 defines “contraband” for purposes of introducing contraband in the second degree, and Comment 4 to that instruction states: “Do not use the definition of ‘obscene’ in Instruction F:246 (defining the term for purposes of the harassment statute).” Additionally, for a number of statutory definitions, the General Assembly has provided that they should be used “unless the context otherwise requires.” *See, e.g.*, § 18-10-102, C.R.S. 2020 (providing

definitions of several terms “[a]s used in this article 10, unless the context otherwise requires”).

5. Several instructions include bracketed directions to insert descriptive statements from statutory provisions that are referenced in the term definitions. The Committee has used this mechanism where the referenced material is lengthy. *See, e.g.*, F:45 (“the term ‘medical directive or order,’ as used in the definition of ‘caretaker neglect,’ includes, but is not limited to, a medical durable power of attorney, a declaration as to medical treatment executed [insert description from section 15-18-104], a medical order for scope of treatment form executed [insert description from article 18.7 of title 15], and a CPR directive executed [insert description from article 18.6 of title 15].”).

6. In 2016, the Committee added the two sentences to Comment 4 beginning with “Additionally.”

7. In 2018, the Committee modified the parenthetical quotation in Comment 4 pursuant to a legislative amendment. *See* Ch. 14, sec. 13, § 18-10-102, 2018 Colo. Sess. Laws 167, 239.

## **F:01 INTRODUCTION FOR LIST OF TERM DEFINITIONS**

In this case, certain words and phrases have particular meanings.

Accordingly, you are to use the following definitions where these words and phrases appear in instructions that define crimes, defenses, special rules, and verdict questions.

[Insert all definitions, arranged alphabetically.]

## **F:02 ABANDON (MOTOR VEHICLE)**

“Abandon” means to leave a thing with the intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving.

### COMMENT

1. *See* § 18-4-512(2), C.R.S. 2020.

## **F:03 ABANDON (CRUELTY TO ANIMALS)**

“Abandon” means the leaving of an animal without adequate provisions for the animal’s proper care by its owner, the person responsible for the animal’s care or custody, or any other person having possession of such animal.

### COMMENT

1. *See* § 18-9-201(1), C.R.S. 2020.

### **F:03.3 ABANDON (HAZARDOUS WASTE VIOLATIONS)**

“Abandon” means to leave a thing with the intention not to retain possession of or assert ownership or control over it. The intent need not coincide with the act of leaving.

#### COMMENT

1. See § 18-13-112(2)(a)(I), C.R.S. 2020.
2. This instruction should be used in conjunction with Instruction 13:21.SP (hazardous waste violations – special instruction (indicia of intent to abandon a vehicle)).
3. Section 18-4-512(2), C.R.S. 2020, defines “abandon” in an identical manner in the context of abandoning a motor vehicle, except that it does not include the words “or control.” See Instruction F:02 (defining “abandon” (motor vehicle)).
4. The Committee added this instruction in 2016.

## **F:03.7 ABUSE (AT-RISK PERSONS)**

“Abuse” means any of the following acts or omissions committed against an at-risk person: the nonaccidental infliction of bodily injury, serious bodily injury, or death; confinement or restraint that is unreasonable under generally accepted caretaking standards; or subjection to sexual conduct or contact classified as a crime.

### COMMENT

1. *See* § 18-6.5-102(1), C.R.S. 2020.
2. *See* Instruction F:26.5 (defining “at-risk person”); Instruction F:36 (defining “bodily injury”); Instruction F:332 (defining “serious bodily injury”); Instruction F:336.5 (defining “sexual conduct”); Instruction F:337 (defining “sexual contact”); *see also* Instruction F:45 (defining “caretaker neglect”).
3. The Committee added this instruction in 2016.

## **F:04 ACADEMIC RECORD**

“Academic record” means a transcript, diploma, grade report, or similar document of an institution of secondary or higher education.

### COMMENT

1. *See* § 18-5-104.5(2)(a), C.R.S. 2020 (forgery).

## **F:04.5 ACCESS DEVICE**

“Access device” means any card, plate, code, account number, or other means of access that can be used, alone or in conjunction with another access device, to obtain telecommunications service.

### COMMENT

1. *See* § 18-9-309(1)(a), C.R.S. 2020 (telecommunications crime).
2. The Committee added this instruction in 2016.

## F:05 ACCESSORY

“Accessory” means any physical evidence in the vicinity of a survey monument, the relative location of which is of public record and which is used to help perpetuate the location of the monument. Accessories shall be construed to include the accessories recorded in the original survey notes and additional reference points and dimensions furnished by subsequent land surveyors or attested to in writing by persons having personal knowledge of the original location of the monument.

### COMMENT

1. *See* § 18-4-508(2), C.R.S. 2020 (defacing, destroying, or removing landmarks, monuments, or accessories; incorporating the above definition from section 38-53-103(1), C.R.S. 2020).
2. *See* Chapter 8-1 for definitions of criminal liability as an accessory.

## **F:06 ACCOUNT HOLDER (FINANCIAL TRANSACTION DEVICE CRIME ACT)**

“Account holder” means the person or business entity named on the face of a financial transaction device to whom or for whose benefit the financial transaction device is issued by an issuer.

### COMMENT

1. *See* § 18-5-701(1), C.R.S. 2020.
2. *See* Instruction F:30 (defining “benefit”); Instruction F:153 (defining “financial transaction device”).

## **F:07 ACCOUNT HOLDER (IDENTITY THEFT AND RELATED OFFENSES)**

“Account holder” means any person or business entity named on or associated with the account or named on the face of a financial device to whom or for whose benefit the financial device is issued by an issuer.

### COMMENT

1. *See* § 18-5-901(1), C.R.S. 2020.
2. *See* Instruction F:150 (defining “financial device”); Instruction F:190 (defining “issuer”).

## F:08 ACT

“Act” means a bodily movement, and includes words or possession of property.

## COMMENT

1. *See* § 18-1-501(1), C.R.S. 2020.

## **F:09 ADMINISTER**

“Administer” means to apply a controlled substance, whether by injection, inhalation, ingestion, or any other means, directly to the body of a patient or research subject by a practitioner (or, in the practitioner’s presence, by the practitioner’s authorized agent), or the patient or research subject, at the direction and in the presence of the practitioner.

### COMMENT

1. *See* § 18-18-102(1), C.R.S. 2020 (controlled substances offenses).
2. *See* Instruction F:13 (defining “agent”).

## **F:09.5 ADULTERATED**

“Adulterated” means varying from the standard of composition or quality prescribed by or pursuant to [insert description of any statute of the state of Colorado or the United States providing criminal penalties for such variance], or set by established commercial usage.

### COMMENT

1. *See* § 18-5-301(1)(d), C.R.S. 2020 (fraud in effecting sales).
2. The Committee added this instruction in 2015.

## F:10 AFTER DELIBERATION

The term “after deliberation” means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

### COMMENT

1. See § 18-3-101(3), C.R.S. 2020 (homicide and related offenses).
2. Under this definition, some “‘appreciable length of time must have elapsed to allow deliberation, reflection and judgment.’” *Key v. People*, 715 P.2d 319, 322 (Colo. 1986) (quoting *People v. Sneed*, 183 Colo. 96, 100, 514 P.2d 776, 778 (1973)). See *Martinez v. People*, 2015 CO 16, ¶ 11, 344 P.3d 862 (“The trial court in this case erroneously instructed the jury that ‘after deliberation’ means an interval of time ‘sufficient for one thought to follow another.’ The prosecution culled this language from an 1895 case, *Van Houten v. People*, that considered how quickly premeditation can occur in the first-degree murder context. 22 Colo. 53, 43 P. 137, 142 (1895). More recently, however, this court has rejected the *Van Houten* language as inconsistent with the element of deliberation that the current first-degree murder statute requires. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776, 778 (1973). . . . [However,] because the record in this case reveals overwhelming evidence of deliberation, and the instructions as a whole adequately informed the jury of the law, the instructional error did not seriously impair the reliability of the jury’s guilty verdict. We therefore affirm the court of appeals’ holding that there was no plain error in the trial court’s jury instructions.”).
3. Evidence of voluntary intoxication is admissible to counter the specific intent element of first-degree murder, which includes “after deliberation” as an element. See *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005); *People v. Harlan*, 8 P.3d 448, 471–75 (Colo. 2000).

4. In 2015, the Committee revised Comment 2 by adding a citation to *Martinez v. People*.

## **F:11 AGENT (BUSINESS ENTITIES)**

“Agent” means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity.

### COMMENT

1. *See* § 18-1-606(2)(a), C.R.S. 2020.
2. *See* Instruction G1:03 (criminal liability of business entities).

**F:12 AGENT (ASSISTED SUICIDE MANSLAUGHTER –  
MEDICAL CAREGIVER AFFIRMATIVE DEFENSE)**

“Agent” means a person appointed to represent the interests of the terminally ill patient by a medical power of attorney, power of attorney, health care proxy, or any other similar statutory or regular procedure used for designation of such person.

COMMENT

1. *See* § 18-3-104(4)(b)(I), C.R.S. 2020.

## **F:13 AGENT (CONTROLLED SUBSTANCES OFFENSES)**

“Agent” means an authorized person who acts on behalf of or at the direction of a person licensed or otherwise authorized [insert description of relevant provision from “this article or under part 2 of article 80 of title 27”].

[“Agent” does not include a common or contract carrier, a public warehouseman, or an employee of a carrier or warehouseman.]

### COMMENT

1. *See* § 18-18-102(2), C.R.S. 2020.

### **F:13.3 AGGREGATE WHOLESALE VALUE**

“Aggregate wholesale value” means the average wholesale value of lawfully manufactured and authorized sound or audio-visual recordings corresponding to the number of nonconforming recorded articles involved in the offense. Proof of the specific wholesale value of each nonconforming device shall not be required.

#### COMMENT

1. *See* § 18-4-601(1), C.R.S. 2020 (theft of sound recordings).
2. *See* Instruction F:21.8 (defining “article” (theft of sound recordings)).
3. The Committee has created this instruction because the term is statutorily defined. However, the Committee notes that the term does not appear in Part 6 of Title 18, Article 4.
4. The Committee added this instruction in 2016.
5. In 2018, the Committee changed this instruction’s number from F:13.03 to F:13.3.

## F:13.7 AGGRIEVED PERSON

“Aggrieved person” means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

### COMMENT

1. *See* § 18-9-301(1), C.R.S. 2020 (wiretapping and eavesdropping).
2. The Committee notes that, although section 18-9-301(1), C.R.S. 2020, defines “aggrieved person,” the definition only applies to terms “[a]s used in sections 18-9-301 to 18-9-305” (i.e., wiretapping and eavesdropping). Those sections do not use the term “aggrieved person.”
3. The Committee added this instruction in 2016.
4. In 2018, the Committee changed this instruction’s number from F:13.07 to F:13.7.

## **F:14 AID OR ASSIST**

“To aid” or “to assist” includes knowingly to give or lend money or extend credit to be used for, or to make possible or available, or to further the activity thus aided or assisted.

### COMMENT

1. *See* § 18-1-901(3)(a), C.R.S. 2020.

## F:15 ALCOHOL BEVERAGE

“Alcohol beverage” means fermented malt beverage or malt, vinous, or spirituous liquors.

### COMMENT

1. *See* § 18-9-123(1), C.R.S. 2020 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium; incorporating the above definition from § 44-3-103(2), C.R.S. 2020).
2. *See* Instruction F:148 (defining “fermented malt beverage”); Instruction F:205 (defining “malt liquors”); Instruction F:350 (defining “spirituous liquors”); Instruction F:390 (defining “vinous liquors”).
3. The model definition does not include the excepting language of the statute; this language should be included when it is relevant. *See* § 44-3-103(2), C.R.S. 2020 (“except that ‘alcohol beverage’ shall not include confectionery containing alcohol within the limits prescribed by section 25-5-410(1)(i)(II)”).
4. In 2018, the Committee modified the statutory citations in Comments 1 and 3 pursuant to a legislative amendment. *See* Ch. 152, secs. 2, 9, §§ 44-3-103(2), 18-9-123(1), 2018 Colo. Sess. Laws 949, 951, 1079.

## **F:16 ANAL INTERCOURSE**

“Anal intercourse” means contact between human beings of the genital organs of one and the anus of another.

### COMMENT

1. See § 18-7-201(2)(d), C.R.S. 2020 (prostitution); § 18-7-401(1), C.R.S. 2020 (child prostitution); *see also* § 18-3-401(6), C.R.S. 2020 (defining “sexual penetration” as including “anal intercourse”).

## **F:16.5 ANARCHISTIC AND SEDITIOUS ASSOCIATION**

Any association, organization, society, or corporation, one of whose purposes or professed purposes is to bring about any governmental, social, industrial, or economic change in this state or in the United States by the use of sabotage, terrorism, physical force, violence, or bodily injury, or which teaches, advocates, advises, or defends the use of sabotage, terrorism, physical force, violence, or bodily injury to person or property, or threats of such injury, to accomplish such change, and which shall, by any such means, prosecute or pursue such purpose or professed purpose is declared to be anarchistic and seditious in character and to be an unlawful association.

### **COMMENT**

1. *See* § 18-11-203(1), C.R.S. 2020 (offenses involving disloyalty).
2. The Committee added this instruction in 2016.

## F:17 ANIMAL (CRUELTY TO ANIMALS)

“Animal” means any living dumb creature, including a certified police working dog, a police working horse, and a service animal.

### COMMENT

1. See § 18-9-201(2), C.R.S. 2020 (cruelty to animals).
2. See Instruction F:48.2 (defining “certified police working dog”); Instruction F:48.25 (defining “police working horse”); Instruction F:334 (defining “service animal”).
3. In 2016, the Committee modified this instruction and Comment 2 to reflect a legislative amendment. See Ch. 236, sec. 1, § 18-9-201(2), 2016 Colo. Sess. Laws 952, 952.
4. In 2017, the Committee added the parenthetical to the instruction’s title to distinguish it from Instruction F:17.5.
5. In 2018, pursuant to a legislative amendment, the Committee added “certified police working horse” to this definition, and it added the cross-reference to Instruction F:48.25 in Comment 2. See Ch. 19, sec. 1, § 18-9-201(2), 2018 Colo. Sess. Laws 266, 266.
6. In 2019, the Committee changed the phrase “certified police working horse” to “police working horse” pursuant to a legislative amendment. See Ch. 75, sec. 1, § 18-9-201(2), 2019 Colo. Sess. Laws 276, 276.

## **F:17.5 ANIMAL (EMERGENCY ASSISTANCE)**

“Animal” means a dog or cat. The term “animal” does not include livestock.

### COMMENT

1. *See* § 13-21-108.4(1)(a), C.R.S. 2020.
2. *See* Instruction F:198.5 (defining “livestock” (emergency assistance)).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 127, sec. 1, § 13-21-108.4(1)(a), 2017 Colo. Sess. Laws 435, 435.

## F:18 ANOTHER

A thing of value is that of “another” if anyone other than the defendant has a possessory or proprietary interest therein.

### COMMENT

1. See § 18-4-401(1.5), C.R.S. 2020 (theft).
2. In *People v. Clayton*, 728 P.2d 723, 726 (Colo. 1986), the supreme court concluded that the definition of property belonging to “another” in section 18-4-101(3), C.R.S. 2020, did not apply to the theft statute, and held that, “without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime.” However, the General Assembly amended the theft statute in 1987 and added the above definition.

## F:19 ANTIQUE FIREARM

The term “antique firearm” means

[any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898]

[any replica of any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898 if the replica [is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition] [uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade]]

[any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition].

The term “antique firearm” does not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

### COMMENT

1. See § 18-12-112(6)(a), C.R.S. 2020 (exempting antique firearms from background check requirements, and incorporating the above definition from 18 U.S.C. § 921(a)(16)).

## **F:20 ANOTHER PERSON**

“Another person” includes a fetus born dead.

### COMMENT

1. *See* § 18-8-109, C.R.S. 2020 (concealing death).

## F:21 ANYTHING OF VALUE

“Anything of value” means any “thing of value,” as that term is defined in these instructions.

### COMMENT

1. See Instruction F:371 (defining “thing of value”).

## F:21.5 APPLICANT

“Applicant” means any person applying to a private employment agency in order to secure employment with any person, firm, association, or corporation other than the private employment agency.

### COMMENT

1. *See* § 18-5-307(1)(a), C.R.S. 2020 (prohibited practice by a private employment agency).
2. *See* Instruction F:285.5 (defining “private employment agency”).
3. The Committee added this instruction in 2015.

## **F:21.8 ARTICLE (THEFT OF SOUND RECORDINGS)**

“Article” means a tangible medium on which sounds, images, or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio or video cassette, wire, film, memory card, flash drive, hard drive, data storage device, or other medium now existing or developed later on which sounds, images, or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates, in whole or in part, the original.

### COMMENT

1. *See* § 18-4-601(1.3), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:22 ARTICLE (THEFT OF TRADE SECRETS)**

“Article” means any object, material, device, or substance, or copy thereof, including any writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, or map.

### COMMENT

1. *See* § 18-4-408(2)(a), C.R.S. 2020.

## F:23 ASSIST

### COMMENT

1. *See* § 18-8-201(3), C.R.S. 2020 (for purposes of the offense of aiding escape, “[a]ssist’ includes any activity characterized as ‘rendering assistance’ in section 18-8-105”); Instruction F:311 (defining “render assistance”).

## F:23.5 ASSISTANCE ANIMAL

“Assistance animal” means an animal that qualifies as a reasonable accommodation under the federal “Fair Housing Act” or the federal “Rehabilitation Act of 1973.”

### COMMENT

1. *See* § 18-13-107.3(5)(a), C.R.S. 2020 (intentional misrepresentation of entitlement to an assistance animal).
2. The court should draft a supplemental instruction discussing either (or both) the relevant provisions of the Fair Housing Act, *see* 42 U.S.C. secs. 3601–19, or the Rehabilitation Act of 1973, *see* 29 U.S.C. sec. 794.
3. The Committee added this instruction in 2016.

## **+ F:23.7 ASSISTED REPRODUCTION**

“Assisted reproduction” means a method of causing pregnancy through means other than by sexual intercourse.

“Assisted reproduction” includes, but is not limited to: intrauterine or intracervical insemination; donation of eggs or sperm; donation of embryos; in vitro fertilization and embryo transfer; and intracytoplasmic sperm injection.

### COMMENT

1. *See* § 18-13-131(3)(a), C.R.S. 2020 (misuse of gametes).
2. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 238, sec. 3, § 18-13-131(3)(a), 2020 Colo. Sess. Laws 1153, 1155.

## F:24 AT-RISK ADULT

“At-risk adult” means any person who is [seventy years of age or older] [eighteen years of age or older, and is a person with a disability].

### COMMENT

1. *See* § 18-6.5-102(2), (11)(a)-(h) C.R.S. 2020 (crimes against at-risk persons).
2. *See* Instruction F:273 (defining “person with a disability”).

## **F:24.5 AT-RISK ADULT WITH IDD**

“At-risk adult with IDD” means a person who is eighteen years of age or older and is a person with an intellectual and developmental disability.

### COMMENT

1. *See* § 18-6.5-102(2.5) C.R.S. 2020 (crimes against at-risk persons).
2. *See* Instruction F:184 (defining “intellectual and developmental disability”).
3. The Committee added this instruction in 2016.

## **F:25 AT-RISK ELDER**

“At-risk elder” means any person who is seventy years of age or older.

### COMMENT

1. *See* § 18-6.5-102(3), C.R.S. 2020 (crimes against at-risk persons).

## **F:26 AT-RISK JUVENILE**

“At-risk juvenile” means any person who is under the age of eighteen years, and is a person with a disability.

### COMMENT

1. *See* § 18-6.5-102(4), (11)(a)–(h), C.R.S. 2020 (crimes against at-risk persons).
2. *See* Instruction F:273 (defining “person with a disability”).

## F:26.5 AT-RISK PERSON

“At-risk person” means an at-risk adult, an at-risk adult with IDD, an at-risk elder, or an at-risk juvenile.

### COMMENT

1. See § 18-6.5-102(4.5), C.R.S. 2020 (crimes against at-risk persons).
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”).
3. The Committee added this instruction in 2016 pursuant to new legislation. See Ch. 172, sec. 2, § 18-6.5-102(4.5), 2016 Colo. Sess. Laws 545, 546.

## **F:27 AUDIOVISUAL RECORDING FUNCTION**

“Audiovisual recording function” means the capability of a device to record or transmit a motion picture or any part thereof by means of any technology now known or hereafter developed.

### **COMMENT**

1. *See* § 18-4-516(6)(a), C.R.S. 2020 (criminal operation of a device in a motion picture theater).

## **F:27.5 AURAL TRANSFER**

“Aural transfer” means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

### COMMENT

1. *See* § 18-9-301(1.5), C.R.S. 2020 (wiretapping and eavesdropping).
2. The Committee added this instruction in 2016.

## F:28 AUTHORIZATION

“Authorization” means the express consent of a person which may include an employee’s job description to use said person’s computer, computer network, computer program, computer software, computer system, property, or services.

### COMMENT

1. *See* § 18-5.5-101(1), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:289 (defining “property”).

## F:28.5 AUTOCYCLE

“Autocycle” means a three-wheeled motorcycle that does not use handlebars or any other device that is directly connected to a single front wheel to steer and in which the driver and each passenger ride in a fully or partly enclosed seating area that is equipped with safety belts for all occupants that constitute a safety belt system.

For purposes of this instruction, “partly enclosed seating area” means a seating area that is entirely or partly surrounded on the sides by the frame or body of a vehicle but is not fully enclosed.

### COMMENT

1. See § 42-1-102(7.5), C.R.S. 2020 (vehicles and traffic).
2. See Instruction F:239.2 (defining “motorcycle”); Instruction F:386 (defining “vehicle”); *see also* § 42-4-237(1)(b), C.R.S. 2020 (defining “safety belt system”).
3. The Committee added this instruction in 2019.

## **F:29 BALLISTIC KNIFE**

“Ballistic knife” means any knife that has a blade which is forcefully projected from the handle by means of a spring-loaded device or explosive charge.

### COMMENT

1. *See* § 18-12-101(1)(a.3), C.R.S. 2020 (offenses relating to firearms and weapons).
2. *See* Instruction F:194 (defining “knife”).

## **F:30 BENEFIT (GENERAL DEFINITION)**

“Benefit” means any gain or advantage to the beneficiary including any gain or advantage to another person pursuant to the desire or consent of the beneficiary.

### COMMENT

1. *See* § 18-1-901(3)(b), C.R.S. 2020.

## **F:30.5 BENEFIT (BRIBERY AND CORRUPT INFLUENCES; ABUSE OF PUBLIC OFFICE)**

“Benefit” means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

### COMMENT

1. *See* § 18-8-301(1), C.R.S. 2020.
2. Although this instruction is virtually identical to Instruction F:30 (defining “benefit” (general definition)), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to offenses involving bribery and corrupt influences. *See* § 18-8-301.
3. The Committee added this instruction in 2015.
4. In 2016, the Committee added the phrase “abuse of public office” to the instruction title’s parenthetical.

**F:31 BENEFIT (PERJURY AND RELATED OFFENSES;  
OFFENSES RELATED TO JUDICIAL AND OTHER  
PROCEEDINGS)**

“Benefit” means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

COMMENT

1. *See* § 18-8-501, C.R.S. 2020 (perjury and related offenses; incorporating the definitions of section 18-8-301, C.R.S. 2020 (bribery and corrupt influences)); § 18-8-702, C.R.S. 2020 (victims and witnesses protection; incorporating the definitions of section 18-8-301).

## **F:31.2 BET**

“Bet” means an amount placed as a wager in a game of chance or on a sports event.

### COMMENT

1. *See* § 44-30-103(5), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* § 44-30-1501(12), C.R.S. 2020 (defining “sports event”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(5), 2018 Colo. Sess. Laws 167, 170.
5. In 2019, the Committee added the phrase “or on a sports event” to this definition pursuant to a legislative amendment; it also added Comment 2 and renumbered the subsequent comments. *See* Ch. 347, sec. 2, § 44-30-103(5), 2019 Colo. Sess. Laws 3209, 3210.

## F:31.5 BEVERAGE

“Beverage” means each of the following forms of liquid refreshment intended for human consumption: fermented malt beverages, malt liquors, beers, or any beverages obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product, or any combination thereof, in water; alcoholic beverages obtained by distillation, and mixed with water or other substances in solution; alcoholic beverages obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar; mineral or soda waters; carbonated or noncarbonated soft drinks; or fruit juices or vegetable juices or fruitades.

### COMMENT

1. *See* § 18-13-113(1)(a), C.R.S. 2020 (unlawful sale of metal beverage container with detachable opening device).
2. The Committee added this instruction in 2016.

## **F:31.8 BEVERAGE CONTAINER**

“Beverage container” means an individual, sealed metal can which contains a beverage.

### COMMENT

1. *See* § 18-13-113(1)(b), C.R.S. 2020 (unlawful sale of metal beverage container with detachable opening device).
2. *See* Instruction F:31.5 (defining “beverage”).
3. The Committee added this instruction in 2016.

## **F:32 BICYCLE**

“Bicycle” means a vehicle propelled by human power applied to pedals upon which a person may ride having two tandem wheels or two parallel wheels and one forward wheel, all of which are more than fourteen inches in diameter.

### COMMENT

1. *See* § 42-1-102(10), C.R.S. 2020 (vehicles and traffic).

## **F:33 BLACKJACK (ILLEGAL WEAPON)**

“Blackjack” includes any billy, sand club, sandbag, or other hand-operated striking weapon consisting, at the striking end, of an encased piece of lead or other heavy substance and, at the handle end, a strap or springy shaft which increases the force of impact.

### COMMENT

1. *See* § 18-12-101(1)(a.5), C.R.S. 2020.

## **F:33.5 BLACKJACK (LIMITED GAMING OFFENSES)**

“Blackjack” means a banking card game commonly known as “21” or “blackjack” played by a maximum of seven players in which each player bets against the dealer. The object is to draw cards whose value will equal or approach twenty-one without exceeding that amount and win amounts bet, payable by the dealer, if the player holds cards more valuable than the dealer’s cards.

### COMMENT

1. *See* § 44-30-103(6), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020).
2. *See* Instruction F:31.2 (defining “bet”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(6), 2018 Colo. Sess. Laws 167, 170.

## **F:34 BLANK FINANCIAL TRANSACTION DEVICE**

A “blank financial transaction device” is one that has at least one or more characteristics of a financial transaction device but does not contain all of the characteristics of a completed financial transaction device.

### COMMENT

1. *See* § 18-5-705(6), C.R.S. 2020 (criminal possession or sale of a blank financial transaction device).
2. *See* Instruction F:153 (defining “financial transaction device”).

## F:35 BLIND

“Blind” means having not more than ten percent visual acuity in the better eye with correction, or not more than 20/200 central visual acuity in the better eye with correction, or a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than twenty degrees.

### COMMENT

1. See § 18-6.5-102(11)(g), C.R.S. 2020 (defining “a person with a disability,” for purposes of the terms “at-risk adult” and “at-risk juvenile,” as including a person who “[i]s blind as that term is defined in section 26-2-103(3), C.R.S.”). See also § 18-6.5-102(11)(a), (b), C.R.S. 2020 (defining a “person with a disability” as someone who “[i]s impaired because of . . . the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness” or “[i]s unable to . . . see”).

## F:36 BODILY INJURY (GENERAL DEFINITION)

“Bodily injury” means physical pain, illness, or any impairment of physical or mental condition.

### COMMENT

1. See § 18-1-901(3)(c), C.R.S. 2020.
2. See *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) (“[t]o support a finding of bodily injury the prosecution must prove that at least some physical pain, illness or physical or mental impairment, *however slight*” (emphasis added)).
3. See *People v. Lobato*, 530 P.2d 493, 495 (Colo. 1975) (“the injury need not be of a crippling or otherwise incapacitating nature to be within the statutory prohibition”).

## **F:37 BODILY INJURY (UNLAWFUL OWNERSHIP OF A DANGEROUS DOG)**

“Bodily injury” means any physical injury that results in severe bruising, muscle tears, or skin lacerations requiring professional medical treatment or any physical injury that requires corrective or cosmetic surgery.

### COMMENT

1. *See* § 18-9-204.5(2)(a), C.R.S. 2020.

## F:38 BOMB

“Bomb” means any explosive or incendiary device or Molotov cocktail, or any chemical device which causes or can cause an explosion, which is not specifically designed for lawful and legitimate use in the hands of its possessor.

### COMMENT

1. See § 18-12-101(1)(b), C.R.S. 2020 (offenses relating to firearms and weapons).
2. The relevant statute provides as follows: “‘Bomb’ means any explosive or incendiary device or molotov cocktail as defined in section 9-7-103, C.R.S., or any chemical device which causes or can cause an explosion, which is not specifically designed for lawful and legitimate use in the hands of its possessor.” § 18-12-101(1)(b), C.R.S. 2020. It is clear that this section incorporates the statutory definition of “Molotov cocktail” contained in section 9-7-103(5), which is part of Article 7 of Title 9 (having to do with the regulation and inspection of explosives). See Instruction F:232 (defining “Molotov Cocktail”). However, it does not appear that this section incorporates the definition of an “explosive” in section 9-7-103(3), C.R.S. 2020, or the definition of an “incendiary device” in section 9-7-103(4), C.R.S. 2020. Rather, the disjunctive term “explosive or incendiary device” is specifically defined (with enumerated exclusions) in section 18-12-109(1)(a)(I), C.R.S. 2020. See Instruction F:134 (defining “explosive or incendiary device”).

### **F:38.3 BOOK OR REGISTER**

“Book or register” means any written or electronic record of transactions kept by any owner, keeper, proprietor, collector, or dealer, including sequentially numbered receipts containing [insert a description of the information required by section 18-13-111(1)].

#### COMMENT

1. *See* § 18-13-111(8)(b), C.R.S. 2020 (unlawful purchase of commodity metals).
2. *See* Instruction F:88.5 (defining “dealer”).
3. The Committee added this instruction in 2016.

## F:38.7 BORROWER

“Borrower” means any person seeking to obtain a loan through the services of a loan finder.

### COMMENT

1. *See* § 18-15-109(1)(a), C.R.S. 2020 (loan finders).
2. *See* Instruction F:199.3 (defining “loan finder”); *see also* § 5-1-301(25), C.R.S. 2020 (defining “loan,” and incorporated by reference by section 18-15-109(1)(b)).
3. The Committee added this instruction in 2016.

## **F:39 BOTTLE**

“Bottle” means a container that is made of nonporous material including but not limited to glass or ceramic, typically with a comparatively narrow neck or mouth, but excluding containers made of cardboard, paper, or plastic; or thermos bottles.

### COMMENT

1. *See* § 18-9-123(1)(b)(I), C.R.S. 2020 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium).

## F:40 BUILDING

“Building” means a structure which has the capacity to contain, and is designed for the shelter of man, animals, or property, and includes a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present.

### COMMENT

1. See § 18-4-101(1), C.R.S. 2020 (offenses against property).

## **F:41 BUILDING OF ANOTHER**

A “building of another” is a unit, in a building divided into units for separate occupancy, that is not occupied by the defendant.

### COMMENT

1. *See* § 18-4-101(4), C.R.S. 2020 (offenses against property).

## F:42 BUSINESS ENTITY

“Business entity” means a corporation or other entity that is subject to [insert description of the relevant provisions of Title 17]; foreign corporations qualified to do business in this state [insert description of from article 115 of Title 7], specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to [insert description of the relevant provisions of Title 11]; or a sole proprietorship or other association or group of individuals doing business in the state.

### COMMENT

1. See § 18-1-606(2)(b), C.R.S. 2020.

## F:42.2 CABLE OPERATOR

“Cable operator” means any person who provides cable service over a cable system in which such person directly or through one or more affiliates owns a significant interest, or who controls or is responsible for the management and operation of such cable system through any arrangement.

### COMMENT

1. *See* § 18-4-701(1)(a), C.R.S. 2020 (theft of cable television service).
2. *See* Instruction F:42.5 (defining “cable service”); Instruction F:42.8 (defining “cable system”).
3. The Committee added this instruction in 2016.

## **F:42.5 CABLE SERVICE**

“Cable service” means the one-way transmission to subscribers of a video programming service; two-way interactive services delivered over a cable system; or subscriber interaction, if any, that is required for the selection or use of such video programming or interactive service.

### COMMENT

1. *See* § 18-4-701(1)(b), C.R.S. 2020 (theft of cable television service).
2. *See* Instruction F:42.8 (defining “cable system”).
3. The Committee added this instruction in 2016.

## **F:42.8 CABLE SYSTEM**

“Cable system” means a facility consisting of a set of closed transmission paths and associated signal operation, reception, and control equipment that is designed to provide cable service.

### COMMENT

1. *See* § 18-4-701(1)(c), C.R.S. 2020 (theft of cable television service).
2. *See* Instruction F:42.5 (defining “cable service”).
3. The Committee added this instruction in 2016.

## F:43 CAN

“Can” means a container of cylindrical shape that is made of metal or metallic alloys.

### COMMENT

1. *See* § 18-9-123(1)(b)(II), C.R.S. 2020 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium).

## F:44 CARETAKER

“Caretaker” means a person who [is responsible for the care of an at-risk person as a result of a family or legal relationship] [has assumed responsibility for the care of an at-risk person] [is paid to provide care or services to an at-risk person].

### COMMENT

1. See § 18-6.5-102(5), C.R.S. 2020 (crimes against at-risk persons).
2. See Instruction F:26.5 (defining “at-risk person”).
3. In 2016, the Committee deleted the bracketed alternatives of “adult,” “elder,” and “juvenile” and replaced them with “person” pursuant to a legislative amendment, and it added Comment 2. See Ch. 172, sec. 2, § 18-6.5-102(5), 2016 Colo. Sess. Laws 545, 546.

## F:45 CARETAKER NEGLECT

“Caretaker neglect” means neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or any other treatment necessary for the health or safety of an at-risk person is not secured for an at-risk person or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise, or a caretaker knowingly uses harassment, undue influence, or intimidation to create a hostile or fearful environment for an at-risk person.

[However, the withholding, withdrawing, or refusing of any medication, any medical procedure or device, or any treatment, including but not limited to resuscitation, cardiac pacing, mechanical ventilation, dialysis, and artificial nutrition and hydration, in accordance with any valid medical directive or order, or as described in a palliative plan of care, is not deemed caretaker neglect.]

Further, the term “medical directive or order,” as used in the definition of “caretaker neglect,” includes a medical durable power of attorney, a declaration as to medical treatment executed [insert description from section 15-18-104], a medical order for scope of treatment form executed [insert description from article 18.7 of title 15], and a CPR directive executed [insert description from article 18.6 of title 15].]

### COMMENT

1. See § 18-6.5-102(6), C.R.S. 2020 (crimes against at-risk persons).
2. See Instruction F:26.5 (defining “at-risk person”); Instruction F:195 (defining “knowingly”); Instruction F:379 (defining “undue influence”).
3. In 2016, the Committee modified the language of this instruction pursuant to a legislative amendment, and it added Comment 2. See Ch. 172, sec. 2, § 18-6.5-102(6), 2016 Colo. Sess. Laws 545, 546.

## F:45.5 + HUMAN SERVICES WORKER

+ “Human services worker” means:

[a state or county employee, or an attorney representing the state or county, who is engaged in investigating or taking legal action regarding allegations of child abuse or neglect, and a state or county support staff person who has contact with the public relating to these allegations.]

[a state or county employee, or an attorney representing the state or county, who is engaged in investigating or taking legal action regarding allegations of mistreatment of an at-risk adult, and a state or county support staff person who has contact with the public relating to these allegations.]

[a state or county employee, including a county attorney or an employee of a person under contract with a state or county, who is engaged in establishing, modifying, and enforcing child support orders, and a state or county support staff person who has contact with the public relating to these duties.]

[a state or county employee, including a county attorney, who is engaged in determining eligibility for or investigating fraud in public programs, and who has contact with the public relating to these duties.]

[an employee of a juvenile detention facility or an employee of the division of youth services within the department of human services, including an employee under contract with the division of youth services, who has contact with juveniles involved with youth services.]

### COMMENT

1. *See* § 18-9-313(1)(a), C.R.S. 2020 (unlawfully making available on the internet personal information about a + human services worker).
2. + *See* Instruction F:24 (defining “at-risk adult”); Instruction F:230.5 (defining “mistreatment”); *see also* Title 19, article 3, C.R.S. 2020

(dependency and neglect); Title 26, article 2, C.R.S. 2020 (public assistance); Title 26, article 3.1, C.R.S. 2020 (protective services for adults at risk of mistreatment or self-neglect); Title 26, article 13, C.R.S. 2020 (child support enforcement act); § 19-2-403, C.R.S. 2020 (human services facilities).

3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 95, sec. 1, § 18-9-313(1)(a), 2019 Colo. Sess. Laws 349, 349.

4. + In 2020, the Committee modified this instruction – including changing its title from “caseworker” to “human services worker” – pursuant to a legislative amendment. *See* Ch. 77, sec. 1, § 18-9-313(1)(a), 2020 Colo. Sess. Laws 315, 315–16. The Committee also added Comment 2.

## F:46 CAVE

“Cave” means any naturally occurring void, cavity, recess, lava tube, or system of interconnected passages that occurs beneath the surface of the earth or within a cliff or ledge, including any cave resource therein, but not including any mine, tunnel, aqueduct, or other artificial excavation, and that is large enough to permit an individual to enter, regardless of whether the entrance is naturally formed or has been artificially created or enlarged. “Cave” includes any natural pit, sinkhole, or other feature that is an extension of the entrance.

### COMMENT

1. *See* § 18-4-509(1)(c)(II)(A), C.R.S. 2020 (defacing property).

## **F:47 CAVE RESOURCE**

“Cave resource” includes any material or substance occurring naturally in caves, such as animal life, plant life, paleontological deposits, sediments, minerals, speleogens, and speleothems.

### COMMENT

1. *See* § 18-4-509(1)(c)(II)(B), C.R.S. 2020 (defacing property).
2. *See* Instruction F:348 (defining “speleogen”); Instruction F:349 (defining “speleothem”).

## F:48 CELLULAR PHONE

“Cellular phone” means a radio telecommunications device that may be used to obtain telecommunications services and that is programmed with an electronic serial number by or with the consent of the cellular phone manufacturer.

### COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2020 (introducing contraband in the second degree; incorporating the definition of a “cloned cellular phone” from section 18-9-309(1)(a.7), which incorporates the definition of a “cellular phone” from section 18-9-309(1)(a.5), C.R.S. 2020 (telecommunications crimes)).
2. *See* Instruction F:116 (defining “electronic serial number”); Instruction F:363 (defining “telecommunications device”); Instruction F:364 (defining “telecommunications service”).

## **F:48.2 CERTIFIED POLICE WORKING DOG**

“Certified police working dog” means a dog that has current certification from a state or national agency or an association that certifies police working dogs, and that is part of a working law enforcement team.

### COMMENT

1. *See* § 18-9-201(2.3), C.R.S. 2020 (cruelty to animals).
2. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 236, sec. 1, § 18-9-201(2.3), 2016 Colo. Sess. Laws 952, 952.

## F:48.25 POLICE WORKING HORSE

“Police working horse” means a horse that is currently working full time or part time as part of a working law enforcement team and has met the standards of the law enforcement team to work in such capacity.

### COMMENT

1. *See* § 18-9-201(2.4), C.R.S. 2020 (cruelty to animals).
2. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 19, sec. 1, § 18-9-201(2.4), 2018 Colo. Sess. Laws 266, 266.
3. In 2019, pursuant to a legislative amendment, the Committee changed the title of this instruction from “certified police working horse” to “police working horse,” and it modified the definition. *See* Ch. 75, sec. 1, § 18-9-201(2.4), 2019 Colo. Sess. Laws 276, 276.

## **F:48.3 CHEATING**

“Cheating” means to alter the selection of criteria which determine either the result of a game or the amount or frequency of payment in a game.

### COMMENT

1. *See* § 18-20-106(2), C.R.S. 2020 (limited gaming offenses).
2. The Committee added this instruction in 2016.

## F:48.5 CHECK

“Check” means a written, unconditional order to pay a sum certain in money, drawn on a bank, payable on demand, and signed by the drawer. “Check” also includes a negotiable order of withdrawal and a share draft.

### COMMENT

1. *See* § 18-5-205(1)(a), C.R.S. 2020 (fraud by check).
2. *See* Instruction F:107.7 (defining “drawer”); Instruction F:241.5 (defining “negotiable order of withdrawal” and “share draft”).
3. The Committee added this instruction in 2015.

## F:49 CHILD (CHILD ABUSE)

“Child” means a person under the age of sixteen years.

### COMMENT

1. See § 18-6-401(2), C.R.S. 2020.
2. See Instruction F:52, Comment 2 (identifying offenses which have an age disparity requirement).
3. Cf. *People v. Lage*, 232 P.3d 138 (Colo. App. 2009) (“child,” as used in the statute defining the offense of reckless child abuse causing death, includes a fetus who is injured while in the womb, is subsequently born and lived outside the womb, and then died from the injuries suffered; unborn child could be a victim of reckless vehicular eluding resulting in death and careless driving resulting in death).

**F:50 CHILD (SECOND DEGREE KIDNAPPING; VIOLATION OF CUSTODY; UNLAWFUL SEXUAL CONTACT; SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST; SEXUAL EXPLOITATION OF A CHILD; CHILD PROSTITUTION; TRAFFICKING IN CHILDREN)**

“Child” means a person under the age of eighteen years.

COMMENT

1. *See* § 18-3-302(2), C.R.S. 2020 (second degree kidnapping); § 18-3-304(1), (2), C.R.S. 2020 (violation of custody); § 18-3-404(1.5), C.R.S. 2020 (unlawful sexual contact); § 18-3-405.3(1), C.R.S. 2020 (sexual assault on a child by one in a position of trust); § 18-3-501(2), C.R.S. 2020 (trafficking in children); § 18-6-403(2)(a), C.R.S. 2020 (sexual exploitation of a child); § 18-6-404, C.R.S. 2020 (defining the offense of procurement of a child for sexual exploitation which, by implication, incorporates the definition of a “child” in section 18-6-403(2)(a), the statute defining the offense of sexual exploitation of a child); § 18-7-401(2), C.R.S. 2020 (child prostitution).
2. *See* Instruction F:52, Comment 2 (identifying offenses which have an age disparity requirement).

## **F:51 CHILD (ENTICEMENT OF A CHILD)**

“Child” means a person under the age of fifteen years.

### COMMENT

1. *See* § 18-3-305(1), C.R.S. 2020.

## **F:52 CHILD (AGGRAVATED INCEST)**

“Child” means a person under the age of twenty-one years.

### COMMENT

1. *See* § 18-6-302(1)(a), C.R.S. 2020.
2. In addition to the three foregoing definitions, certain offenses have specific definitions of the term “child” that include an age disparity requirement with respect to the “actor.” *See, e.g.*, § 18-3-405(1), C.R.S. 2020 (sexual assault on a child); § 18-3-405.3, C.R.S. 2020 (sexual assault on a child by one in a position of trust); § 18-3-405.4(1), C.R.S. 2020 (internet sexual exploitation of a child).

## **F:52.5 CHOKEHOLD (USE OF FORCE BY PEACE OFFICER)**

+ “Chokehold” means a method by which a person applies sufficient pressure to a person to make breathing difficult or impossible and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing or reduce intake of air.

“Chokehold” also means applying pressure to a person’s neck on either side of the windpipe, but not to the windpipe itself, to stop the flow of blood to the brain via the carotid arteries.

### COMMENT

1. *See* § 18-1-707(2.5)(b), C.R.S. 2020.
2. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 341, sec. 1, § 18-1-707(2.5)(b), 2016 Colo. Sess. Laws 1390, 1391.
3. + In 2020, the Committee updated this definition pursuant to a legislative amendment. *See* Ch. 110, sec. 5, § 18-1-707(2.5)(b), 2020 Colo. Sess. Laws 445, 454.

## F:53 CHOP SHOP

“Chop shop” means any building, lot, facility, or other structure or premise where: any person or persons possess, receive, store, disassemble, or alter, including the alteration or concealment of any identifying feature or number, an unlawfully obtained motor vehicle or major component motor vehicle part for the purpose of using, selling, or disposing of the motor vehicle or major component motor vehicle part; or two or more unlawfully obtained motor vehicles are present for the purpose of alteration, sale, or disposal; or six or more unlawfully obtained major component motor vehicle parts from two or more motor vehicles are present for the purpose of alteration, sale, or disposal.

### COMMENT

1. *See* § 18-4-420(5)(a)(I)–(III), C.R.S. 2020 (chop shop activity).
2. *See* Instruction F:204 (defining “major component motor vehicle part”); Instruction F:238 (defining “motor vehicle”); Instruction F:381 (defining “unlawfully obtained”).

## **F:53.5 CIGARETTE, TOBACCO PRODUCT, OR NICOTINE PRODUCT**

“Cigarette, tobacco product, or nicotine product” means a product that contains nicotine or tobacco or is derived from tobacco and is intended to be ingested or inhaled by or applied to the skin of an individual; or any device that can be used to deliver tobacco or nicotine to the person inhaling from the device, including an electronic cigarette, cigar, cigarillo, or pipe.

“Cigarette, tobacco product, or nicotine product” does not mean a product that the food and drug administration of the United States department of health and human services has approved as a tobacco use cessation product.

### **COMMENT**

1. *See* § 18-13-121(5), C.R.S. 2020 (furnishing cigarettes, tobacco products, or nicotine products to minors).
2. If no evidence has been presented regarding an FDA-approved tobacco use cessation product, the court should omit the second paragraph of this instruction.
3. The Committee added this instruction in 2016.

## **F:54 CIVIL DISORDER**

“Civil disorder” means any planned public disturbance involving acts of violence by an assemblage of two or more persons that causes an immediate danger of, or results in, damage or injury to property or to another person.

### COMMENT

1. *See* § 18-9-120(1)(a), C.R.S. 2020 (terrorist training activities).

## F:54.5 CLAIM

“Claim” means a demand for money, property, or services pursuant to a contract of insurance as well as any documentation in support of such claim whether submitted contemporaneously with the claim or at a different time. A claim and any supporting information may be in written, verbal, or digital form.

### COMMENT

1. *See* § 18-5-211(7)(a), C.R.S. 2020 (insurance fraud).
2. *See* Instruction F:183.7 (defining “insurance”).
3. The Committee added this instruction in 2015.
4. In 2017, the Committee deleted the words “oral” and “electronic” and replaced them with “verbal” pursuant to a legislative amendment. *See* Ch. 68, sec. 1, § 18-5-211(7)(a), 2017 Colo. Sess. Laws 214, 215.

## **F:54.8 CLERGY MEMBER**

“Clergy member” means a priest; rabbi; duly ordained, commissioned, or licensed minister of a church; member of a religious order; or recognized leader of any religious body.

### COMMENT

1. *See* § 18-6.5-102(7), C.R.S. 2020 (crimes against at-risk persons).
2. The Committee added this instruction in 2016.

## F:55 CLONED CELLULAR PHONE

“Cloned cellular phone” means a cellular phone, the electronic serial number of which has been altered without the consent of the cellular phone’s manufacturer.

### COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2020 (introducing contraband in the second degree; incorporating the above definition from § 18-9-309(1)(a.7), C.R.S. 2020 (telecommunications crimes)).
2. *See* Instruction F:48 (defining “cellular phone”); Instruction F:116 (defining “electronic serial number”).

## F:55.5 CLONING EQUIPMENT

“Cloning equipment” means any instrument, apparatus, equipment, computer hardware, computer software, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used, is intended to be used, or is capable of being used to intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or to create cloned cellular phones.

### COMMENT

1. *See* § 18-9-309(1)(a.8), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:48 (defining “cellular phone”); Instruction F:55 (defining “cloned cellular phone”); Instruction F:185.7 (defining “intercept signals”); Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)); Instruction F:364 (defining “telecommunications service”).
3. The Committee added this instruction in 2016.

## F:56 COCAINE

“Cocaine” means coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this definition.

### COMMENT

1. *See* § 18-18-102(4), C.R.S. 2020 (controlled substances offenses).

## F:56.5 COERCING

“Coercing” means inducing a person to act or to refrain from acting, if the inducement is accomplished by any one or more of the following means:

[the use or threat of the use of force against, abduction of, causing of serious harm to, or physical restraint of a person]

[the use of a plan, pattern, or statement for the purpose of causing the person to believe that failure to perform the act or failure to refrain from performing the act will result in the use of force against, abduction of, causing of serious harm to, or physical restraint of that person or another person]

[using or threatening to use the law or the legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed]

[threatening to notify law enforcement officials that a person is present in the United States in violation of federal immigration laws]

[the destruction or taking, or a threat to destroy or take, a person’s identification document or other property]

[controlling or threatening to control a person’s access to a controlled substance]

[the use of debt bondage]

[the exploitation of a person’s physical or mental impairment, where such impairment has a substantial adverse effect on the person’s cognitive or volitional functions].

### COMMENT

1. *See* § 18-3-502(2), C.R.S. 2020 (human trafficking and slavery).

2. *See* Instruction F:89.5 (defining “debt bondage”); Instruction F:174.5 (defining “identification document” (human trafficking and slavery)).
3. The Committee added this instruction in 2015.

## **F:56.8 COHABITATION**

“Cohabitation” means to live together under the representation of being married.

### COMMENT

1. *See* § 18-6-203, C.R.S. 2020 (bigamy).
2. The Committee added this instruction in 2016.

## F:57 COIN MACHINE

“Coin machine” means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or token made for the purpose and, in return for the insertion or deposit thereof, to offer, to provide, to assist in providing, or to permit the acquisition of some property or some public or private service.

### COMMENT

1. *See* § 18-5-111(2), C.R.S. 2020 (unlawfully using slugs).

## F:57.2 COLLECT

To “collect” an extension of credit means to induce in any way any person to make repayment thereof.

### COMMENT

1. See § 18-15-101(1), C.R.S. 2020 (unlawful lending practices).
2. See Instruction F:135.5 (defining “extend credit”); Instruction F:311.7 (defining “repayment”).
3. The Committee added this instruction in 2016.

## F:57.25 COLLECTION

“Collection” means a trade, barter, or in-kind exchange for one or more firearms.

### COMMENT

1. *See* § 18-12-506(1), C.R.S. 2020 (background checks – gun shows).
2. *See* Instruction F:154.5 (defining “firearm” (background checks – gun shows)).
3. The Committee added this instruction in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 5, § 18-12-506(1), 2018 Colo. Sess. Laws 145, 152.

## **F:57.3 COMMERCIAL ELECTRONIC MAIL MESSAGE (ELECTRONIC MAIL FRAUD)**

“Commercial electronic mail message” means any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose).

The term “commercial electronic mail message” does not include a transactional or relationship message.

### COMMENT

1. *See* § 18-5-308(1), C.R.S. 2020 (incorporating 18 U.S.C. § 1037(a) (2014), which uses the term “commercial electronic mail message,” which is defined in 15 U.S.C. § 7702(2) (2014), and incorporated by reference in 18 U.S.C. § 1037(d)(4) (2014)).
2. In 15 U.S.C. § 7702(2)(C) (2014), Congress directed the Federal Trade Commission to issue regulations “defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message.” Those regulations were promulgated as 16 C.F.R. § 316.3.
3. The Committee added this instruction in 2015.

## **F:57.5 COMMERCIAL SEXUAL ACTIVITY**

“Commercial sexual activity” means sexual activity for which anything of value is given to, promised to, or received by a person.

### COMMENT

1. *See* § 18-3-502(3), C.R.S. 2020 (human trafficking and slavery).
2. *See* Instruction F:21 (defining “anything of value”); Instruction F:335.5 (defining “sexual activity”).
3. The Committee added this instruction in 2015.

## F:57.8 COMMODITY METAL

“Commodity metal” means copper; a copper alloy, including bronze or brass; or aluminum.

“Commodity metal” does not include precious metals such as gold, silver, or platinum.

### COMMENT

1. See § 18-13-111(8)(b.5), C.R.S. 2020 (unlawful purchase of commodity metals).
2. See § 18-13-111(6), C.R.S. 2020 (“There is a rebuttable presumption that metal purchased by a dealer for the purpose of recycling is a commodity metal if the commodity metal has a value of fifty cents per pound or greater for purposes of recycling the commodity metal.”); *see also* Instruction F:88.5 (defining “dealer”).
3. The Committee added this instruction in 2016.

## **F:58 COMMON CARRIER (AFFIRMATIVE DEFENSE: USE OF FORCE BASED ON A SPECIAL RELATIONSHIP)**

### COMMENT

1. Previously, the Committee had provided a definition for the term “common carrier” as it related to the affirmative defense of use of force – special relationship. However, upon further reflection, the Committee determined that this definition, which appears in the Public Utilities Law, *see* § 40-1-102(3)(a), C.R.S. 2020, was not incorporated into the Criminal Code. Therefore, the Committee is no longer providing a definitional instruction for this term.
2. In 2018, the Committee deleted the substance of this instruction and replaced it with Comment 1.

## **F:58.5 COMMON CARRIER (WIRETAPPING AND EAVESDROPPING)**

“Common carrier” means any person engaged as a common carrier for hire in intrastate, interstate, or foreign communication by wire or radio or in intrastate, interstate, or foreign radio transmission of energy.

### COMMENT

1. *See* § 18-9-301(2), C.R.S. 2020.
2. The Committee notes that, although section 18-9-301(2), C.R.S. 2020, defines “common carrier,” the definition only applies to terms “[a]s used in sections 18-9-301 to 18-9-305” (i.e., wiretapping and eavesdropping). Those sections do not use the term “common carrier.”
3. The Committee added this instruction in 2016.

## F:58.8 COMMUNITY CLINIC EMERGENCY CENTER

“Community clinic emergency center” means a community clinic licensed by the department of public health and environment that delivers emergency services and provides emergency care twenty-four hours per day and seven days a week throughout the year[, except if located in a rural or frontier area that does not have the demand to support twenty-four-hour service or only operates each year during a specified time period due to seasonal population influx].

### COMMENT

1. *See* § 18-6-401(9)(b), C.R.S. 2020 (child abuse – affirmative defense of safe surrender of a newborn).
2. *See* § 25-3-101(2)(a)(I)(B), C.R.S. 2020 (discussing health care facilities that provide emergency services).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 20, sec. 1, § 18-6-401(9)(b), 2018 Colo. Sess. Laws 269, 269-70.

## F:59 COMMUNITY CORRECTIONS PROGRAM

“Community corrections program” means a community-based or community-oriented program that provides supervision of offenders, that is operated by a unit of local government, the department, or any private individual, partnership, corporation, or association, and that provides residential or nonresidential services for offenders, monitoring of the activities of offenders, oversight of victim restitution and community service by offenders, programs and services to aid offenders in obtaining and holding regular employment, programs and services to aid offenders in enrolling in and maintaining academic courses, programs and services to aid offenders in participating in vocational training programs, programs and services to aid offenders in utilizing the resources of the community, meeting the personal and family needs of such offenders, programs and services to aid offenders in obtaining appropriate treatment for such offenders, programs and services to aid offenders in participating in whatever specialized programs exist within the community, day reporting programs, or and such other services and programs as may be appropriate to aid in offender rehabilitation and public safety.

### COMMENT

1. See § 18-8-208.1(1.5), C.R.S. 2020 (attempt to escape; referencing direct sentences to community corrections pursuant to section 18-1.3-301, C.R.S. 2020, for which the term “community corrections” is defined, as set forth above, in section 17-27-102(3), C.R.S. 2020).

## F:60 COMPLETE WRITTEN INSTRUMENT

“Complete written instrument” means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

### COMMENT

1. *See* § 18-5-101(1), C.R.S. 2020 (forgery and impersonation offenses).
2. *See* Instruction F:180 (definition of an “incomplete written instrument”); Instruction F:394 (defining “written instrument”).

## **F:61 COMPUTER**

“Computer” means an electronic, magnetic, optical, electromagnetic, or other data processing device which performs logical, arithmetic, memory, or storage functions by the manipulations of electronic, magnetic, radio wave, or light wave impulses, and includes all input, output, processing, storage, software, or communication facilities which are connected or related to or operating in conjunction with such a device.

### COMMENT

1. *See* § 18-5.5-101(2), C.R.S. 2020 (cybercrime).

## F:62 COMPUTER NETWORK

“Computer network” means the interconnection of communication lines (including microwave or other means of electronic communication) with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

### COMMENT

1. *See* § 18-5.5-101(3), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:61 (defining “computer”).

## **F:63 COMPUTER PROGRAM**

“Computer program” means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from such computer system.

### COMMENT

1. *See* § 18-5.5-101(4), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:61 (defining “computer”).

## F:64 COMPUTER SOFTWARE

“Computer software” means computer programs, procedures, and associated documentation concerned with the operation of a computer system.

### COMMENT

1. *See* § 18-5.5-101(5), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:61 (defining “computer”); Instruction F:63 (defining “computer program”).

## F:65 COMPUTER SYSTEM

“Computer system” means a set of related, connected or unconnected, computer equipment, devices, and software.

### COMMENT

1. *See* § 18-5.5-101(6), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:61 (defining “computer”); Instruction F:64 (defining “computer software”).

## F:66 CONDUCT

“Conduct” means an act or omission and its accompanying state of mind or, where relevant, a series of acts or omissions.

### COMMENT

1. *See* § 18-1-501(2), C.R.S. 2020.
2. *See* Instruction F:251 (defining “omission”).

## **F:67 CONDUCT IN CONNECTION WITH A CREDIBLE THREAT**

“Conduct ‘in connection with’ a credible threat” means acts which further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat.

### COMMENT

1. *See* § 18-3-602(2)(a), C.R.S. 2020 (stalking).

## **F:67.5 CONDUCTS OR ATTEMPTS TO CONDUCT A FINANCIAL TRANSACTION**

“Conducts or attempts to conduct a financial transaction” includes, but is not limited to, initiating, concluding, or participating in the initiation or conclusion of a transaction.

### COMMENT

1. *See* § 18-5-309(3)(a), C.R.S. 2020 (money laundering).
2. *See* Instruction F:374.5 (defining “transaction”).
3. The Committee added this instruction in 2015.

## F:68 CONSENT

“Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship is not sufficient to constitute consent. Submission under the influence of fear does not constitute consent.

### COMMENT

1. *See* § 18-3-401(1.5), C.R.S. 2020 (sexual offenses).

## F:68.5 CONTENTS

“Contents”, when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.

### COMMENT

1. *See* § 18-9-301(3), C.R.S. 2020 (wiretapping and eavesdropping).
2. The Committee added this instruction in 2016.

## **F:69 CONTRABAND (INTRODUCING OR POSSESSING CONTRABAND IN THE FIRST DEGREE)**

“Contraband” means a dangerous instrument, malt, vinous or spirituous liquor, fermented malt beverage, a controlled substance, or marijuana or marijuana concentrate.

### COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2020; *see also* § 18-8-204.1, C.R.S. 2020 (incorporating this definition for purposes of possession of contraband in the first degree).
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:85 (defining “dangerous instrument” pursuant to section 18-8-203(4)); Instruction F:205 (defining “malt liquor”); Instruction F:390 (defining “vinous liquors”); Instruction F:148 (defining “fermented malt beverage”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”).
3. Section 18-8-203(1)(a) states that the term “controlled substance” is “as defined in section 18-18-102(5).” Section 18-18-102(5), C.R.S. 2020, states: “‘Controlled substance’ means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum.”

## **F:70 CONTRABAND (INTRODUCING CONTRABAND IN THE SECOND DEGREE)**

“Contraband” means any of the following, but does not include a dangerous instrument, malt, vinous or spirituous liquor, fermented malt beverage, a controlled substance, marijuana or marijuana concentrate:

[any key, key pattern, key replica or lock pick] [any tool or instrument which could be used to cut fence or wire, dig, pry or file]

[any money or coin of the United States or foreign currency or any written instrument of value] [any uncanceled postage stamp or implement of the United States Postal Service]

[any counterfeit or forged identification card] [any combustible material other than safety matches] [any drug, other than a controlled substance, in quantities other than those authorized by a physician]

[any mask, wig, disguise, or other means of altering normal physical appearance which could hinder ready identification]

[any drug paraphernalia]

[any material which is “obscene”]

[any chain, rope, or ladder] [any article or thing that poses or may pose a threat to the security of the detention facility as determined by the administrative head of the detention facility if reasonable notice was given that such article or thing was contraband]

[for purposes of a facility of the department of corrections or any private contract prison, any cigarettes or tobacco products]

[any portable electronic communication device, including but not limited to cellular telephones; cloned cellular telephones; public, private, or family-style radios; pagers; personal digital assistants; any other device capable of transmitting or intercepting cellular or radio signals between providers and users of telecommunication and data

services; and portable computers; except those devices authorized by the executive director of the department of corrections or his [her] designee].

#### COMMENT

1. *See* § 18-8-204(2)(a)-(n), C.R.S. 2020.
2. *See* Instruction F:48 (defining “cellular phone”); Instruction F:55 (defining “cloned cellular telephone”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:113 (defining “drug paraphernalia”).
3. The second comment to Instruction F:69 contains citations to the instructions in Chapter F that define items that section 18-8-204(2) excludes from the definition of “contraband.”
4. Do not use the definition of “obscene” in Instruction F:246 (defining the term for purposes of the harassment statute). Section 18-8-204(2)(j) specifies that the term “obscene” is to be defined by the obscenity statute: section 18-7-101(2)(a)-(c), C.R.S. 2020.
5. *See* § 39-28.5-101(5), C.R.S. 2020 (defining “tobacco products”).

## **F:71 CONTROL CORNER**

“Control corner” means any land survey corner the position of which controls the location of the boundaries of a tract or parcel of land, and “corner” means a point of reference determined by the surveying process.

### COMMENT

1. *See* § 18-4-508(2), C.R.S. 2020 (defacing, destroying, or removing landmarks, monuments, or accessories; incorporating sections 38-53-103(6), (6.3), C.R.S. 2020).

## **F:72 CONTROLLED AGRICULTURAL BURN**

“Controlled agricultural burn” means a technique used in farming to clear the land of any existing crop residue, kill weeds and weed seeds, or reduce fuel buildup and decrease the likelihood of a future fire.

### **COMMENT**

1. *See* § 18-4-105(6), C.R.S. 2020 (fourth degree arson).

## F:73 CONTROLLED SUBSTANCE

### COMMENT

1. There is no model instruction defining this term. Users should consult the relevant statutory schedule and draft an instruction tailored to the facts of the case. *See* § 18-18-102(5), C.R.S. 2020 (“‘Controlled substance’ means a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana, marijuana concentrate, cathinones, any synthetic cannabinoid, and salvia divinorum.”); *see also* § 18-18-102(6)(a), C.R.S. 2020 (defining “controlled substance analog,” a term which is used in schedules I and II).
2. *See also* Instruction F:179 (defining “immediate precursor”).

## **F:73.5 CONVICTED OR CONVICTION**

“Convicted” and “conviction” mean a plea of guilty accepted by the court, including a plea of guilty entered pursuant to a deferred sentence, a verdict of guilty by a judge or jury, or a plea of no contest accepted by the court.

### COMMENT

1. *See* § 18-6.5-102(8), C.R.S. 2020 (crimes against at-risk persons).
2. The Committee added this instruction in 2016.

## **F:74 COPY (THEFT OF TRADE SECRETS)**

“Copy” means any facsimile, replica, photograph, or other reproduction of an article, and any note, drawing, or sketch made of or from an article.

### COMMENT

1. *See* § 18-4-408(2)(d), C.R.S. 2020.
2. *See* Instruction F:22 (defining “article”).

## **F:75 COPY (THEFT OF MEDICAL RECORDS)**

“Copy” means any facsimile, replica, photograph, sound recording, magnetic or electronic recording, or other reproduction of a medical record and any note, drawing or sketch made of or from a medical record.

### COMMENT

1. *See* § 18-4-412(2)(d), C.R.S. 2020.

## F:75.2 COPYRIGHT

“Copyright” means the ownership rights that accrue to an owner and relate solely to the common law copyright accruing to such owner. No common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.

The term “copyright” does not include a federal copyright.

### COMMENT

1. *See* § 18-4-601(1.5), C.R.S. 2020 (theft of sound recordings).
2. *See* Instruction F:255.5 (defining “owner” (theft of sound recordings)).
3. The Committee added this instruction in 2016.

## **F:75.5 CORRECTIONAL INSTITUTION**

“Correctional institution” means a correctional facility, a local jail operated by or under contract with the department of corrections, a jail, a facility operated by or under contract with the department of human services in which juveniles are or may be lawfully held for detention or commitment for the commission of a crime, or a facility of a community corrections program.

### **COMMENT**

1. *See* § 18-7-701(2)(a), C.R.S. 2020 (sexual conduct in a correctional institution).
2. *See* Instruction F:59 (defining “community corrections program”); § 17-1-102(1.7), C.R.S. 2020 (defining “correctional facility”); § 17-1-102(7), C.R.S. 2020 (defining “local jail”).
3. The Committee added this instruction in 2015.

## F:75.8 COSMETIC

“Cosmetic” means an article, or its components, intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to, the human body, or any part of the human body, for cleansing, beautifying, promoting attractiveness, or altering appearance.

“Cosmetic” does not include soap.

### COMMENT

1. *See* § 18-13-114.5(3)(a), C.R.S. 2020 (sale without proof of ownership).
2. The Committee added this instruction in 2016.

## F:76 COUNTERFEIT MARK

“Counterfeit mark” means a mark identical to or substantially indistinguishable from a trademark that, without the permission of the owner of the trademark, is affixed or designed to be affixed to, or displayed or otherwise associated with, goods; or displayed in advertising for, or otherwise associated with, services.

### COMMENT

1. *See* § 18-5-110.5(3)(a), C.R.S. 2020 (trademark counterfeiting).
2. *See* Instruction F:373 (defining “trademark”).

## F:76.3 CRANE GAME

“Crane game” means an amusement machine that, upon insertion of a coin, bill, token, or similar object, allows the player to use one or more buttons, joysticks, or other controls to maneuver a crane or claw over a nonmonetary prize, toy, or novelty, none of which shall have a cost of more than twenty-five dollars, and then, using the crane or claw, to attempt to retrieve the prize, toy, or novelty for the player.

### COMMENT

1. See § 44-30-103(9), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. The Committee added this instruction in 2016.
3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. See Ch. 14, sec. 2, § 44-30-103(9), 2018 Colo. Sess. Laws 167, 170.

## **F:76.7 CRAPS**

“Craps” means a game played by one or more players against a casino using two dice, in which players bet upon the occurrence of specific combinations of numbers shown by the dice on each throw.

### COMMENT

1. *See* § 44-30-103(10), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:31.2 (defining “bet”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(10), 2018 Colo. Sess. Laws 167, 170.

**F:77 CREDIBLE THREAT (STALKING; RETALIATION AGAINST A JUDGE; RETALIATION AGAINST A PROSECUTOR)**

“Credible threat” means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person’s safety or the safety of his [her] immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

COMMENT

1. See § 18-3-602(2)(b), C.R.S. 2020 (stalking); § 18-8-615(1)(a), C.R.S. 2020 (retaliation against a judge); § 18-8-616(1)(a), C.R.S. 2020.
2. In 2015, the Committee revised this instruction, and the preceding Comment, to reflect the enactment of section 18-8-616(1) (retaliation against a prosecutor). See Ch. 239, sec. 1, § 18-8-616(1), 2015 Colo. Sess. Laws 884, 884.

## **F:78 CREDIBLE THREAT (INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS)**

“Credible threat” means a threat or physical action that would cause a reasonable person to be in fear of bodily injury with a deadly weapon or death.

### COMMENT

1. *See* § 18-9-109(6)(b), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”).

## F:78.2 CREDIT CARD NUMBER

“Credit card number” means the card number appearing on a credit card which is an identification card or plate issued to a person by any supplier of telecommunications service which permits the person to whom the card has been issued to obtain telecommunications service on credit. The term includes the number or description of the card or plate even if the card or plate itself is not produced at the time of obtaining telecommunications service.

### COMMENT

1. *See* § 18-9-309(1)(b), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:364 (defining “telecommunications service”).
3. The Committee added this instruction in 2016.

## **F:78.5 CREDITOR**

“Creditor” means any person who extends credit or any person claiming by, under, or through any such person.

### COMMENT

1. *See* § 18-15-101(2), C.R.S. 2020 (unlawful lending practices).
2. *See* Instruction F:135.5 (defining “extend credit”).
3. The Committee added this instruction in 2016.

## **F:78.8 CRIME AGAINST AN AT-RISK PERSON**

“Crime against an at-risk person” means [insert relevant offense(s) from section 18-6.5-103, C.R.S. 2020], or criminal attempt, conspiracy, or solicitation to commit [that offense] [any of those offenses].

### COMMENT

1. *See* § 18-6.5-102(9), C.R.S. 2020.
2. *See* Instruction G2:01 (criminal attempt); Instruction G2:05 (conspiracy); Instruction G2:09 (criminal solicitation).
3. The Committee added this instruction in 2016.

## F:79 CRIMINAL NEGLIGENCE

A person acts with “criminal negligence” when, through a gross deviation from the standard of care that a reasonable person would exercise, he [she] fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

### COMMENT

1. *See* § 18-1-501(3), C.R.S. 2020.
2. *See* Instruction G1:01 (requirements for criminal liability in general).

## F:79.5 CRIMINAL STREET GANG

“Criminal street gang” means any ongoing organization, association, or group of three or more persons, whether formal or informal, which has as one of its primary objectives or activities the commission of one or more predicate criminal acts, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

### COMMENT

1. *See* § 18-23-101(1), C.R.S. 2020 (gang recruitment).
2. *See* Instruction F:260.5 (defining “pattern of criminal gang activity”); Instruction F:282.3 (defining “predicate criminal acts”).
3. The Committee added this instruction in 2016.

## **F:80 CULPABLE STATE OF MIND**

“Culpable state of mind” means intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence, as these terms are defined in these instructions.

### **COMMENT**

1. *See* § 18-1-501(4), C.R.S. 2020 (defining “culpable mental state,” for which the Committee has substituted “culpable state of mind”).

## F:81 CUNNILINGUS

“Cunnilingus” means any act of oral stimulation of the vulva or clitoris.

### COMMENT

1. See § 18-7-201(2)(b), C.R.S. 2020 (prostitution); § 18-7-401(3), C.R.S. 2020 (child prostitution).

## F:82 CURIO OR RELIC

“Curios or relics” are firearms which are of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons.

To be recognized as a curio or relic, a firearm must meet [one of] the following definition[s]:

[a firearm which was manufactured at least 50 years prior to the date of the transfer (not including replicas thereof)]

[a firearm which is certified by the curator of a municipal, State, or Federal museum which exhibits firearms to be a curio or relic of museum interest]

[a firearm which derives a substantial part of its monetary value from the fact that it is novel, rare, bizarre, or because of its association with some historical figure, period, or event].

### COMMENT

1. *See* § 18-12-112(6)(a), C.R.S. 2020 (exempting curios and relics from background check requirement for firearms transfers, and incorporating the above definition from 27 C.F.R. 478.11).
2. When instructing the jury concerning the exception for a firearm that derives a “substantial part” of its “monetary value” from its novelty, rarity, or historical significance, draft a special instruction based on the following provision (but omit the words “Proof of,” so as not to suggest that the defendant bears any burden of proof):

Proof of qualification of a particular firearm under this category may be established by evidence of present value and evidence that like firearms are not available except as collector’s items, or that the value of like firearms available in ordinary commercial channels is substantially less.

27 C.F.R. 478.11.

## F:83 DAMAGE

“Damage” includes, but is not limited to, any impairment to the integrity of availability of information, data, computer program, computer software, or services on or via a computer, computer network, or computer system or part thereof.

### COMMENT

1. *See* § 18-5.5-101(6.3), C.R.S. 2020 (cybercrime).

## F:84 DANGEROUS DOG

“Dangerous dog” means any dog that inflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal; or demonstrates tendencies that would cause a reasonable person to believe that the dog may inflict bodily or serious bodily injury upon or cause the death of any person or domestic animal; or engages in or is trained for animal fighting.

### COMMENT

1. *See* § 18-9-204.5(2)(b), C.R.S. 2020 (unlawful ownership of a dangerous dog).
2. *See* Instruction F:37 (defining “bodily injury”); Instruction F:106 (defining “dog”); Instruction F:107 (defining “domestic animal”); Instruction F:332 (defining “serious bodily injury”).

## F:85 DANGEROUS INSTRUMENT

“Dangerous instrument” means a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material or substance which was readily capable of causing or inducing fear of death or bodily injury, the use of which is not specifically authorized.

### COMMENT

1. See § 18-8-203(4), C.R.S. 2020 (introducing contraband in the first degree); § 18-8-204.1, C.R.S. 2020 (possession of contraband in the first degree).
2. See Instruction F:154 (defining “firearm”); Instruction F:194 (defining “knife”).
3. This definition does not apply to the term “dangerous instrument,” as used to define a “knife” in section 18-12-101(1)(f), C.R.S. 2020. See *People v. Gross*, 830 P.2d 933, 941 (Colo. 1992) (rejecting a constitutional overbreadth challenge to the statute criminalizing possession of a weapon by a previous offender by construing the “other dangerous instrument” language within the definition of a “knife” as requiring that the defendant have intended to use the instrument as a weapon).

## F:86 DANGEROUS WEAPON

“Dangerous weapon” means a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife.

### COMMENT

1. See § 18-12-102(1), C.R.S. 2020 (possessing a dangerous weapon); *see also* § 18-1.3-406(7)(a), C.R.S. 2020 (crime of violence sentence enhancement).
2. See Instruction F:29 (defining “ballistic knife”); Instruction F:154 (defining “firearm”); Instruction F:156 (defining “firearm silencer”); Instruction F:203 (defining “machine gun”); Instruction F:344 (defining “short rifle”); Instruction F:345 (defining “short shotgun”).

## F:87 DEADLY PHYSICAL FORCE

“Deadly physical force” means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.

### COMMENT

1. See § 18-1-901(3)(d), C.R.S. 2020.
2. See *People v. Opana*, 2017 CO 56, ¶¶ 9-17, 395 P.3d 757, 759-62 (overruling *People v. Vasquez*, 148 P.3d 326 (Colo. App. 2006)), and holding that—in the context of the phrase “the intended, natural, and probable consequence of which is to produce death”—the word “intended” does not refer to the defendant’s subjective intent, but rather to what would normally or typically be intended); *People v. Ferguson*, 43 P.3d 705 (Colo. App. 2001) (trial court, in giving jury instruction concerning self-defense in attempted murder and assault prosecution where the victim did not die, erred in defining deadly physical force as “force, the intended, natural, and probable consequence of which is to produce death”; the error was not harmless because the jury was permitted to hold defendant to a higher standard in establishing self-defense than what was required by law).
3. In 2017, the Committee added the citation to *People v. Opana* in Comment 2, and it removed a prior citation to *People v. Vasquez*.

## F:88 DEADLY WEAPON

["Deadly weapon" means a firearm, whether loaded or unloaded.]

["Deadly weapon" means a knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury.]

### COMMENT

1. See § 18-1-901(3)(e), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:194 (defining "knife"); Instruction F:332 (defining "serious bodily injury").
3. See *People v. Saleh*, 45 P.3d 1272, 1275 (Colo. 2002) (any object can be a deadly weapon if it is used in a manner capable of producing death or serious bodily injury; body parts can be deadly weapons depending upon the manner in which they are used; whether an object is a deadly weapon does not depend upon the ultimate result of an object's use; the statute does not require that the object actually cause serious bodily injury; rather, it must be "capable of producing" such injury).
4. The definition of a "deadly weapon" was amended in 2013, following the supreme court's decision in *Montez v. People*, 2012 CO 6, ¶¶ 3-22, 269 P.3d 1228, 1229-32 (the General Assembly has not classified firearms as per se deadly weapons for purposes of the first degree burglary statute; the legislature did not intend theft of a firearm from a building to constitute first degree burglary regardless of the manner the burglar used or intended to use the firearm).

## **F:88.5 DEALER**

“Dealer” means any person, business, or entity that buys, sells, or distributes, for the purpose of recycling, any commodity metal on a wholesale basis.

### COMMENT

1. *See* § 18-13-111(8)(d), C.R.S. 2020 (unlawful purchase of commodity metals).
2. *See* Instruction F:57.8 (defining “commodity metal”).
3. The Committee added this instruction in 2016.

## F:89 DEBILITATING MEDICAL CONDITION

“Debilitating medical condition” means:

[Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions.]

[A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient’s physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis.]

[Any other medical condition, or treatment for such condition, approved by the state health agency.]

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(a) (medical marijuana).
2. The final provision, allowing for inclusion of “other” medical conditions, requires that the state health agency act “pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.” In the unlikely event that a case arises in which there is a dispute concerning the propriety of the approval process, the court should determine this issue as a matter of law.

## F:89.5 DEBT BONDAGE

“Debt bondage” means demanding:

[commercial sexual activity as payment toward or satisfaction of a real or purported debt]

[or demanding labor or services as payment toward or satisfaction of a real or purported debt and failing to apply the reasonable value of the labor or services toward the liquidation of the debt]

[demanding labor or services where the length of the labor or services is not limited and the nature of the labor or services is not defined.

### COMMENT

1. *See* § 18-3-502(4), C.R.S. 2020 (human trafficking and slavery).
2. The Committee added this instruction in 2015.

## **F:89.7 DEBTOR**

“Debtor” means any person who receives an extension of credit or any person who guarantees the repayment of an extension of credit or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person who receives an extension of credit to repay the same.

### COMMENT

1. *See* § 18-15-101(3), C.R.S. 2020 (unlawful lending practices).
2. *See* Instruction F:135.5 (defining “extend credit”); Instruction F:311.7 (defining “repayment”).
3. The Committee added this instruction in 2016.

## **F:90 DEFACE**

“Deface” means to alter the appearance of something by removing, distorting, adding to, or covering all or part of the thing.

### COMMENT

1. *See* § 18-1-901(3)(f), C.R.S. 2020.

## **F:90.5 DEFENSE COUNSEL PERSONNEL**

“Defense counsel personnel” means any defense attorney lawfully representing a defendant in a criminal case or a juvenile in a delinquency case that involves sexually exploitative material or another individual employed or retained by the defense attorney who performs or assists in the duties relating to the defense of the accused that may involve sexually exploitative materials.

### COMMENT

1. *See* § 18-6-403(2)(b.5), C.R.S. 2020 (sexual exploitation of a child).
2. *See* Instruction F:341 (defining “sexually exploitative material”).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 141, sec. 1, § 18-6-403(2)(b.5), 2017 Colo. Sess. Laws 470, 470.

## **F:91 DELIVER OR DELIVERY**

“Deliver” or “delivery” means to transfer or attempt to transfer a substance, actually or constructively, from one person to another, whether or not there is an agency relationship.

### COMMENT

1. *See* § 18-18-102(7), C.R.S. 2020 (controlled substances offenses).

## **F:92 DESCENDANT**

“Descendant” includes a child by adoption and a stepchild, but only if the person is not legally married to the child by adoption or the stepchild.

### COMMENT

1. *See* § 18-6-301(1), C.R.S. 2020 (stating that this definition applies only to the offense of incest).

## **F:93 DESECRATE**

“Desecrate” means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover his action or its result

### COMMENT

1. *See* § 18-9-113(2), C.R.S. 2020 (desecration of venerated objects).

## **F:94 DESTRUCTIVE DEVICE**

“Destructive device” means any material, substance, or mechanism capable of being used, either by itself or in combination with any other substance, material, or mechanism, to cause sudden and violent injury, damage, destruction, or death.

### COMMENT

1. *See* § 18-9-101(1), C.R.S. 2020 (public peace and order offenses).

**F:95 DETENTION FACILITY (AFFIRMATIVE DEFENSE; USE  
OF FORCE TO PREVENT AN ESCAPE)**

“Detention facility” means any place maintained for the confinement, pursuant to law, of persons charged with or convicted of an offense, held pursuant to the “Colorado Children’s Code”, held for extradition, or otherwise confined pursuant to an order of a court.

COMMENT

1. *See* § 18-1-707(9), C.R.S. 2020.

**F:96 DETENTION FACILITY (FIRST DEGREE ASSAULT;  
SECOND DEGREE ASSAULT NOT INVOLVING BODILY  
FLUIDS OR HAZARDOUS MATERIALS; ATTEMPT TO  
ESCAPE; INTRODUCING CONTRABAND IN THE FIRST  
DEGREE; ATTEMPT TO ESCAPE)**

“Detention facility” means any building, structure, enclosure, vehicle, institution, worksite, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the jurisdiction of the department of corrections or under the authority of the United States, the state of Colorado, or any political subdivision of the state of Colorado.

COMMENT

1. *See* § 18-8-203(3), C.R.S. 2020 (introducing contraband in the first degree); § 18-3-202(1)(f), C.R.S. 2020 (first degree assault, incorporating this definition by reference); section 18-3-203(1)(f), C.R.S. 2020 (second degree assault, incorporating this definition by reference); +.
2. + In 2020, the Committee removed a statutory citation in Comment 1 pursuant to a legislative repeal. *See* Ch. 9, sec. 9, § 18-8-208.1(6), 2020 Colo. Sess. Laws 23, 27.

**F:97 DETENTION FACILITY (SECOND DEGREE ASSAULT INVOLVING A BODILY FLUID OR A HAZARDOUS MATERIAL; RIOTS IN DETENTION FACILITIES; USE OF MARIJUANA IN DETENTION FACILITIES)**

“Detention facility” means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

COMMENT

1. See § 18-3-203(1)(f.5)(III)(A), C.R.S. 2020 (second degree assault involving a bodily fluid or a hazardous material); § 18-8-211(4), C.R.S. 2020 (riots in detention facilities; same definition); § 18-18-406.5(3), C.R.S. 2020 (use of marijuana in detention facilities; same definition).
2. See *People v. Luna*, 2013 COA 67, ¶¶ 30–32, 410 P.3d 475, 480 (for purposes of sections 18-3-203(1)(f.5)(I), (III)(A), being placed under arrest in a patrol vehicle by a police officer constitutes being lawfully confined in a “detention facility” by an “employee of a detention facility”).

## F:98 DEVELOPMENTAL DISABILITY

### COMMENT

1. *See* § 27-10.5-102(11)(a), C.R.S. 2020 (“‘developmental disability’ has the same meaning as ‘intellectual and developmental disability,’ as set forth in 25.5-10-202”); Instruction F:184 (defining “intellectual and developmental disability”).

## F:98.5 DEVICE

“Device” means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including a component, part, or accessory, that is: recognized in the official national formulary or the United States pharmacopoeia, or any supplement to them; intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease in humans or animals; or intended to affect the structure or any function of the body of humans or animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or animals and that is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

### COMMENT

1. *See* § 18-13-114.5(3)(b), C.R.S. 2020 (sale without proof of ownership).
2. The Committee added this instruction in 2016.

## F:99 DISEASED OR DEFECTIVE IN MIND

“Diseased or defective in mind” does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct. + Evidence of knowledge or awareness of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation shall not constitute inability to distinguish right from wrong.

### COMMENT

1. *See* § 16-8-101.5(2)(a), C.R.S. 2020 (insanity).
2. + *See* Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. + In 2020, the Committee added the second sentence to this definition pursuant to new legislation. *See* Ch. 279, sec. 2, § 16-8-101.5(2)(a), 2020 Colo. Sess. Laws 1364, 1365. The Committee also added Comment 2.

## F:100 DISPENSE

“Dispense” means to deliver a controlled substance to an ultimate user, patient, or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

[“Dispense” does not include preparing and affixing a label to any drug container.]

### COMMENT

1. *See* § 18-18-102(9), C.R.S. 2020 (controlled substances offenses); § 18-18-405(1)(b), C.R.S. 2020 (limiting the definition of “dispense” to exclude “labeling,” as defined in section 12-280-103(23), C.R.S. 2020, for purposes of the offense of unlawful distribution, manufacturing, dispensing, or sale of a controlled substance); § 18-18-406(2)(b)(II), C.R.S. 2020 (same); § 18-18-406.2(4), C.R.S. 2020 (same).
2. *See* Instruction F:376 (defining “ultimate user”).
3. In 2019, the Committee updated the statutory cross-reference in Comment 1 to reflect a legislative amendment. *See* Ch. 136, sec. 106, § 18-18-405(1)(b), 2019 Colo. Sess. Laws 613, 1679.

## **F:101 DISPENSER**

“Dispenser” means a practitioner who dispenses.

### COMMENT

1. *See* § 18-18-102(10), C.R.S. 2020 (controlled substances offenses).

## **F:101.5 DISPLAYING SEXUAL ACTS**

“Displaying sexual acts” means any display of sexual acts even if the private intimate parts are not visible in the image.

### COMMENT

1. *See* §§ 18-7-107(6)(a), 18-7-108(6)(a), C.R.S. 2020 (posting a private image).
2. *See* Instruction F:176.5 (defining “image”); Instruction F: 285.6 (defining “private intimate parts”); Instruction F:336.2 (defining “sexual acts”).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 192, secs. 1, 2, §§ 18-7-107(6)(a), 18-7-108(6)(a), 2018 Colo. Sess. Laws 1276, 1277-78.

## **F:102 DISTRIBUTE**

“Distribute” means to deliver other than by administering or dispensing a controlled substance, with or without remuneration.

### COMMENT

1. *See* § 18-18-102(11), C.R.S. 2020 (controlled substances offenses).
2. *See* Instruction F:310 (defining “remuneration”).

## **F:103 DISTRIBUTE (IMITATION CONTROLLED SUBSTANCE)**

“Distribute” means the actual, constructive, or attempted transfer, delivery or dispensing to another of an imitation controlled substance, with or without remuneration.

### COMMENT

1. *See* § 18-18-420(2), C.R.S. 2020 (explicitly supplanting, for purposes of offenses in “sections 18-18-419 to 18-18-424,” the alternate definition set forth in section 18-18-102(11)).
2. *See* Instruction F:310 (defining “remuneration”).

## **F:104 DISTRIBUTOR**

“Distributor” means a person who distributes.

### COMMENT

1. *See* § 18-18-102(12), C.R.S. 2020 (controlled substances offenses).

## **F:105 DOCUMENT-MAKING IMPLEMENT**

“Document-making implement” means any implement or impression, including but not limited to a template or a computerized template or form, specifically designed or primarily used for making identification documents, false identification documents, or another document-making implement.”

### COMMENT

1. *See* § 18-5-101(1.5), C.R.S. 2020 (forgery and impersonation offenses).
2. *See* Instruction F:174 (defining “identification document”).

## **F:106 DOG**

“Dog” means any domesticated animal related to the fox, wolf, coyote, or jackal.

### **COMMENT**

1. *See* § 18-9-204.5(2)(c), C.R.S. 2020 (unlawful ownership of a dangerous dog).

## F:107 DOMESTIC ANIMAL

“Domestic animal” means any dog, cat, any animal kept as a household pet, or livestock.

### COMMENT

1. *See* § 18-9-204.5(2)(d), C.R.S. 2020 (unlawful ownership of a dangerous dog).

## + F:107.2 DONOR

“Donor” means an individual who expressly provides consent to provide donated eggs, sperm, or embryos for a patient for assisted reproduction.

### COMMENT

1. *See* § 18-13-131(3)(b), C.R.S. 2020 (misuse of gametes).
2. *See* Instruction F:23.7 (defining “assisted reproduction”).
3. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 238, sec. 3, § 18-13-131(3)(b), 2020 Colo. Sess. Laws 1153, 1155.

## **F:107.5 DRAWEE**

“Drawee” means the bank upon which a check is drawn or a bank, savings and loan association, or credit union on which a negotiable order of withdrawal or a share draft is drawn.

### COMMENT

1. *See* § 18-5-205(1)(b), C.R.S. 2020 (fraud by check).
2. *See* Instruction F:48.5 (defining “check”); Instruction F:241.5 (defining “negotiable order of withdrawal” and “share draft”).
3. The Committee added this instruction in 2015.

## **F:107.7 DRAWER**

“Drawer” means a person, either real or fictitious, whose name appears on a check as the primary obligor, whether the actual signature be that of himself [herself] or of a person authorized to draw the check on himself [herself].

### COMMENT

1. *See* § 18-5-205(1)(c), C.R.S. 2020 (fraud by check).
2. *See* Instruction F:48.5 (defining “check”).
3. The Committee added this instruction in 2015.

## F:108 DOMESTIC VIOLENCE

“Domestic violence” means an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship. “Domestic violence” also includes any other crime against a person, or against property, including an animal, or any municipal ordinance violation against a person, or against property, including an animal, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.

### COMMENT

1. *See* § 18-6-800.3(1), C.R.S. 2020 (domestic violence).
2. *See* § 18-6-401(7)(e)(IV), (III), C.R.S. 2020 (child abuse sentence enhancement, determinable by trier of fact, applicable to a repeat offender who commits a continued pattern of acts of domestic violence in the presence of the child); § 18-6-801(7), C.R.S. 2020 (elevating misdemeanors to class five felonies where the defendant is adjudicated as an habitual domestic violence offender).
3. *See* Instruction F:187 (defining “intimate relationship”).

## F:108.5 DRIP GASOLINE

“Drip gasoline” means a combustible hydrocarbon liquid formed as a product of condensation from either associated or nonassociated natural or casing-head gas which remains a liquid at the existing atmospheric temperature and pressure.

### COMMENT

1. *See* § 18-13-120(1), C.R.S. 2020 (use, transportation, and storage of drip gasoline).
2. The Committee added this instruction in 2016.

**F:109 DRIVING UNDER THE INFLUENCE (VEHICULAR HOMICIDE; VEHICULAR ASSAULT; AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY)**

“Driving under the influence” means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affect such person to a degree that such person is substantially incapable, either mentally or physically, or both mentally and physically, of exercising clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

COMMENT

1. *See* § 18-3-106(1)(b)(IV), C.R.S. 2020 (vehicular homicide); § 18-3-205(1)(b)(IV), C.R.S. 2020 (vehicular assault); § 18-3.5-108(1)(b)(I), C.R.S. 2020 (aggravated vehicular unlawful termination of pregnancy).
2. *See* Instruction F:252 (defining “one or more drugs”).
3. In 2015, the Committee modified the title of this instruction and added a citation in Comment 1.

## **F:110 DRIVING UNDER THE INFLUENCE (TRAFFIC CODE)**

“Driving under the influence” means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, that affects the person to a degree that the person is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

### COMMENT

1. *See* § 42-4-1301(1)(f), C.R.S. 2020.
2. *See* Instruction F:239 (defining “motor vehicle”); Instruction F:252 (defining “one or more drugs”); Instruction F:386 (defining “vehicle”).

## **F:111 DRIVING WHILE ABILITY IMPAIRED**

“Driving while ability impaired” means driving a motor vehicle or vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

### COMMENT

1. *See* § 42-4-1301(1)(g), C.R.S. 2020 (vehicles and traffic).
2. *See* Instruction F:239 (defining “motor vehicle”); Instruction F:252 (defining “one or more drugs”); Instruction F:386 (defining “vehicle”).

## **F:111.5 DRUG (SALE WITHOUT PROOF OF OWNERSHIP)**

“Drug” means: any article recognized in an official compendium of drugs; an article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals; an article, other than food, that is used or intended to affect the structure or any function of the body of humans or animals; or an article intended for use as a component of any of the foregoing articles.

### COMMENT

1. *See* § 18-13-114.5(3)(c), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:112 DRUG (TITLE 18 OFFENSES)**

“Drug” means substances [recognized as drugs in the official United States pharmacopoeia, national formulary, or the official homeopathic pharmacopoeia of the United States, or any supplement to any of them] [intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in individuals or animals] [(other than food) intended to affect the structure or any function of the body of individuals or animals].

[“Drug” also means substances intended for use as a component of any of the foregoing.]

[However, the term does not include devices or their components, parts, or accessories.]

### COMMENT

1. *See* § 18-18-102(13), C.R.S. 2020.

## **F:113 DRUG PARAPHERNALIA**

“Drug paraphernalia” means all equipment, products, and materials of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the laws of this state.

“Drug paraphernalia” includes, but is not limited to: scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances; separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marijuana; blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances; capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances; containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances; or objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as: metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips, meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand; miniature cocaine spoons and cocaine vials; chamber pipes; carburetor pipes; electric pipes; air-driven pipes; chillums; bongos; or ice pipes or chillers.

“Drug paraphernalia” does not include any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise

introducing marijuana into the human body.

“Drug paraphernalia” also does not include testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of controlled substances.

#### COMMENT

1. *See* § 18-18-426, C.R.S. 2020 (drug paraphernalia offenses).
2. *See* Instruction F:56 (defining “cocaine”).
3. Section 18-18-427(1), C.R.S. 2020, enumerates several factors that a court may consider in determining whether an object is drug paraphernalia. Section 18-18-427(2), C.R.S. 2020, states that: “In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera.” Although the Committee has not drafted a special instruction identifying these factors, it may be appropriate for the court to do so.
4. *See* § 18-18-426(2)(a), C.R.S. 2020 (“‘Drug paraphernalia’ does not include any marijuana accessories as defined in section 16(2)(g) of article XVIII of the state constitution . . .”).
5. In 2019, the Committee amended this definition, along with the statutory citations in Comments 1 and 4, pursuant to a legislative amendment. *See* Ch. 273, sec. 8, § 18-18-426, 2019 Colo. Sess. Laws 2575, 2580.

## F:113.5 DUAL CONTRACTS

The term “dual contracts,” either written or oral, means two separate contracts concerning the same parcel of real property, one of which states the true and actual purchase price and one of which states a purchase price in excess of the true and actual purchase price, and is used, or intended to be used, to induce persons to make a loan or a loan commitment on such real property in reliance upon the stated inflated value.

### COMMENT

1. *See* § 18-5-208, C.R.S. 2020 (dual contracts to induce loan).
2. The Committee added this instruction in 2015.

## F:114 DWELLING

“Dwelling” means a building which is used, intended to be used, or usually used by a person for habitation.

[“Dwelling” does not include any place of habitation in a detention facility.]

### COMMENT

1. See § 18-1-901(3)(g), C.R.S. 2020; § 18-1-704.5(5), C.R.S. 2020 (use of deadly physical force against an intruder).
2. See *People v. Jiminez*, 651 P.2d 395 (Colo. 1982) (the definition of dwelling encompasses the entire residential structure including an attached garage); *People v. Morales*, 2012 COA 2, ¶¶ 58–76, 298 P.3d 1000, 1011–14 (“the phrase ‘intended to be used’ includes future use in addition to present use, and, therefore, existing homes undergoing renovation are ‘dwellings,’ provided they are intended to be used for habitation”); *People v. Cushinberry*, 855 P.2d 18, 19 (Colo. App. 1992) (the common areas of an apartment building, such as a stairwell, do not constitute a dwelling); *People v. Germany*, 586 P.2d 1006, 1009 (Colo. App. 1978) (a hospital room falls within the definition of a dwelling), *rev’d on other grounds*, 599 P.2d 904 (Colo. 1979).
3. The court should only include the bracketed paragraph where the defendant has raised the affirmative defense of use of physical force, including deadly physical force (intruder into a dwelling), and only then if the context does not require otherwise. See Instruction H:15; see also Instruction F:97 (defining “detention facility” (second degree assault involving a bodily fluid or a hazardous material; riots in detention facilities; use of marijuana in detention facilities)).
4. The bracketed paragraph derives from a 2016 legislative amendment. See Ch. 87, sec. 1, § 18-1-704.5, 2016 Colo. Sess. Laws 245, 245. In *People v. Alaniz*, 2016 COA 101, ¶ 36, 409 P.3d 508, 515, the court of appeals analyzed the statute as it existed prior to the amendment, but it also suggested that

the General Assembly intended the amendment to prevent prisoners from claiming immunity when using force against someone within their cell. *See id.* (“The People argue that public policy reasons should prevent incarcerated felons from claiming ‘make-my-day’ immunity. . . . The General Assembly is free to amend the statute . . . *and indeed has already done so*, but we must apply the statute in effect at the time of the charged offense.” (emphasis added)).

5. In 2016, pursuant to new legislation, the Committee added the bracketed paragraph to the instruction, modified the citation in Comment 1, and added Comments 3 and 4. *See* Ch. 87, sec. 1, § 18-1-704.5, 2016 Colo. Sess. Laws 245, 245.

## **F:114.5 EDITION OF A NEWSPAPER**

“Edition of a newspaper” means a single press run of a newspaper.

### COMMENT

1. *See* § 18-9-314(3)(a), C.R.S. 2020 (interference with lawful distribution of newspapers).
2. *See* Instruction F:241.8 (defining “newspaper”).
3. The Committee added this instruction in 2016.

## **F:114.8 ELECTRIC PERSONAL ASSISTIVE MOBILITY DEVICE OR EPAMD**

“Electric personal assistive mobility device” or “EPAMD” means a self-balancing, nontandem two-wheeled device, designed to transport only one person, that is powered solely by an electric propulsion system producing an average power output of no more than seven hundred fifty watts.

### COMMENT

1. *See* § 42-1-102(28.7), C.R.S. 2020 (vehicles and traffic).
2. The Committee added this instruction in 2019.

## **F:114.9 ELECTRIC SCOOTER**

“Electric scooter” means a device weighing less than one hundred pounds, with handlebars and an electric motor, that is powered by an electric motor, and that has a maximum speed of twenty miles per hour on a paved level surface when powered solely by the electric motor.

“Electric scooter” does not include an electrical assisted bicycle, EPAMD, motorcycle, or low-power scooter.

### COMMENT

1. See § 42-1-102(28.8), C.R.S. 2020 (vehicles and traffic)
2. See Instruction F:114.8 (defining “EPAMD”); Instruction F:115 (defining “electrical assisted bicycle”); Instruction F:202 (defining “low-power scooter”); Instruction F:239.2 (defining “motorcycle”).
3. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 271, sec. 1, § 42-1-102(28.8), 2019 Colo. Sess. Laws 2557, 2557.

## **F:115 ELECTRICAL ASSISTED BICYCLE**

“Electrical assisted bicycle” means a vehicle having two or three wheels, fully operable pedals, and an electric motor not exceeding seven hundred fifty watts of power.

### COMMENT

1. *See* § 42-1-102(28.5), C.R.S. 2020 (vehicles and traffic).
2. In 2017, the Committee modified this instruction pursuant to a legislative amendment. *See* Ch. 98, sec. 1, § 42-1-102(28.5), 2017 Colo. Sess. Laws 295, 295.

## F:115.2 ELECTRONIC COMMUNICATION

“Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include: any wire or oral communication; any communication made through a tone-only paging device; or any communication from a tracking device.

### COMMENT

1. *See* § 18-9-301(3.3), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:254.7 (defining “oral communication”); Instruction F:392.2 (defining “wire communication”).
3. The Committee added this instruction in 2016.

## **F:115.4 ELECTRONIC COMMUNICATION SERVICE**

“Electronic communication service” means any service which provides to users thereof the ability to send or receive wire or electronic communications.

### COMMENT

1. *See* § 18-9-301(3.5), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:383.5 (defining “user”); Instruction F:392.2 (defining “wire communication”).
3. The Committee added this instruction in 2016.

## **F:115.6 ELECTRONIC COMMUNICATIONS SYSTEM**

“Electronic communications system” means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of electronic communications and any computer facilities or related electronic equipment for the electronic storage of such communications.

### COMMENT

1. *See* § 18-9-301(3.7), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:116.2 (defining “electronic storage”).
3. The Committee added this instruction in 2016.

## F:115.8 ELECTRONIC GAMING MACHINE

“Electronic gaming machine” means an electrically or electronically operated machine or device that is used by a sweepstakes entrant and that displays the results of a game entry or game outcome to a participant on a screen or other mechanism at a business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person conducting the sweepstakes or by that person’s partners, affiliates, subsidiaries, agents, or contractors.

“Electronic gaming machine” includes a machine or device that: uses a simulated game terminal as a representation of the prizes associated with the results of the sweepstakes entries; uses software that simulates a game that influences or determines the winning or value of the prize, or appears to influence or determine the winning or value of the prize; selects prizes from a predetermined, finite pool of entries; uses a mechanism that reveals the content of a predetermined sweepstakes entry; predetermines the prize results and stores those results for delivery when the sweepstakes entry is revealed; uses software to create a game result; requires a deposit of any currency or token or the use of any credit card, debit card, prepaid card, or other method of payment to activate the machine or device; requires direct payment into the machine or device or remote activation of the machine or device upon payment to the person offering the sweepstakes game; requires the purchase of a related product at additional cost in order to participate in the sweepstakes game or makes a related product available for no cost but under restrictive conditions; reveals a sweepstakes prize incrementally even though the progress of the images on the screen does not influence whether a prize is awarded or the value of any prize awarded; or determines and associates the prize with an entry or entries at the time the sweepstakes is entered.

### COMMENT

1. See § 18-10.5-102(1), C.R.S. 2020 (simulated gambling devices).

2. See Instruction F:124.5 (defining “enter” or “entry”); Instruction F:126.5 (defining “entrant”); Instruction F:285.7 (defining “prize”); Instruction F:357.5 (defining “sweepstakes”).
3. The Committee added this instruction in 2016.

## F:116 ELECTRONIC SERIAL NUMBER

“Electronic serial number” means an electronic number that is programmed into a cellular phone by or with the consent of the manufacturer, transmitted by the cellular phone, and used by cellular phone telecommunications providers to validate radio transmissions as having been made by cellular phones authorized or approved by telecommunications providers.

### COMMENT

1. *See* § 18-8-204(2)(n), C.R.S. 2020 (introducing contraband in the second degree; which incorporates the definition of a “cloned cellular phone” from section 18-9-309(1)(a.7); which incorporates the definition of a “cellular phone” from section 18-9-309(1)(a.5); which uses the term “electronic serial number,” as defined in § 18-9-309(1)(b.7), C.R.S. 2020); *see also* Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)).

## **F:116.2 ELECTRONIC STORAGE**

“Electronic storage” means any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

### COMMENT

1. *See* § 18-9-301(4.5), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:115.4 (defining “electronic communication service”); Instruction F:254.7 (defining “oral communication”); Instruction F:392.2 (defining “wire communication”).
3. The Committee added this instruction in 2016.

## **F:116.5 ELECTRONIC, MECHANICAL, OR OTHER DEVICE**

“Electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire, oral, or electronic communication, other than: any telephone or telegraph instrument, equipment, or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or furnished by such subscriber or user for connection to the facilities of such service and being used in the ordinary course of its business, or being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of his duties; or a hearing aid or similar device being used to correct subnormal hearing to not better than normal hearing.

### COMMENT

1. *See* § 18-9-301(4), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:115.4 (defining “electronic communication service”); Instruction F:185.3 (defining “intercept”); Instruction F:188.3 (defining “investigative or law enforcement officer”); Instruction F:254.7 (defining “oral communication”); Instruction F:383.5 (defining “user”); Instruction F:392.2 (defining “wire communication”).
3. The Committee added this instruction in 2016.

## **F:116.8 EMERGENCY (PARTY LINE)**

“Emergency” means a situation in which property or human safety is in jeopardy and the prompt summoning of aid is essential.

### COMMENT

1. *See* § 18-9-307(1)(b), C.R.S. 2020 (refusal to yield party line).
2. The Committee added this instruction in 2016.

## **F:117 EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT**

“Emergency drug or alcohol overdose event” means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, or death resulting from the consumption or use of a controlled substance, or of alcohol, or another substance with which a controlled substance or alcohol was combined, and that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.

### **COMMENT**

1. *See* § 18-1-711(5), C.R.S. 2020 (affirmative defense of “reporting an emergency drug or alcohol overdose event”).

## **F:118 EMERGENCY MEDICAL CARE PROVIDER**

“Emergency medical care provider” means a doctor, intern, nurse, nurse’s aide, physician’s assistant, ambulance attendant or operator, air ambulance pilot, paramedic, or any other member of a hospital or health care facility staff or security force who is involved in providing emergency medical care at a hospital or health care facility, or in an air ambulance or ambulance.

### COMMENT

1. *See* § 18-3-201(1), C.R.S. 2020 (assault).
2. *See* § 25-3.5-103(1), (1.5), C.R.S. 2020 (defining “air ambulance” and “ambulance”).
3. In 2015, the Committee changed the citation in Comment 1 to reflect a legislative reorganization. *See* Ch. 109, secs. 2, 4, §§ 18-3-201(1), 18-3-204(4), 2015 Colo. Sess. Laws 316, 317–19.

## F:119 EMERGENCY MEDICAL SERVICE PROVIDER (ASSAULTS)

“Emergency medical service provider” means an individual who holds a valid emergency medical service provider certificate or license issued by the Department of Public Health and Environment. The term refers to both paid and volunteer emergency medical service providers.

### COMMENT

1. See § 18-1.3-501(1.5)(a), (b), C.R.S. 2020 (incorporating this definition, from section 25-3.5-103(8), C.R.S. 2020, for purposes of a sentence enhancement provision applicable to third degree assault); § 18-3-201(1.3), C.R.S. 2020 (“‘Emergency medical service provider’ has the same meaning as set forth in section 25-3.5-103(8), C.R.S. The term refers to both paid and volunteer emergency medical service providers.”); *see also* Instruction 3-1:01, Comment 5 (discussing the offense of first degree murder of an emergency medical service provider engaged in the performance of his or her duties, in violation of section 18-3-107(1), C.R.S. 2020).
2. In 2015, the Committee changed the subsection number of the citation to 18-3-201 that appears in Comment 1. This was done to reflect a legislative reorganization. *See* Ch. 109, sec. 4, § 18-3-201(1), (1.3), 2015 Colo. Sess. Laws 316, 319.
3. In 2019, the Committee added the phrase “or license” to this instruction pursuant to a legislative amendment. *See* Ch. 396, sec. 1, § 25-3.5-103(8), 2019 Colo. Sess. Laws 3518, 3518.

**F:120 EMERGENCY MEDICAL SERVICE PROVIDER  
(OBSTRUCTING)**

“Emergency medical service provider” means a member of a public or private emergency medical service agency, whether that person is a volunteer or receives compensation for services rendered as such emergency medical service provider.

COMMENT

1. *See* § 18-8-104(5)(a), C.R.S. 2020 (obstructing).

## **F:121 EMPLOYEE OF A DETENTION FACILITY**

“Employee of a detention facility” includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility.

“Employee of a detention facility” does not include a person lawfully confined in a detention facility.

### COMMENT

1. *See* § 18-3-203(1)(f.5)(III)(B), C.R.S. 2020 (second-degree assault).

## **F:121.5 EMPLOYMENT**

“Employment” means every character of service rendered or to be rendered for wages, salary, commission, or other form of remuneration.

### COMMENT

1. *See* § 18-5-307(1)(b), C.R.S. 2020 (prohibited practice by a private employment agency).
2. The Committee added this instruction in 2015.

## **F:122 ENCLOSED**

“Enclosed” means a permanent or semi-permanent area covered and surrounded on all sides. Temporary opening of windows or doors or the temporary removal of wall or ceiling panels does not convert the area into an unenclosed space.

### COMMENT

1. *See* § 18-18-102(14.5), C.R.S. 2020 (defining the term for purposes of lawful marijuana cultivation).

## F:122.5 ENCODING MACHINE

“Encoding machine” means an electronic device that is used to encode information onto a payment card.

### COMMENT

1. *See* § 18-5.5-101(6.5), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:262.5 (defining “payment card”).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 379, sec. 1, § 18-5.5-101(6.5), 2018 Colo. Sess. Laws 2290, 2290.

**F:123 ENGAGED IN THE PERFORMANCE OF HIS [HER]  
DUTIES (THIRD DEGREE ASSAULT SENTENCE  
ENHANCEMENT)**

A peace officer, emergency medical service provider, emergency medical care provider, or firefighter is “engaged in the performance of his [her] duties” if he [she] is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a peace officer, emergency medical service provider, emergency medical care provider, or firefighter, whether or not the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is within the territorial limits of his [her] jurisdiction, if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is in uniform or the person committing an assault upon or offense against or otherwise acting toward such peace officer, emergency medical service provider, emergency medical care provider, or firefighter knows or reasonably should know that the victim is a peace officer, emergency medical service provider, emergency medical care provider, or firefighter or if the peace officer, emergency medical service provider, emergency medical care provider, or firefighter is intentionally assaulted in retaliation for the performance of his [her] official duties.

COMMENT

1. See § 18-1.3-501(1.5)(a), (b), C.R.S. 2020.
2. See Instruction F:118 (defining “emergency medical care provider”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:157 (defining “firefighter”); Instruction F:263 (defining “peace officer”).

## **F:124 ENGAGED IN THE PERFORMANCE OF HIS [HER] DUTIES (FIRST DEGREE MURDER AND FIRST AND SECOND DEGREE ASSAULT)**

A [peace officer] [firefighter] [emergency medical service provider] is “engaged in the performance of his [her] duties” if he [she] is engaged or acting in, or is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required, or permitted by law to be performed by a [peace officer] [firefighter] [emergency medical service provider], whether or not the [peace officer] [firefighter] [emergency medical service provider] is within the territorial limits of his [her] jurisdiction, if the [peace officer] [firefighter] [emergency medical service provider] is in uniform or the person committing the assault upon or offense against or otherwise acting toward the [peace officer] [firefighter] [emergency medical service provider] knows or reasonably should know that the victim is a [peace officer] [firefighter] [emergency medical service provider].

### COMMENT

1. *See* § 18-3-201(2), C.R.S. 2020 (defining this term for purposes of first degree assault in violation of section 18-3-202, C.R.S. 2020, and second degree assault in violation of section 18-3-203, C.R.S. 2020).
2. *See* Instruction F:119 (defining “emergency medical service provider”); Instruction F:157 (defining “firefighter”); Instruction F:263 (defining “peace officer”).
3. Section 18-3-201(2) states that the definition of the “term ‘peace officer’ includes county enforcement personnel designated pursuant to section 29-7-101(3), C.R.S.” There is no model instruction defining the term “county enforcement personnel” because the statutory definition delegates authority to boards of county commissioners to define the scope of the term. Accordingly, in cases where this term is applicable, users should consult section 29-7-101(3) and draft an instruction tailored to the facts of the case.

## **F:124.5 ENTER OR ENTRY**

“Enter” or “entry” means the act or process by which a person becomes eligible to receive a prize offered in a sweepstakes.

### COMMENT

1. *See* § 18-10.5-102(2), C.R.S. 2020 (simulated gambling devices).
2. *See* Instruction F:285.7 (defining “prize”); Instruction F:357.5 (defining “sweepstakes”).
3. The Committee added this instruction in 2016.

## **F:125 ENTERPRISE**

“Enterprise” means any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities.

### COMMENT

1. *See* § 18-17-103(2), C.R.S. 2020 (Colorado Organized Crime Control Act).

## F:126 ENTERS UNLAWFULLY OR REMAINS UNLAWFULLY

A person “enters unlawfully” or “remains unlawfully” in or upon premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of his [her] intent, enters or remains in or upon premises that are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to him [her] by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.

### COMMENT

1. *See* § 18-4-201(3), C.R.S. 2020 (offenses against property in Article 4).
2. When relevant, the above definition should be modified to include an explanation of the following principle, which is also set forth in section 18-4-201(3):

Except as is otherwise provided in section 33-6-116(1), C.R.S., [relating to hunting, fishing, and trapping,] a person who enters or remains upon unimproved and apparently unused land that is neither fenced nor otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land or some other authorized person or unless notice forbidding entry is given by posting with signs at intervals of not more than four hundred forty yards or, if there is a readily identifiable entrance to the land, by posting with signs at such entrance to the private land or the forbidden part of the land. In the case of a designated access road not otherwise posted, said notice shall be posted at the entrance to private land and shall be substantially as follows: ‘ENTERING PRIVATE PROPERTY REMAIN ON ROADS.’”).

## **F:126.5 ENTRANT**

“Entrant” means a person who is or seeks to become eligible to receive a prize offered in a sweepstakes.

### COMMENT

1. *See* § 18-10.5-102(3), C.R.S. 2020 (simulated gambling devices).
2. *See* Instruction F:285.7 (defining “prize”); Instruction F:357.5 (defining “sweepstakes”).
3. The Committee added this instruction in 2016.

## F:127 EROTIC FONDLING

“Erotic fondling” means touching a person’s clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breast, or developing or undeveloped breast area (if the person is a child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

“Erotic fondling” does not include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

### COMMENT

1. *See* § 18-6-403(2)(c), C.R.S. 2020 (sexual exploitation of a child).
2. *See* Instruction F:50 (defining “child”).

## F:128 EROTIC NUDDITY

“Erotic nudity” means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

### COMMENT

1. See § 18-6-403(2)(d), C.R.S. 2020 (sexual exploitation of a child).
2. See Instruction F:50 (defining “child”).
3. See *People v. Gagnon*, 997 P.2d 1278, 1283 (Colo. App. 1999) (definition of “erotic nudity” was not unconstitutionally vague, as applied, where the sexually suggestive context of the photos included more than a mere display of a substantial portion of the girl’s breasts).
4. See *People v. Henley*, 2017 COA 76, ¶¶ 21-22, \_\_ P.3d \_\_ (concluding that the statutory definition of “erotic nudity” “focuses on the purpose for which the image is displayed, not the subjective purpose of a particular viewer,” meaning that “the particular viewer’s purpose in looking at the image is irrelevant for purposes of determining whether the image is ‘erotic nudity’”).
5. In 2017, the Committee added Comment 4.

## **F:129 ESCAPE**

“Escape” is deemed to be a continuing activity commencing with the conception of the design to escape and continuing until the escapee is returned to custody or the attempt to escape is thwarted or abandoned.

### COMMENT

1. *See* § 18-8-201(2), C.R.S. 2020 (aiding escape).

## **F:129.5 ETHYL ALCOHOL**

“Ethyl alcohol” means any substance which is or contains ethyl alcohol.

### COMMENT

1. *See* § 18-13-122(2)(b), C.R.S. 2020 (illegal possession or consumption of ethyl alcohol or marijuana).
2. The Committee added this instruction in 2016.

## **F:130 EXCEED AUTHORIZED ACCESS**

“Exceed authorized access” means to access a computer with authorization and to use such access to obtain or alter information, data, computer program, or computer software that the person is not entitled to so obtain or alter.

### COMMENT

1. *See* § 18-5.5-101(6.7), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:28 (defining “authorization”); Instruction F:61 (defining “computer”); Instruction F:63 (defining “computer program”); Instruction F:64 (defining “computer software”); Instruction F:383 (defining “use”).

## F:131 EXHIBITION

“Exhibition” means a show or sale of livestock at a fair or elsewhere in this state that is sponsored by or under the authority of the state or any unit of local government or any agricultural, horticultural, or livestock society, association, or corporation.

### COMMENT

1. *See* § 18-9-207(1)(a), C.R.S. 2020 (tampering with livestock).

## F:132 EXPLICIT SEXUAL CONDUCT

“Explicit sexual conduct” means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, or sexual excitement.

### COMMENT

1. See § 18-6-403(2)(e), C.R.S. 2020 (sexual exploitation of a child).
2. See Instruction F:127 (defining “erotic fondling”); Instruction F:128 (defining “erotic nudity”); Instruction F:216 (defining “masturbation”); Instruction F:326 (defining “sadomasochism”); Instruction F:338 (defining “sexual excitement”); Instruction F:339 (defining “sexual intercourse”).

## F:132.5 EXPLOITATION

“Exploitation” means an act or omission committed by a person who [uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk person of the use, benefit, or possession of any thing of value] [employs the services of a third party for the profit or advantage of the person or another person to the detriment of the at-risk person] [forces, compels, coerces, or entices an at-risk person to perform services for the profit or advantage of the person or another person against the will of the at-risk person] [misuses the property of an at-risk person in a manner that adversely affects the at-risk person’s ability to receive health care or health care benefits or to pay bills for basic needs or obligations].

### COMMENT

1. See § 18-6.5-102(10), C.R.S. 2020 (crimes against at-risk persons).
2. See Instruction F:08 (defining “act”); Instruction F:26.5 (defining “at-risk person”); Instruction F:30 (defining “benefit” (general definition)); Instruction F:251 (defining “omission”); Instruction F:281 (defining “possession”); Instruction F:371 (defining “thing of value”); Instruction F:379 (defining “undue influence”).
3. The Committee added this instruction in 2016.

## F:133 EXPLOSIVE OR INCENDIARY DEVICE (TERRORIST TRAINING ACTIVITIES)

“Explosive or incendiary device” means dynamite and all other forms of high explosives; any explosive bomb, grenade, missile, or similar device; or any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable receptacle containing a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one person acting alone.

### COMMENT

1. See § 18-9-120(b), C.R.S. 2020.
2. See *People v. Owens*, 670 P.2d 1233, 1237 (Colo. 1983) (“an incendiary device without a wick may be prosecuted under the incendiary device statute, despite any apparent language to the contrary in [*People v. Brown*, 574 P.2d 92 (Colo. 1978)]”); *People v. Lovato*, 630 P.2d 597, 599-600 (Colo. 1981) (blasting caps with attached safety fuses were “explosive or incendiary devices,” rather than “explosive or incendiary parts”).

## **F:134 EXPLOSIVE OR INCENDIARY DEVICE (POSSESSION, USE, OR REMOVAL)**

“Explosive or incendiary device” means dynamite and all other forms of high explosives, including, but not limited to water gel, slurry, military C-4 (plastic explosives), blasting agents to include nitro-carbon-nitrate, and ammonium nitrate and fuel oil mixtures, cast primers and boosters, R.D.X., P.E.T.N., electric and nonelectric blasting caps, exploding cords commonly called detonating cord or det-cord or primacord, picric acid explosives, T.N.T. and T.N.T. mixtures, and nitroglycerin and nitroglycerin mixtures; any explosive bomb, grenade, missile, or other similar device; any incendiary bomb or grenade, fire bomb, or similar device, including any device, except kerosene lamps, which consists of or include a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and can be carried or thrown by one individual acting alone.

[“Explosive or incendiary device” does not include a rifle, pistol or shotgun ammunition, or the components for handloading rifle, pistol or shotgun ammunition.]

### COMMENT

1. *See* § 18-12-109(1)(a)(I), C.R.S. 2020 (possession, use, or removal of explosives or incendiary devices).

## F:135 EXPLOSIVE OR INCENDIARY PARTS

“Explosive or incendiary parts” means any substances or materials or combinations thereof which have been prepared or altered for use in the creation of an explosive or incendiary device. Such substances or materials may include, but are not limited to, any timing device, clock or watch which has been altered in such a manner as to be used as the arming device in an explosive; pipe, end caps, or metal tubing which has been prepared for a pipe bomb; mechanical timers, mechanical triggers, chemical time delays, electronic time delays, or commercially made or improvised items which, when used singly or in combination, may be used in the construction of a timing delay mechanism, booby trap, or activating mechanism for any explosive or incendiary device.

[“Explosive or incendiary parts” does not include rifle, pistol or shotgun ammunition, or the components for handloading rifle, pistol or shotgun ammunition, or any signaling device customarily used in the operation of railroad equipment.]

### COMMENT

1. See § 18-12-109(1)(b)(I), C.R.S. 2020 (possession, use, or removal of explosives or incendiary devices).
2. See *People v. Lovato*, 630 P.2d 597, 599–600 (Colo. 1981) (blasting caps with attached safety fuses were “explosive or incendiary devices,” rather than “explosive or incendiary parts”).

## **F:135.5 EXTEND CREDIT**

To “extend credit” means to make or renew any loan or to enter into any agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

### COMMENT

1. *See* § 18-15-101(4), C.R.S. 2020 (unlawful lending practices).
2. *See* Instruction F:311.7 (defining “repayment”).
3. The Committee added this instruction in 2016.

## **F:136 EXTENSION OF CREDIT (IDENTITY THEFT AND RELATED OFFENSES)**

“Extension of credit” means any loan or agreement, express or implied, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

### COMMENT

1. *See* § 18-5-901(2), C.R.S. 2020 (identity theft and related offenses).

## **F:136.5 EXTORTIONATE MEANS**

An “extortionate means” is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

### COMMENT

1. *See* § 18-15-101(5), C.R.S. 2020 (unlawful lending practices).
2. The Committee added this instruction in 2016.

## **F:137 FACILITY OF PUBLIC TRANSPORTATION**

“Facility of public transportation” includes a public conveyance and any area, structure, or device which is designed, adapted, and used to support, guide, control, permit, or facilitate the movement, starting, stopping, takeoff, landing, or servicing of a public conveyance or the loading or unloading of passengers, freight, or goods.

### COMMENT

1. *See* § 18-9-115(4), C.R.S. 2020 (endangering public transportation).
2. *See* Instruction F:297 (defining “public”); Instruction F:299 (defining “public conveyance”).

## **F:138 FACILITY OF UTILITY TRANSMISSION**

“Facility of utility transmission” includes any area, structure, or device that is designed, adopted, or used to support, guide, control, permit, or facilitate transmission of electrical energy in excess of thirty thousand volts; or water, liquid fuel, or gaseous fuel by pipeline.

### COMMENT

1. *See* § 18-9-115(4.5), C.R.S. 2020 (endangering public transportation and utility transmission).

## **F:139 FALSELY ALTER (FORGERY AND IMPERSONATION OFFENSES)**

To “falsely alter” a written instrument means to change a written instrument without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

### COMMENT

1. See § 18-5-101(2), C.R.S. 2020 (forgery and impersonation offenses).
2. See Instruction F:394 (defining “written instrument”); see also *Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:140 FALSELY ALTER (FINANCIAL TRANSACTION DEVICE)**

To “falsely alter” a financial transaction device means to change such device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

### COMMENT

1. See § 18-5-707(2)(a), C.R.S. 2020 (unlawful manufacture of a financial transaction device).
2. See Instruction F:153 (defining “financial transaction device”); Instruction F:189 (defining “issuer”); *see also Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:140.5 FALSELY ALTER (IDENTITY THEFT AND RELATED OFFENSES)**

To “falsely alter” a written instrument or financial device means to change a written instrument or financial device without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that the written instrument or financial device in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker.

### COMMENT

1. *See* § 18-5-901(3), C.R.S. 2020.
2. *See* Instruction F:395 (defining “written instrument”); *see also* *Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:141 FALSELY COMPLETE (FORGERY AND IMPERSONATION OFFENSES)**

To “falsely complete” a written instrument means to transform an incomplete written instrument into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or to transform an incomplete written instrument into a complete one by adding or inserting materially false information or adding or inserting a materially false statement.

A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

### COMMENT

1. See § 18-5-101(3)(a), (b), C.R.S. 2020 (forgery and impersonation offenses).
2. See Instruction F:30 (defining “benefit”); Instruction F:394 (defining “written instrument”); see also *Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).
3. See *People v. Kovacs*, 2012 COA 111, ¶ 19, 284 P.3d 186, 190 (“[A] person falsely completes a written instrument under section 18-5-101(3)(b) when he or she adds or inserts materially false information or a materially false statement to any instrument, genuine or non-genuine, thereby purporting to complete the instrument so as to render it legally operative.”).
4. In 2015, the Committee corrected this instruction, to reflect the statutory language, by changing the words “by adding or” to “by adding,”.

## **F:142 FALSELY COMPLETE (UNLAWFUL MANUFACTURE OF FINANCIAL TRANSACTION DEVICE)**

To “falsely complete” a financial transaction device means to transform an incomplete device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer.

### COMMENT

1. See § 18-5-707(2)(b), C.R.S. 2020 (unlawful manufacture of a financial transaction device).
2. See Instruction F:153 (defining “financial transaction device”); Instruction F:189 (defining “issuer”); *see also Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:143 FALSELY COMPLETE (IDENTITY THEFT AND RELATED OFFENSES)**

To “falsely complete” a written instrument or financial device means to transform an incomplete written instrument or financial device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant that authority, so that the complete written instrument or financial device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker; or to transform an incomplete written instrument or financial device into a complete one by adding or inserting materially false information or adding or inserting a materially false statement.

A materially false statement is a false assertion that affects the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that directly or indirectly benefits the person making the assertion.

### COMMENT

1. *See* § 18-5-901(4)(a), (b), C.R.S. 2020 (identity theft and related offenses).
2. *See* Instruction F:30 (defining “benefit”); Instruction F:150 (defining “financial device”); Instruction F:395 (defining “written instrument”); *see also Webster’s Third New International Dictionary 1597* (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:144 FALSELY MAKE (FORGERY)**

To “falsely make” a written instrument means to make or draw a written instrument, whether complete or incomplete, which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or the drawing thereof.

### COMMENT

1. *See* § 18-5-101(4), C.R.S. 2020.
2. *See* Instruction F:394 (defining “written instrument”); *see also* *Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:145 FALSELY MAKE (FINANCIAL TRANSACTION DEVICE)**

To “falsely make” a financial transaction device means to make or manufacture a device, whether complete or incomplete, which purports to be an authentic creation of its ostensible issuer, but which is not, either because the ostensible issuer is fictitious, or because, if real, he [she] did not authorize the making or the manufacturing thereof.

### COMMENT

1. *See* § 18-5-707(2)(c), C.R.S. 2020 (unlawful manufacture of a financial transaction device).
2. *See* Instruction F:153 (defining “financial transaction device”); Instruction F:189 (defining “issuer”); *see also Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:146 FALSELY MAKE (IDENTITY THEFT AND RELATED OFFENSES)**

To “falsely make” a written instrument or financial device means to make or draw a written instrument or financial device, whether it be in complete or incomplete form, that purports to be an authentic creation of its ostensible maker, but that is not, either because the ostensible maker is fictitious or because, if real, the ostensible maker did not authorize the making or the drawing of the written instrument or financial device.

### COMMENT

1. *See* § 18-5-901(5), C.R.S. 2020 (identity theft and related offenses).
2. *See* Instruction F:150 (defining “financial device”); Instruction F:395 (defining “written instrument”); *see also Webster’s Third New International Dictionary* 1597 (2002) (defining “ostensible” as meaning “professing genuineness and sincerity but . . . concealing the real aspects behind a plausible facade.”).

## **F:146.2 FARM TRACTOR**

“Farm tractor” means every implement of husbandry designed and used primarily as a farm implement for drawing plows and mowing machines and other implements of husbandry.

### COMMENT

1. *See* § 42-1-102(33), C.R.S. 2020 (vehicles and traffic).
2. *See* Instruction F:179.5 (defining “implement of husbandry”).
3. The Committee added this instruction in 2019.

## **F:146.5 FEE-PAID POSITION**

“Fee-paid position” means a position of employment which is available to an applicant where no fee or cost accrues to the applicant as a condition of obtaining such position.

### COMMENT

1. *See* § 18-5-307(1)(b.5), C.R.S. 2020 (prohibited practice by a private employment agency).
2. *See* Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”).
3. The Committee added this instruction in 2015.

## **F:147 FELLATIO**

“Fellatio” means any act of oral stimulation of the penis.

### COMMENT

1. See § 18-7-201(2)(a), C.R.S. 2020 (prostitution); § 18-7-401(4), C.R.S. 2020 (child prostitution).

## F:148 FERMENTED MALT BEVERAGE

“Fermented malt beverage” means malt liquors, when purchased by a fermented malt beverage retailer from a licensed wholesaler, or when sold by a fermented malt beverage retailer to consumers or to licensed persons.

### COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2020 (introducing contraband in the first degree; incorporating the definition from section 44-4-103(1), C.R.S. 2020).
2. *See* Instruction F:205 (defining “malt liquors”).
3. In 2019, pursuant to a legislative amendment, the Committee revised this instruction, added Comment 2, and deleted the prior Comments 2 and 3. *See* Ch. 1, sec. 2, § 44-4-103(1)(a), 2019 Colo. Sess. Laws 1, 2.

## **F:149 FINANCIAL ASSISTANCE**

“Financial assistance” means financial assistance for educational purposes, including, but not limited to, loans, scholarships, grants, fellowships, assistantships, work-study programs, or other forms of financial aid.

### COMMENT

1. *See* § 18-5-104.5(2)(b), C.R.S. 2020 (use of forged academic record).
2. In 2016, the Committee corrected the statutory citation in Comment 1.

## **F:150 FINANCIAL DEVICE**

“Financial device” means any instrument or device that can be used to obtain cash, credit, property, services, or any other thing of value or to make financial payments, including but not limited to a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card; a check; a negotiable order of withdrawal; a share draft; or a money order.

### **COMMENT**

1. *See* § 18-5-901(6), C.R.S. 2020 (identity theft and related offenses).

## **F:151 FINANCIAL IDENTIFYING INFORMATION**

“Financial identifying information” means any of the following that can be used, alone or in conjunction with any other information, to obtain cash, credit, property, services, or any other thing of value or to make a financial payment: a personal identification number, credit card number, banking card number, checking account number, debit card number, electronic fund transfer card number, guaranteed check card number, or routing number; or a number representing a financial account or a number affecting the financial interest, standing, or obligation of or to the account holder.

### COMMENT

1. *See* § 18-5-901(7), C.R.S. 2020 (identity theft and related offenses).
2. *See* Instruction F:271 (defining “personal identification number”).

## **F:152 FINANCIAL INSTRUMENT**

“Financial instrument” means any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card, debit card, or marketable security.

### COMMENT

1. *See* § 18-5.5-101(7), C.R.S. 2020 (cybercrime).

## **F:152.5 FINANCIAL TRANSACTION (MONEY LAUNDERING)**

“Financial transaction” means a transaction involving the movement of moneys by wire or other means; one or more monetary instruments; the transfer of title to any real property, vehicle, vessel, or aircraft; or the use of a financial institution.

### **COMMENT**

1. *See* § 18-5-309(3)(b), C.R.S. 2020 (money laundering).
2. *See* Instruction F:374.5 (defining “transaction”); Instruction F:232.5 (defining “monetary instrument”).
3. The Committee added this instruction in 2015.

## F:153 FINANCIAL TRANSACTION DEVICE

“Financial transaction device” means any instrument or device whether known as a credit card, banking card, debit card, electronic fund transfer card, or guaranteed check card, or account number representing a financial account or affecting the financial interest, standing, or obligation of or to the account holder, that can be used to obtain cash, goods, property, or services or to make financial payments, but it does not include a “check,” a “negotiable order of withdrawal,” and a “share draft.”

### COMMENT

1. See § 18-5-701(3), C.R.S. 2020 (Financial Transaction Device Crime Act); *see also* § 18-5-205(1)(a), (f), C.R.S. 2020 (definitions of “check”, “negotiable order of withdrawal,” and “share draft,” which are incorporated by section 18-5-701(3)).

## **F:154 FIREARM**

“Firearm” means any handgun, automatic, revolver, pistol, rifle, shotgun, or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.

### COMMENT

1. *See* § 18-1-901(3)(h), C.R.S. 2020.

## **F:154.5 FIREARM (BACKGROUND CHECKS – GUN SHOWS)**

“Firearm” means any handgun, automatic, revolver, pistol, rifle, shotgun, or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.

### COMMENT

1. *See* § 18-12-506(2), C.R.S. 2020 (background checks – gun shows).
2. The Committee added this instruction in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 5, § 18-12-506(2), 2018 Colo. Sess. Laws 145, 152.

## **F:155 FIREARM (TERRORIST TRAINING ACTIVITIES)**

“Firearm” means any weapon which is designed to expel or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.

### COMMENT

1. *See* § 18-9-120(1)(c), C.R.S. 2020 (terrorist training activities).

## **F:156 FIREARM SILENCER**

“Firearm silencer” means any instrument, attachment, weapon, or appliance for causing the firing of any gun, revolver, pistol, or other firearm to be silent or intended to lessen or muffle the noise of the firing of any such weapon.

### COMMENT

1. *See* § 18-12-101(1)(c), C.R.S. 2020 (offenses relating to firearms and weapons).

## **F:156.5 FIREARMS (DEALERS)**

“Firearms” means a pistol, revolver, or other weapon of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable, or magazine breech, does not exceed twelve inches.

“Firearms” does not include pistols, revolvers, or other weapons for which ammunition is not sold or which there is reasonable ground for believing are not capable of being effectually used.

### COMMENT

1. *See* § 18-12-401(1), C.R.S. 2020 (firearms – dealers).
2. The Committee added this instruction in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 4, § 18-12-401(1), 2018 Colo. Sess. Laws 145, 150–51.

## F:157 FIREFIGHTER

“Firefighter” means an officer or member of a fire department or fire protection or fire-fighting agency of the state, or any municipal or quasi-municipal corporation in this state, whether that person is a volunteer or receives compensation for services rendered as such firefighter.

### COMMENT

1. See § 18-3-201(1.5), C.R.S. 2020 (assaults); *see also* § 18-3-107(2), C.R.S. 2020 (first degree murder; incorporating this definition).
2. See *People v. Montoya*, 104 P.3d 303, 305-06 (Colo. App. 2004) (“[T]he word ‘firefighter’ in § 18-3-201 and § 18-3-203(1)(c) encompasses a person like the victim here, who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.”).

### **F:157.3 FLAG (MUTILATION OR CONTEMPT)**

“Flag” means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the state of Colorado.

#### COMMENT

1. *See* § 18-11-204(2), C.R.S. 2020.
2. This definition differs from the definition of “flag” in relation to the offense of “unlawful flag display.” *See* § 18-11-205, C.R.S. 2020; Instruction F:157.7 (defining “flag” (unlawful display)).
3. The Committee added this instruction in 2016.

## **F:157.7 FLAG (UNLAWFUL DISPLAY)**

“Flag” means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of a particular nation, state, movement, cause, or organization.

### COMMENT

1. *See* § 18-11-205(3), C.R.S. 2020.
2. This definition differs from the definition of “flag” in relation to the offense of “mutilation or contempt.” *See* § 18-11-204, C.R.S. 2020; Instruction F:157.3 (defining “flag” (mutilation or contempt)).
3. The Committee added this instruction in 2016.

## F:157.8 FLOWERING

“Flowering” means the reproductive state of the cannabis plant in which there are physical signs of flower budding out of the nodes in the stem.

### COMMENT

1. *See* § 18-18-406(3)(c)(I), C.R.S. 2020 (cultivating, growing, or producing marijuana).
2. *See* Instruction F:279.3 (defining “plant”).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 402, sec. 2, § 18-18-406(3)(c)(I), 2017 Colo. Sess. Laws 2094, 2096.

## **F:158 FORGED INSTRUMENT**

“Forged instrument” means a written instrument that has been falsely made, completed, or altered.

### COMMENT

1. *See* § 18-5-101(5), C.R.S. 2020 (forgery and impersonation offenses).
2. *See* Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”).

## **F:159 FUNERAL**

“Funeral” means the ceremonies, rituals, and memorial services held in connection with the burial, cremation, or memorial of a deceased person, including the assembly and dispersal of the mourners.

### COMMENT

1. *See* § 18-9-101(1.4), C.R.S. 2020 (public peace and order offenses).

## **F:160 FUNERAL SITE**

“Funeral site” means a church, synagogue, mosque, funeral home, mortuary, cemetery, gravesite, mausoleum, or other place where a funeral is conducted.

### COMMENT

1. *See* § 18-9-101(1.5), C.R.S. 2020 (public peace and order offenses).

## **F:160.1 GAIN**

“Gain” means the direct realization of winnings.

### COMMENT

1. *See* § 18-10-102(1), C.R.S. 2020 (gambling offenses).
2. The Committee added this instruction in 2016.

## F:160.2 GAMBLING

“Gambling” means risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control.

“Gambling” does not include: bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries; bona fide business transactions which are valid under the law of contracts; other acts or transactions expressly authorized by law; any game, wager, or transaction that is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling; any use of or transaction involving a crane game; or sports betting conducted in accordance with state law and applicable rules of the limited gaming control commission.

### COMMENT

1. See § 18-10-102(2), C.R.S. 2020 (gambling offenses).
2. See Instruction F:76.3 (defining “crane game”); Instruction F:160.1 (defining “gain”); Instruction F:160.3 (defining “gambling device”); Instruction F:287.2 (defining “professional gambling”).
3. The Committee added this instruction in 2016.
4. In 2019, pursuant to a legislative amendment, the Committee added the “sports betting” clause to the instruction’s second paragraph. See Ch. 347, sec. 13, § 18-10-102(g), 2019 Colo. Sess. Laws 3209, 3232.

## **F:160.25 GAMBLING (SIMULATED GAMBLING DEVICES)**

“Gambling” means risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control.

“Gambling” does not include: bona fide business transactions which are valid under the law of contracts; other acts or transactions expressly authorized by law; any game, wager, or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling; or any use of or transaction involving a crane game.

### COMMENT

1. *See* § 18-10.5-102(3.5), C.R.S. 2020 (simulated gambling devices).
2. *See* Instruction F:76.3 (defining “crane game”); Instruction F:160.1 (defining “gain”); Instruction F:160.3 (defining “gambling device”); Instruction F:287.2 (defining “professional gambling”).
3. This instruction is identical to the general definition of “gambling” as found in Instruction F:160.2 (pertaining to gambling offenses), except that it removes the exception for “bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries.” *See* § 18-10.5-102(3.5) (noting that “the exception set forth in section 18-10-102 (2)(a) does not apply”).
4. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 381, sec. 3, § 18-10.5-102(3.5), 2018 Colo. Sess. Laws 2297, 2298.

### **F:160.3 GAMBLING DEVICE**

“Gambling device” means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any professional gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine; except that the term does not include a crane game.

#### COMMENT

1. *See* § 18-10-102(3), C.R.S. 2020 (gambling offenses).
2. *See* Instruction F:76.3 (defining “crane game”); Instruction F:160.2 (defining “gambling”); Instruction F:287.2 (defining “professional gambling”).
3. The Committee added this instruction in 2016.

## F:160.4 GAMBLING INFORMATION

“Gambling information” means a communication with respect to any wager made in the course of, and any information intended to be used for, professional gambling.

Evidence of information as to wagers, betting odds, or changes in betting odds gives rise to a permissible inference that the information was intended for use in professional gambling. However, legitimate news reporting of an event for public dissemination is not gambling information.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-10-102(4), C.R.S. 2020 (gambling offenses).
2. See Instruction F:287.2 (defining “professional gambling”).
3. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (holding that, unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).
4. The Committee added this instruction in 2016.

## F:160.5 GAMBLING PREMISES

“Gambling premises” means any building, room, enclosure, vehicle, vessel, or other place, whether open or enclosed, used or intended to be used for professional gambling.

Evidence that a gambling device was found in a place gives rise to a permissible inference that the place was intended to be used for professional gambling.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-10-102(5), C.R.S. 2020 (gambling offenses).
2. See Instruction F:160.3 (defining “gambling device”); Instruction F:287.2 (defining “professional gambling”).
3. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (holding that, unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).
4. The Committee added this instruction in 2016.

## **F:160.6 GAMBLING PROCEEDS**

“Gambling proceeds” means all money or other things of value at stake or displayed in or in connection with professional gambling.

### COMMENT

1. *See* § 18-10-102(6), C.R.S. 2020 (gambling offenses).
2. *See* Instruction F:287.2 (defining “professional gambling”).
3. The Committee added this instruction in 2016.

## **F:160.7 GAMBLING RECORD**

“Gambling record” means any record, receipt, ticket, certificate, token, slip, or notation given, made, used, or intended to be used in connection with professional gambling.

### COMMENT

1. *See* § 18-10-102(7), C.R.S. 2020 (gambling offenses).
2. *See* Instruction F:287.2 (defining “professional gambling”).
3. The Committee added this instruction in 2016.

## + F:160.75 GAMETES

“Gametes” means one or more cells containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete.

Sperm and eggs are gametes.

A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.

### COMMENT

1. *See* § 18-13-131(3)(c), C.R.S. 2020 (misuse of gametes).
2. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 238, sec. 3, § 18-13-131(3)(c), 2020 Colo. Sess. Laws 1153, 1155.

## F:160.8 GAMING DEVICE OR GAMING EQUIPMENT

“Gaming device” or “gaming equipment” means any equipment or mechanical, electromechanical, or electronic contrivance, component, or machine used remotely or directly in connection with gaming or any game. The term includes a system for processing information that can alter the normal criteria of random selection affecting the operation, or determining the outcome, of a game. The term includes a physical or electronic version of a slot machine, poker table, blackjack table, craps table, roulette table, dice, and the cards used to play poker and blackjack.

### COMMENT

1. *See* § 44-30-103(13), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:33.5 (defining “blackjack” (limited gaming offenses)); Instruction F:76.7 (defining “craps”); Instruction F:279.5 (defining “poker”); Instruction F:324.5 (defining “roulette”); Instruction F:345.6 (defining “slot machine”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(13), 2018 Colo. Sess. Laws 167, 170-71.

## F:160.9 GAMING EMPLOYEE

“Gaming employee” means any person employed by an operator or retailer hosting gaming to work directly with the gaming portion of the operator’s or retailer’s business who is twenty-one years of age or older and holds a support license.

Persons deemed to be gaming employees include: dealers; change and counting room personnel; cashiers; floormen; cage personnel; slot machine repairmen or mechanics; persons who accept or transport gaming revenues; security personnel; shift or pit bosses; floor managers; supervisors; slot machine and slot booth personnel; any person involved in the handling, counting, collecting, or exchanging of money, property, checks, credit, or any representative of value, including [any coin, token, chip, cash premium, merchandise, redeemable game credits, or any other thing of value] [the payoff from any game, gaming, or gaming device]; craps table personnel and roulette table personnel; and any other persons that the Colorado limited gaming control commission shall by rule determine.

### COMMENT

1. See § 44-30-103(14), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. See Instruction F:160.8 (defining “gaming device”); Instruction F:254.3 (defining “operator”); Instruction F:322.5 (defining “retailer”); Instruction F:371 (defining “thing of value”); see also § 44-30-501(1)(d) (discussing support licenses).
3. Where appropriate, the court should eliminate examples from the second paragraph that are irrelevant to the case.
4. The Committee added this instruction in 2016.
5. In 2018, the Committee modified this instruction and the statutory citations in Comments 1 and 2 pursuant to a legislative amendment and

reorganization. *See* Ch. 14, sec. 2, §§ 44-30-103(14), -501(1)(d), 2018 Colo. Sess. Laws 167, 171, 184-85.

## **F:161 GAS GUN**

“Gas gun” means a device designed for projecting gas-filled projectiles which release their contents after having been projected from the device and includes projectiles designed for use in such a device.

### COMMENT

1. *See* § 18-12-101(1)(d), C.R.S. 2020 (offenses relating to firearms and weapons).

## **+ F:161.3 GENDER IDENTITY AND GENDER EXPRESSION**

“Gender identity” and “gender expression” mean a person’s gender-related identity and gender-related appearance or behavior whether or not that gender-related identity, appearance, or behavior is associated with the person’s assigned sex at birth.

### COMMENT

1. *See* § 18-1-901(3)(h.5), C.R.S. 2020.
2. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 279, sec. 5, § 18-1-901(3)(h.5), 2020 Colo. Sess. Laws 1364, 1368.

## **F:161.5 GOODS**

“Goods” means all things that are treated as movable for the purposes of a contract for storage or transportation.

### COMMENT

1. *See* § 4-7-102(a)(7), C.R.S. 2020 (offenses relating to the Uniform Commercial Code).
2. The Committee added this instruction in 2015.

## **F:162 GOVERNMENT (GENERAL DEFINITION)**

“Government” includes the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function.

### COMMENT

1. *See* § 18-1-901(3)(i), C.R.S. 2020.
2. *See also* § 18-8-101(1), C.R.S. 2020 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).
3. In 2015, the Committee added Comment 2.

## **F:163 GOVERNMENT (FORGERY)**

“Government” means the United States, any state, county, municipality, or other political unit, any department, agency, or subdivision of any of the foregoing, or any corporation or other entity established by law to carry out governmental functions.

### COMMENT

1. *See* § 18-5-101(6), C.R.S. 2020 (forgery and impersonation offenses).

## **F:164 GOVERNMENT (IDENTITY THEFT AND RELATED OFFENSES)**

“Government” means the United States and its departments, agencies, or subdivisions; a state, county, municipality, or other political unit and its departments, agencies, or subdivisions; and a corporation or other entity established by law to carry out governmental functions.

### COMMENT

1. *See* § 18-5-901(8), C.R.S. 2020 (identity theft and related offenses).

## **F:164.5 GOVERNMENT ENTITY**

“Government entity” means the state of Colorado, a political subdivision of Colorado, or an agency of either the state of Colorado or a political subdivision of Colorado.

### COMMENT

1. *See* § 18-8-117(4), C.R.S. 2020 (unlawful sale of public services).
2. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(4), 2016 Colo. Sess. Laws 1014, 1015.

## **F:165 GOVERNMENTAL FUNCTION**

“Governmental function” includes any activity which a public servant is legally authorized to undertake on behalf of government.

### COMMENT

1. *See* § 18-1-901(3)(j), C.R.S. 2020.
2. *See also* § 18-8-101(2), C.R.S. 2020 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).
3. In 2015, the Committee added Comment 2.

## **F:166 GRAVITY KNIFE**

### COMMENT

1. Effective August 9, 2017, section 18-12-101(1)(e), C.R.S., defining “gravity knife,” was repealed. *See* Ch. 74, secs. 1, 3, § 18-12-101(1)(e), 2017 Colo. Sess. Laws 234, 234-35. Accordingly, the Committee deleted this definition in 2017.

## F:166.2 GUN SHOW

“Gun show” means the entire premises provided for an event or function, including but not limited to parking areas for the event or function, that is sponsored to facilitate, in whole or in part, the purchase, sale, offer for sale, or collection of firearms at which: twenty-five or more firearms are offered or exhibited for sale, transfer, or exchange; or not less than three gun show vendors exhibit, sell, offer for sale, transfer, or exchange firearms.

### COMMENT

1. *See* § 18-12-506(3), C.R.S. 2020 (background checks – gun shows).
2. *See* Instruction F:57.25 (defining “collection”); Instruction F:154.5 (defining “firearm” (background checks – gun shows)); Instruction F:166.8 (defining “gun show vendor”).
3. The Committee added this instruction in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 5, § 18-12-506(3), 2018 Colo. Sess. Laws 145, 152–53.

## **F:166.5 GUN SHOW PROMOTER**

“Gun show promoter” means a person who organizes or operates a gun show.

### COMMENT

1. *See* § 18-12-506(4), C.R.S. 2020 (background checks – gun shows).
2. *See* Instruction F:166.2 (defining “gun show”).
3. The Committee added this instruction in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 5, § 18-12-506(4), 2018 Colo. Sess. Laws 145, 153.

## F:166.8 GUN SHOW VENDOR

“Gun show vendor” means any person who exhibits, sells, offers for sale, transfers, or exchanges any firearm at a gun show, regardless of whether the person arranges with a gun show promoter for a fixed location from which to exhibit, sell, offer for sale, transfer, or exchange any firearm.

### COMMENT

1. See § 18-12-506(5), C.R.S. 2020 (background checks – gun shows).
2. See Instruction F:154.5 (defining “firearm” (background checks – gun shows)); Instruction F:166.2 (defining “gun show”); Instruction F:166.5 (defining “gun show promoter”).
3. The Committee added this instruction in 2018 pursuant to a legislative reorganization. See Ch. 8, sec. 5, § 18-12-506(5), 2018 Colo. Sess. Laws 145, 153.

## F:167 HANDGUN

“Handgun” means a pistol, revolver, or other firearm of any description, loaded or unloaded, from which any shot, bullet, or any other missile can be discharged; and the length of the barrel, excluding any revolving, detachable, or magazine breech, does not exceed twelve inches.

### COMMENT

1. *See* § 18-12-101(1)(e.5), C.R.S. 2020 (offenses relating to firearms and weapons).
2. *See* Instruction F:154 (defining “firearm”).
3. The terms “pistol” and “revolver” are not defined by statute.

## **F:167.5 HAZARDOUS WASTE**

“Hazardous waste” means any waste or other material, alone, mixed with, or in combination with other wastes or materials, which because of its quantity, concentration, or physical or chemical characteristics: causes, or significantly contributes to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise improperly managed.

“Hazardous waste” also means any waste or other material [insert definition of the relevant hazardous waste from the rules and regulations promulgated pursuant to the federal “Solid Waste Disposal Act” (42 U.S.C. 3251 et seq.), as amended by the federal “Resource Conservation and Recovery Act of 1976,” as amended (42 U.S.C. 6905, 6912(a), 6921–6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260–265 on July 1, 1981].

“Hazardous waste” does not include: discharges which are [insert definition of relevant point source(s) subject to permits under section 402 of the “Federal Water Pollution Control Act,” as amended]; [insert definition of relevant source, special nuclear, or byproduct material as defined by the federal “Atomic Energy Act of 1954,” as amended]; agricultural waste; domestic sewage which includes final use for beneficial purposes, including fertilizer, soil conditioner, fuel, and livestock feed, of sludge from wastewater treatment plants if such sludge meets all applicable standards of the department; irrigation return flows; inert materials deposited for construction fill or topsoil placement in connection with actual or contemplated construction at such location or for changes in land contour for agricultural purposes; or [insert definition of relevant waste or other material exempted or otherwise not regulated as a hazardous waste in the rules and regulations promulgated pursuant to the federal “Solid Waste Disposal Act” (42 U.S.C. 3251 et seq.), as amended by the federal “Resource Conservation and Recovery Act of 1976,” as amended (42 U.S.C. 6905, 6912(a), 6921-6927, 6930, 6974), as such rules and regulations are set forth in 40 C.F.R. Parts 122-124 and 260–265 on July 1, 1981].

## COMMENT

1. *See* § 18-13-112(2)(b)-(c), C.R.S. 2020 (hazardous waste violations).
2. *See* Instruction F:181.2 (defining “inert material”).
3. The Committee added this instruction in 2016.

## F:168 HAZING

“Hazing” means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that “hazing” does not include customary athletic events or other similar contests or competitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

“Hazing” includes but is not limited to: forced and prolonged physical activity; forced consumption of any food, beverage, medication or controlled substance, whether or not prescribed, in excess of the usual amounts for human consumption or forced consumption of any substance not generally intended for human consumption; and prolonged deprivation of sleep, food, or drink.

### COMMENT

1. *See* § 18-9-124(2), C.R.S. 2020 (hazing).

## **F:169 HEALTH CARE FACILITY**

“Health care facility” means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in Colorado.

### **COMMENT**

1. *See* § 18-9-122(4), C.R.S. 2020) (preventing passage to and from a health care facility; engaging in prohibited activities near a facility).

## **+ F:169.5 HEALTH CARE PROVIDER**

“Health care provider” means any individual who is authorized to practice some component of the healing arts by license, certificate, or registration.

### COMMENT

1. *See* § 18-13-131(3)(d), C.R.S. 2020 (misuse of gametes).
2. The statute refers to authorization pursuant to Title 12. If there is a dispute about whether the individual is in fact authorized under that title, the court should draft a supplemental instruction explaining the relevant requirements found in Title 12.
3. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 238, sec. 3, § 18-13-131(3)(d), 2020 Colo. Sess. Laws 1153, 1155.

## **F:170 HIGH MANAGERIAL AGENT**

“High managerial agent” means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity’s policy or the supervision in a managerial capacity of subordinate employees.

### COMMENT

1. *See* § 18-1-606(2)(a), C.R.S. 2020 (criminal liability of business entities).

## **F:171 HIGHWAY**

“Highway” means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel or the entire width of every way declared to be a public highway by any law of this state.

### COMMENT

1. *See* § 42-1-102(43), C.R.S. 2020 (vehicles and traffic).

## **F:172 HOLD HOSTAGE**

“Hold hostage” means to seize, imprison, entice, detain, confine, or persuade another person to remain in any premises or on any property during a violation of any provision of this section in order to seek concessions from law enforcement personnel or their representatives, or to prevent their entry to property or premises. The term includes imprisoning, enticing, detaining, confining, or persuading any child to remain in said premises or on said property in an attempt to secure said concessions.

### **COMMENT**

1. *See* § 18-9-119(8), C.R.S. 2020 (failure or refusal to leave premises or property upon request of a peace officer).

## **F:173 HOME DETENTION**

“Home detention” means an alternative correctional sentence or term of probation supervision wherein a defendant convicted of any felony, other than a class 1 or violent felony, is allowed to serve his [her] sentence or term of probation, or a portion thereof, within his [her] home or other approved residence.

### COMMENT

1. *See* § 17-27.8-101(1), C.R.S. 2020 (home detention programs).

## **F:173.5 HOTEL FACILITY**

“Hotel facility” means an establishment engaged in the business of furnishing overnight room accommodations primarily for transient persons.

### COMMENT

1. *See* § 18-14-101, C.R.S. 2020 (unlawful notice at a hotel facility).
2. The Committee added this instruction in 2016.

## **F:174 IDENTIFICATION DOCUMENT (FORGERY AND IMPERSONATION OFFENSES)**

“Identification document” means a document made or issued by or under the authority of the United States Government, a state, a political subdivision of a state, a foreign government, a political subdivision of a foreign government, an international governmental, or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

### COMMENT

1. *See* § 18-5-101(6.5), C.R.S. 2020 (forgery and impersonation offenses).
2. *See* Instruction F:162 (defining “government”).
3. In 2015, the Committee added the parenthetical to this instruction’s title to distinguish it from the new Instruction F:174.5 (defining “identification document” (human trafficking and slavery)).

## **F:174.5 IDENTIFICATION DOCUMENT (HUMAN TRAFFICKING AND SLAVERY)**

“Identification document” means a real or purported passport, driver’s license, immigration document, travel document, or other government-issued identification document, including a document issued by a foreign government.

### COMMENT

1. *See* § 18-3-502(5), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **F:174.7 IDENTIFICATION NUMBER**

“Identification number” means a serial or motor number placed by the manufacturer upon an article as a permanent individual identifying mark.

### COMMENT

1. *See* § 18-5-305(2), C.R.S. 2020 (altering an identification number).
2. The Committee added this instruction in 2015.

## **F:175 IDENTIFYING INFORMATION (FALSE REPORTING TO AUTHORITIES)**

“Identifying information” means a person’s name, address, birth date, social security number, or driver’s license or Colorado identification number.

### COMMENT

1. *See* § 18-8-111(1)(c), C.R.S. 2020 (false reporting to authorities).
2. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(c), 2018 Colo. Sess. Laws 2370, 2371.

### **F:175.3 IDENTIFYING INFORMATION (HOSPITAL ADMITTANCE)**

“Identifying information” includes, without limitation, a name, address, or telephone number, or health coverage information.

#### COMMENT

1. *See* § 18-13-124(1), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:175.7 ILLEGAL TELECOMMUNICATIONS EQUIPMENT**

“Illegal telecommunications equipment” means any instrument, apparatus, equipment, computer hardware, computer software, mechanism, operating procedure or code, or device, whether used separately or in combination, that is designed or adapted and is used or is intended to be used to evade the lawful charges for any telecommunications service or for concealing from any telecommunications provider or lawful authority the existence, place of origin, or destination of any telecommunication. Illegal telecommunications equipment includes cloned cellular phones.

### COMMENT

1. *See* § 18-9-309(1)(c), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:55 (defining “cloned cellular phone”); Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)); Instruction F:364 (defining “telecommunications service”).
3. The Committee added this instruction in 2016.

## F:176 ILLEGAL WEAPON

“Illegal weapon” means a blackjack, gas gun, or metallic knuckles.

### COMMENT

1. See § 18-12-102(2), C.R.S. 2020 (possessing a dangerous or illegal weapon).
2. See Instruction F:33 (defining “blackjack”); Instruction F:161 (defining “gas gun”).
3. The term “metallic knuckles” is not defined by statute.
4. Effective August 9, 2017, “gravity knife” and “switchblade knife” were deleted from the definition of “illegal weapon.” See Ch. 74, secs. 2-3, § 18-12-102(2), 2017 Colo. Sess. Laws 234, 234-35. Therefore, the Committee has amended this definition and Comment 2 accordingly.
5. In 2017, the Committee added Comment 4.

## F:176.5 IMAGE

“Image” means a photograph, film, videotape, recording, digital file, or other reproduction.

### COMMENT

1. See §§ 18-7-107(6)(b), 18-7-108(6)(b), 18-7-901(3)(a), C.R.S. 2020 (posting a private image; posting an image of suicide of a minor).
2. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 192, secs. 1, 2, §§ 18-7-107(6)(b), 18-7-108(6)(b), 2018 Colo. Sess. Laws 1276, 1277-78.
3. In 2019, pursuant to new legislation, the Committee added the citation to section 18-7-901(3)(a) in Comment 1, and it added “posting an image of suicide of a minor” to the parenthetical. See Ch. 388, sec. 1, § 18-7-901(3)(a), 2019 Colo. Sess. Laws 3455, 3456.

## F:177 IMITATION CONTROLLED SUBSTANCE

“Imitation controlled substance” means a substance that is not the controlled substance that it is purported to be but which, by appearance, including color, shape, size, and markings, by representations made, and by consideration of all relevant factors set forth below, would lead a reasonable person to believe that the substance is the controlled substance that it is purported to be.

In determining whether a substance is an imitation controlled substance, you may consider, in addition to all other relevant factors, the following: (a) statements by an owner or by anyone in control of the substance concerning the nature of the substance or its use or effect; (b) statements made to the recipient that the substance may be resold for inordinate profit which is more than the normal markup charged by legal retailers of similar pharmaceutical products; (c) whether the substance is packaged in a manner normally used for illicit controlled substances; (d) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities; and (e) the proximity of the imitation controlled substance to any controlled substances when conduct purported to be illegal was observed.

### COMMENT

1. See §§ 18-18-420(3), 18-18-421(1), C.R.S. 2020 (imitation controlled substances offenses).

## **F:177.3 IMMEDIATE FAMILY (LAW ENFORCEMENT OFFICIAL)**

“Immediate family” means a law enforcement official’s or + human services worker’s spouse, child, or parent or any other blood relative who lives in the same residence as the law enforcement official or + human services worker.

### COMMENT

1. *See* § 18-9-313(1)(b), C.R.S. 2020 (unlawfully making available on the internet personal information about a law enforcement official).
2. *See* Instruction F:45.5 (defining “human services worker”); Instruction F:196.3 (defining “law enforcement official”).
3. The Committee added this instruction in 2016.
4. In 2019, pursuant to a legislative amendment, the Committee added the phrase “or caseworker’s” to this definition, updated the statutory citation in Comment 1, and added the cross-reference to Instruction F:45.5 in Comment 2. *See* Ch. 95, sec. 1, § 18-9-313(1)(b), 2019 Colo. Sess. Laws 349, 349.
5. + In 2020, pursuant to a legislative amendment, the Committee changed the term “caseworker” to “human services worker” throughout this instruction. *See* Ch. 77, sec. 1, § 18-9-313(1)(b), 2020 Colo. Sess. Laws 315, 316.

## **F:177.7 IMMEDIATE FAMILY (LIMITED GAMING)**

“Immediate family” means a person’s spouse and any children actually living with the person.

### COMMENT

1. *See* § 44-30-103(16), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020).
2. The Committee added this instruction in 2016.
3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(16), 2018 Colo. Sess. Laws 167, 171-72.

## **F:178 IMMEDIATE FAMILY (STALKING)**

“Immediate family” includes the person’s spouse and the person’s parent, grandparent, sibling, or child.

### COMMENT

1. *See* § 18-3-602(2)(c), C.R.S. 2020 (stalking).

## F:179 IMMEDIATE PRECURSOR

“Immediate precursor” means a substance which is a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used, or likely to be used, in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

### COMMENT

1. See § 18-18-102(15), C.R.S. 2020 (controlled substances offenses).
2. This definition is generally applicable under the definition of a “controlled substance.” See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020). In addition, it is independently applicable to: § 18-6-401(1)(c)(I), (III), C.R.S. 2020 (child abuse); § 18-18-412.5, C.R.S. 2020 (unlawful possession of materials to make methamphetamine and amphetamine); § 18-18-418(1)(c), C.R.S. 2020 (exemption from criminal liability if possession is for bona fide chemistry education).

## **F:179.5 IMPLEMENT OF HUSBANDRY**

“Implement of husbandry” means every vehicle that is designed, adapted, or used for agricultural purposes. It also includes equipment used solely for the application of liquid, gaseous, and dry fertilizers. Transportation of fertilizer, in or on the equipment used for its application, shall be deemed a part of application if it is incidental to such application. It also includes hay balers, hay stacking equipment, combines, tillage and harvesting equipment, agricultural commodity handling equipment, and other heavy movable farm equipment primarily used on farms or in a livestock production facility and not on the highways. Trailers specially designed to move such equipment on highways shall be considered as component parts of such implements of husbandry.

“Implements of husbandry” includes personal property valued by the county assessor as silvicultural.

### COMMENT

1. *See* § 42-1-102(44), C.R.S. 2020 (vehicles and traffic).
2. *See* Instruction F:171 (defining “highway”); Instruction F:386 (defining “vehicle”).
3. The Committee added this instruction in 2019.

## **F:180 INCOMPLETE WRITTEN INSTRUMENT**

“Incomplete written instrument” means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

### COMMENT

1. *See* § 18-5-101(7), C.R.S. 2020 (forgery and impersonation offenses).

## F:181 IN CONNECTION WITH

“In connection with” means communications that further, advance, promote, or have a continuity of purpose and may occur before, during, or after the invitation to meet.

### COMMENT

1. *See* § 18-3-306(4), C.R.S. 2020 (internet luring of a child); § 18-3-418(3)(b) (unlawful electronic sexual communication).
2. In 2019, the legislature created the crime of unlawful electronic sexual communication, and it created a separate definition of “in connection with” as applies to that crime. *See* Ch. 145, sec. 1, § 18-3-418(3)(b), 2019 Colo. Sess. Laws 1758, 1759. Because that separate definition is identical to the existing definition of “in connection with” as applied to internet luring of a child, rather than creating an entirely new instruction, the Committee has simply added the new statutory citation to Comment 1.

## **F:181.2 INERT MATERIAL**

“Inert material” means non-water-soluble and nondecomposable inert solids together with such minor amounts and types of other materials as will not significantly affect the inert nature of such solids. The term includes but is not limited to earth, sand, gravel, rock, concrete which has been in a hardened state for at least sixty days, masonry, asphalt paving fragments, and such other non-water-soluble and nondecomposable inert solids.

### COMMENT

1. *See* § 18-13-112(2)(d), C.R.S. 2020 (hazardous waste violations).
2. The Committee added this instruction in 2016.

## **F:181.3 INFANT FORMULA**

“Infant formula” means a food that purports to be or is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.

### COMMENT

1. *See* § 18-13-114.5(3)(d), C.R.S. 2020 (sale without proof of ownership).
2. The Committee added this instruction in 2016.

## **F:181.5 INHERENTLY HAZARDOUS SUBSTANCE**

“Inherently hazardous substance” means any liquid chemical, compressed gas, or commercial product that has a flash point at or lower than thirty-eight degrees celsius or one hundred degrees fahrenheit, including butane, propane, and diethyl ether and excluding all forms of alcohol and ethanol.

### COMMENT

1. *See* § 18-18-406.6(4), C.R.S. 2020 (extraction of marijuana concentrate).
2. The Committee added this instruction in 2015. *See* Ch. 242, sec. 2, § 18-18-406.6(4), 2015 Colo. Sess. Laws 895, 896.

## F:182 INJURY

“Injury” means physical pain, illness, or any impairment of physical or mental condition.

### COMMENT

1. *See* § 42-4-1601(4)(a), C.R.S. 2020 (failure to fulfill duties after involvement in an accident involving injury or death).
2. Although this definition is identical to the definition of “bodily injury” in section § 18-1-901(3)(c), *see* Instruction F:36, a separate entry is included here because section 42-4-1601(1) does not include the adjective “bodily” (except in reference to “serious bodily injury”).

## F:183 INSANITY

Under the two legal tests defining “insanity,” a person is not accountable if:

1. he [she] was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act; or
2. he [she] suffered from a condition of mind caused by a mental disease or defect that prevented him [her] from forming a culpable state of mind that is an essential element of a crime charged.

But, under both tests, care should be taken not to confuse mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when an act is induced by any of these causes, the person is accountable to the law.

### COMMENT

1. *See* § 16-8-101.5(1)(a), (b), C.R.S. 2020.
2. *See* Instruction F:80 (defining “culpable state of mind”); Instruction F:99 (defining “diseased or defective in mind”); Instruction F:226 (defining “mental disease or defect”).

## F:183.3 INSOLVENT

A financial institution is “insolvent” when from any cause it is unable to pay its obligations in the ordinary or usual course of business or its liabilities exceed its assets.

### COMMENT

1. *See* § 18-5-210, C.R.S. 2020 (receiving deposits in a failing financial institution).
2. The Committee added this instruction in 2015.
3. In 2016, the Committee corrected the statutory citation in Comment 1.

## **F:183.5 INSUFFICIENT FUNDS (FRAUD IN OBTAINING PROPERTY OR SERVICES)**

“Insufficient funds” means a drawer has insufficient funds with the drawee to pay a check when the drawer has no checking account, negotiable order of withdrawal account, or share draft account with the drawee or has funds in such an account with the drawee in an amount less than the amount of the check plus the amount of all other checks outstanding at the time of issuance; and a check dishonored for “no account” shall also be deemed to be dishonored for “insufficient funds.”

### COMMENT

1. *See* § 18-5-205(1)(d), C.R.S. 2020.
2. *See* Instruction F:48.5 (defining “check”); Instruction F:107.5 (defining “drawee”); Instruction F:107.7 (defining “drawer”); Instruction F:241.7 (defining “negotiable order of withdrawal account” and “share draft account”).
3. The Committee added this instruction in 2015.

## **F:183.6 INSUFFICIENT FUNDS (OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE)**

“Insufficient funds” means not having a sufficient balance in account with a bank or other drawee for the payment of a check or order when the check or order is presented for payment and it remains unpaid thirty days after such presentment.

### COMMENT

1. *See* § 18-5-512(2), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **F:183.7 INSURANCE**

“Insurance” means a contract whereby one, for consideration, undertakes to indemnify another or to pay a specified or ascertainable amount or benefit upon determinable risk contingencies, and includes annuities.

### COMMENT

1. *See* § 18-5-211(7)(b), C.R.S. 2020 (incorporating section 10-1-102(12), C.R.S. 2020).
2. The Committee added this instruction in 2015.

## F:183.8 INSURANCE PRODUCER

“Insurance producer” means a person who solicits, negotiates, effects, procures, delivers, renews, continues, or binds policies of insurance for risks residing, located, or to be performed in this state; membership in a prepayment plan; or membership enrollment in a health care plan; and a public adjuster.

[However, “insurance producer” does not include the following:  
[insert relevant exemption(s) from section 10-2-105(2)(a)–(j), C.R.S. 2020].]

### COMMENT

1. See § 18-5-211(7)(c), C.R.S. 2020 (incorporating section 10-2-103(6), C.R.S. 2020).
2. See Instruction F:183.7 (defining “insurance”).
3. The term “membership in a prepayment plan” should be defined based on the relevant provisions in Title 10, Article 16, Parts 2 and 3, and the term “membership enrollment in a health care plan” should be defined based on the relevant provisions in Title 10, Article 16, Part 4.
4. The Committee added this instruction in 2015.

## **F:183.9 INSURER**

“Insurer” means every person engaged as principal, indemnitor, surety, or contractor in the business of making contracts of insurance.

### COMMENT

1. *See* § 18-5-211(7)(d), C.R.S. 2020 (incorporating section 10-1-102(13), C.R.S. 2020).
2. *See* Instruction F:183.7 (defining “insurance”).
3. The Committee added this instruction in 2015.

## **F:184 INTELLECTUAL AND DEVELOPMENTAL DISABILITY**

“Intellectual and developmental disability” means a disability that manifests before the person reaches twenty-two years of age, that constitutes a substantial disability to the affected person, and that is attributable to an intellectual and developmental disability or related conditions, including Prader-Willi syndrome, cerebral palsy, epilepsy, autism, or other neurological conditions when those conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with an intellectual and developmental disability.

### COMMENT

1. *See* § 18-6.5-102(11)(d), C.R.S. 2020 (incorporating the definition of a “person with an intellectual and developmental disability as defined in section 25.5-10-202, C.R.S.”); § 25.5-10-202(26)(a), C.R.S. 2020 (defining “intellectual and developmental disability” as set forth above, and specifying that: “Unless otherwise specifically stated, the federal definition of ‘developmental disability’ found in 42 U.S.C. sec. 15002(8) does not apply.”).
2. In 2018, the Committee modified this instruction and Comment 1 pursuant to a legislative amendment. *See* Ch. 98, sec. 3, § 25.5-10-202(26)(a), 2018 Colo. Sess. Laws 769, 770–71.
3. In 2019, the Committee modified a parenthetical quotation in Comment 1 pursuant to a legislative amendment. *See* Ch. 390, sec. 41, § 25.5-10-202(26)(a), 2019 Colo. Sess. Laws 3462, 3474.

## **F:185 INTENTIONALLY (AND WITH INTENT)**

A person acts “intentionally” or “with intent” when his [her] conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.

### COMMENT

1. *See* § 18-1-501(5), C.R.S. 2020.

## F:185.3 INTERCEPT

“Intercept” means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

### COMMENT

1. See § 18-9-301(5), C.R.S. 2020 (wiretapping and eavesdropping).
2. See Instruction F:115.2 (defining “electronic communication”); Instruction F:116.5 (defining “electronic, mechanical, or other device”); Instruction F:254.7 (defining “oral communication”); Instruction F:392.2 (defining “wire communication”); *see also* Instruction F:27.5 (defining “aural transfer”).
3. The Committee added this instruction in 2016.

## F:185.7 INTERCEPT SIGNALS

To “intercept signals” means to electronically capture, record, reveal, or otherwise access signals, including data, electronic serial numbers, and mobile identification numbers, that are emitted, transmitted, or received by a telecommunications provider without consent of the telecommunications provider or the person receiving or initiating the signal.

### COMMENT

1. *See* § 18-9-309(1)(c.5), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:116 (defining “electronic serial number”); Instruction F:231.5 (defining “mobile identification number”); Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)).
3. The Committee added this instruction in 2016.

## F:186 INTIMATE PARTS

“Intimate parts” means the external genitalia, perineum, anus, buttocks, pubes, or breast of any person.

### COMMENT

1. See § 18-3-401(2), C.R.S. 2020 (sexual offenses).
2. The terms “perineum” and “pubes” are not defined by statute. See, e.g., *United States v. Crosby*, 106 F. Supp. 2d 53, 57 n.7 (D. Me. 2000) (“The *Random House Dictionary of the English Language* provides two definitions for the perineum. The first defines it as ‘the area in front of the anus extending to the fourchette of the vulva in the female and to the scrotum in the male’ and the second as ‘the diamond-shaped area corresponding to the outlet of the pelvis, containing the anus and vulva or the roots of the penis.’ *Random House Dictionary of the English Language* 1440 (2d ed. unabridged 1987). In an illustration of the male perineum (absent the skin) in *Grant’s Atlas of Anatomy*, the urogenital and anal region are depicted as part of the male perineum, and described as such in the accompanying description. See *Grant’s Atlas of Anatomy* 185 (9th ed. 1991.”); *Nickerson v. State*, 69 S.W.3d 661, 666 n.3 (Tex. Ct. App. 2002) (“The perineum is ‘the area between the anus and the posterior part of the external genitalia.’ *Merriam Webster’s Collegiate Dictionary* 864 (10th ed. 1993.”); *Webster’s Third New International Dictionary* 1836 (2002) (defining “pubes” as “the hair that appears upon the lower part of the hypogastric region at the age of puberty,” “the lower part of the hypogastric region,” or “the pubic region”).
3. See *People v. Ramirez*, 2018 COA 129, ¶ 23, \_\_ P.3d \_\_ (holding that semen is not part of a person’s “external genitalia,” meaning it is not an “intimate part” under the statutory definition).
4. In 2019, the Committee added Comment 3.

## F:187 INTIMATE RELATIONSHIP

“Intimate relationship” means a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time.

### COMMENT

1. See § 18-6-800.3(2), C.R.S. 2020 (domestic violence).
2. See *People v. Disher*, 224 P.3d 254, 258 (Colo. 2010) (“When determining if a relationship falls within the category of intimate relationships a court may take into account the following three factors: (1) the length of time the relationship has existed, or did exist; (2) the nature or type of the relationship; (3) the frequency of interaction between the parties. These factors are not intended to be an exhaustive list of the characteristics a court may consider; they are a guide that may be used in whole or in part. However, an intimate relationship should not include mere social or business acquaintances and friends.”).

## **F:188 INTOXICATION**

“Intoxication” means a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.

### COMMENT

1. *See* § 18-1-804(4), C.R.S. 2020.

## **F:188.3 INVESTIGATIVE OR LAW ENFORCEMENT OFFICER**

“Investigative or law enforcement officer” means any officer of the United States or of the state of Colorado or a political subdivision thereof who is empowered by law to conduct investigations of, or to make arrests for, [insert relevant offense[s] from Chapter 9-3], and any attorney authorized by law to prosecute or participate in the prosecution of such offense[s].

### COMMENT

1. *See* § 18-9-301(6), C.R.S. 2020 (wiretapping and eavesdropping).
2. The Committee added this instruction in 2016.

## **F:188.5 ISSUE (FRAUD IN OBTAINING PROPERTY OR SERVICES)**

A person “issues” a check when he [she] makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.

### COMMENT

1. *See* § 18-5-205(1)(e), C.R.S. 2020.
2. *See* Instruction F:48.5 (defining “check”).
3. The Committee added this instruction in 2015.

## **F:189 ISSUER (FINANCIAL TRANSACTION DEVICE CRIMES)**

“Issuer” means any person or banking, financial, or business institution, corporation, or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling a financial transaction device.

### COMMENT

1. *See* § 18-5-701(4), C.R.S. 2020 (financial transaction device crimes).

## **F:190 ISSUER (IDENTITY THEFT AND RELATED OFFENSES)**

“Issuer” means a person, a banking, financial, or business institution, or a corporation or other business entity that assigns financial rights by acquiring, distributing, controlling, or cancelling an account or a financial device.

### COMMENT

1. *See* § 18-5-901(9), C.R.S. 2020 (identity theft and related offenses).
2. *See* Instruction F:150 (defining “financial device”).

## **F:191 JUDGE (RETALIATION AGAINST A JUDGE)**

“Judge” means any justice of the supreme court, judge of the court of appeals, district court judge, juvenile court judge, probate court judge, water court judge, county court judge, district court magistrate, county court magistrate, municipal judge, administrative law judge, or unemployment insurance hearing officer.

### COMMENT

1. *See* § 18-8-615(3), C.R.S. 2020.

## **F:192 JUROR**

“Juror” means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury, and includes any person who has been drawn or summoned to attend as a prospective juror.

### COMMENT

1. *See* § 18-8-601(1), C.R.S. 2020 (offenses relating to judicial and other proceedings).

## **F:193 JUVENILE**

“Juvenile” means any person under the age of eighteen years.

### COMMENT

1. *See* § 18-12-101(1)(e.7), C.R.S. 2020 (offenses relating to firearms and weapons).

## **F: 193.5 JUVENILE (PRIVATE IMAGE)**

“Juvenile” means a person under eighteen years of age.

### COMMENT

1. *See* § 18-7-109(8)(a), C.R.S. 2020.
2. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(8)(a), 2017 Colo. Sess. Laws 2012, 2016.

## F:194 KNIFE

“Knife” means any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, but does not include a hunting or fishing knife carried for sports use.

### COMMENT

1. See § 18-12-101(1)(f), C.R.S. 2020 (offenses relating to firearms and weapons).
2. Section 18-12-101(1)(f) states that “[t]he issue that a knife is a hunting or fishing knife must be raised as an affirmative defense.”
3. See *A.P.E. v. People*, 20 P.3d 1179, 1183 (Colo. 2001) (because all knives of any blade length necessarily meet the catchall definition in § 18-12-101(1)(f), a conclusion that any knife is per se illegal would render meaningless the blade length distinction); *People in Interest of J.W.T.*, 93 P.3d 580, 582-83 (Colo. App. 2004) (although a knife is a deadly weapon when it is used or intended to be used during the commission of another crime, a person carrying a knife with a blade less than three and one-half inches in length, on school grounds, cannot be prosecuted under § 18-12-105.5(1) unless the prosecution can also establish that the person used or intended to use the knife as a weapon).

## F:195 KNOWINGLY OR WILLFULLY

A person acts “knowingly” or “willfully” with respect to conduct or to a circumstance described by a statute defining an offense when he [she] is aware that his [her] conduct is of such nature or that such a circumstance exists. A person acts “knowingly” or “willfully,” with respect to a result of his [her] conduct, when he [she] is aware that his [her] conduct is practically certain to cause the result.

### COMMENT

1. *See* § 18-1-501(6), C.R.S. 2020.

## **F:196 KNOWLEDGE (OF DRIVING RESTRAINT)**

“Knowledge” means actual knowledge of any restraint from whatever source or knowledge of circumstances sufficient to cause a reasonable person to be aware that such person’s license or privilege to drive was under restraint. “Knowledge” does not mean knowledge of a particular restraint or knowledge of the duration of restraint.

### COMMENT

1. See § 42-2-138(4)(a), C.R.S. 2020.
2. See *People v. Ellison*, 14 P.3d 1034, 1035, 1040 (Colo. 2000) (“the definition of knowledge in Colorado’s driving under restraint statute does not violate the guarantees of due process of law” because “this statute requires both a subjective and objective component of knowledge” and “a driver may not be punished without proof of actual knowledge of facts that show that a reasonable person would believe his license to drive was under restraint”).

## F:196.2 LARGE-CAPACITY MAGAZINE

“Large-capacity magazine” means a fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is designed to be readily converted to accept, more than fifteen rounds of ammunition; a fixed, tubular shotgun magazine that holds more than twenty-eight inches of shotgun shells, including any extension device that is attached to the magazine and holds additional shotgun shells; or a nontubular, detachable magazine, box, drum, feed strip, or similar device that is capable of accepting more than eight shotgun shells when combined with a fixed magazine.

“Large-capacity magazine” does not mean a feeding device that has been permanently altered so that it cannot accommodate more than fifteen rounds of ammunition; an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition; or a tubular magazine that is contained in a lever-action firearm.

### COMMENT

1. See § 18-12-301(2), C.R.S. 2020 (large-capacity ammunition magazine offenses).
2. The Committee added this instruction in 2016.

## **F:196.3 LAW ENFORCEMENT OFFICIAL**

“Law enforcement official” means a peace officer, a judge, or a prosecutor.

### COMMENT

1. *See* § 18-9-313(1)(c), C.R.S. 2020 (unlawfully making available on the internet personal information about a law enforcement official).
2. *See* Instruction F:191 (defining “judge”); Instruction F:263 (defining “peace officer”); Instruction F:291.5 (defining “prosecutor”).
3. The Committee added this instruction in 2016.
4. In 2019, the Committee updated the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 95, sec. 1, § 18-9-313(1)(c), 2019 Colo. Sess. Laws 349, 349.

## **F:196.35 LAW ENFORCEMENT PERSONNEL**

“Law enforcement personnel” means any peace officer, prosecutor, criminal investigator, crime analyst, or other individual who is employed by a law enforcement agency or district attorney’s office and who performs or assists in investigative duties that may involve sexually exploitative materials.

### COMMENT

1. *See* § 18-6-403(2)(e.5), C.R.S. 2020 (sexual exploitation of a child).
2. *See* Instruction F:263 (defining “peace officer”); Instruction F:341 (defining “sexually exploitative material”).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 141, sec. 1, § 18-6-403(2)(e.5), 2017 Colo. Sess. Laws 470, 470.

## **F:196.4 LAWFUL AUTHORIZATION (UNAUTHORIZED TRADING IN TELEPHONE RECORDS)**

“Lawful authorization” means authorization from the person or the agent of the person to whom the telephone number is assigned or from the person or the agent of the person who purchases the telephone service.

### COMMENT

1. *See* § 18-13-125(2)(a), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:196.5 LEASE**

“Lease” means any grant of use and possession for consideration, with or without an option to buy.

### COMMENT

1. *See* § 18-5-801(1), C.R.S. 2020 (equity skimming and related offenses).
2. The Committee added this instruction in 2015.

## F:196.55 LEGAL BUYER

“Legal buyer” means a buyer who resides in another state or country which does not restrict the possession of the specific gambling device in question.

### COMMENT

1. *See* § 18-10-105(1.5), C.R.S. 2020 (possession of a gambling device or record).
2. *See* Instruction F:160.3 (defining “gambling device”).
3. When using this definition, the court should draft an instruction explaining its legal determination concerning the gambling device laws of the other state or country.
4. The Committee added this instruction in 2016.

## F:196.6 LICENSED GAMING ESTABLISHMENT

“Licensed gaming establishment” means any premises licensed pursuant to the Limited Gaming Act of 1991 for the conduct of gaming.

### COMMENT

1. *See* § 44-30-103(18), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:196.7 (defining “licensed premises”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(18), 2018 Colo. Sess. Laws 167, 172.

## F:196.65 LICENSED GUN DEALER

“Licensed gun dealer” means any person who is a licensed importer, licensed manufacturer, or licensed dealer in firearms pursuant to federal law.

### COMMENT

1. See § 18-12-506(6), C.R.S. 2020 (background checks – gun shows).
2. See Instruction F:154.5 (defining “firearm” (background checks – gun shows)); *see also* 18 U.S.C. § 923 (firearms licensing).
3. The Committee added this instruction in 2018 pursuant to a legislative reorganization. See Ch. 8, sec. 5, § 18-12-506(6), 2018 Colo. Sess. Laws 145, 153.

## F:196.7 LICENSED PREMISES

“Licensed premises” means that portion of any premises licensed for the conduct of limited gaming.

### COMMENT

1. *See* § 44-30-103(19), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. The Committee added this instruction in 2016.
3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(19), 2018 Colo. Sess. Laws 167, 172.

## F:196.8 LICENSEE

“Licensee” means any person licensed under the Limited Gaming Act of 1991.

### COMMENT

1. *See* § 44-30-103(20), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. The Committee added this instruction in 2016.
3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(20), 2018 Colo. Sess. Laws 167, 172.

## **F:196.9 LIMITED CARD GAMES AND SLOT MACHINES, LIMITED GAMING, OR GAMING**

“Limited card games and slot machines,” “limited gaming,” or “gaming” means physical and electronic versions of slot machines, craps, roulette, and the card games of poker and blackjack authorized by the Limited Gaming Act of 1991 and defined and regulated by the Colorado limited gaming control commission, each game having a maximum single bet of one hundred dollars.

### COMMENT

1. *See* § 44-30-103(22), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:31.2 (defining “bet”); Instruction F:33.5 (defining “blackjack” (limited gaming offenses)); Instruction F:76.7 (defining “craps”); Instruction F:279.5 (defining “poker”); Instruction F:324.5 (defining “roulette”); Instruction F:345.6 (defining “slot machine”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(22), 2018 Colo. Sess. Laws 167, 172.

## **F:197 LITTER**

“Litter” means all rubbish, waste material, refuse, garbage, trash, debris, or other foreign substances, solid or liquid, of every form, size, kind, and description.

### COMMENT

1. *See* § 18-4-511(3)(a), C.R.S. 2020 (littering of public or private property).

## F:197.5 LIVE PERFORMANCE

“Live performance” means a recitation, rendering, or playing of a series of images, musical, spoken, or other sounds, or a combination of images and sounds, in an audible sequence.

### COMMENT

1. *See* § 18-4-604.3(5), C.R.S. 2020 (theft of sound recordings).
2. The Committee added this instruction in 2016.

## **F:198 LIVESTOCK (TAMPERING)**

“Livestock” means any domestic animal generally used for food or in the production of food, including, but not limited to, cattle, sheep, goats, poultry, swine, or llamas.

### COMMENT

1. *See* § 18-9-207(1)(b), C.R.S. 2020 (tampering with livestock).
2. In 2017, the Committee added the parenthetical to the instruction’s title to distinguish it from Instruction F:198.5.

## **F:198.5 LIVESTOCK (EMERGENCY ASSISTANCE)**

“Livestock” means cattle, horses, mules, burros, sheep, poultry, swine, llamas, and goats.

### COMMENT

1. *See* § 13-21-108.4(1)(c), C.R.S. 2020.
2. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 127, sec. 1, § 13-21-108.4(1)(a), 2017 Colo. Sess. Laws 435, 435.

## **F:199 LOADED**

A handgun is “loaded” if [there is a cartridge in the [chamber of the handgun] [cylinder of the handgun, if the handgun is a revolver]] [the handgun, and the ammunition for such handgun, are carried on the person of a person under the age of eighteen years, or are in such proximity to such person that he [she] could readily gain access to the handgun and the ammunition and load the handgun].

### COMMENT

1. *See* § 18-12-108.5(3), C.R.S. 2020 (possession of a handgun by a juvenile; defining this term for purposes of explaining the meaning of the term “unloaded,” as used in the affirmative defense related to travel that is established by section 18-12-108.5 (2)(a)(V)).

## F:199.2 LOAN FINANCE CHARGE

“Loan finance charge” means the sum of all charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to or as a condition of the extension of credit, whether paid or payable by the debtor, the lender, or any other person on behalf of the debtor to the lender or to a third party, including, but not limited to, any of the following types of charges that are applicable: interest or any amount payable under a point, discount, or other system of charges, however denominated; premium or other charge for any guarantee of insurance protecting the lender against the debtor’s default or other credit loss; charges incurred for investigating the collateral or credit-worthiness of the debtor or for commissions or brokerage for obtaining the credit.

[The term does not include the charges as a result of [insert explanation(s) of additional charges as defined in section 5-2-202, C.R.S.; delinquency charges as defined in section 5-2-203, C.R.S.; deferral charges as defined in section 5-2-204, C.R.S.; similar charges specifically authorized by law; or additional interest charges permitted by section 5-12-107(3), C.R.S.]].

### COMMENT

1. See § 18-15-101(6), C.R.S. 2020 (unlawful lending practices).
2. See Instruction F:89.7 (defining “debtor”); Instruction F:135.5 (defining “extend credit”).
3. In the first paragraph, the court may wish to excise from the definition any types of charges that are not applicable in the particular case.
4. The Committee added this instruction in 2016.

## F:199.3 LOAN FINDER

“Loan finder” means any person who, directly or indirectly, serves or offers to serve as a lender or as an agent to obtain a loan or who holds himself or herself out as capable of obtaining a loan for any person.

### COMMENT

1. See § 18-15-109(1)(c), C.R.S. 2020 (loan finders).
2. See also § 5-1-301(25), C.R.S. 2020 (defining “loan,” and incorporated by reference by section 18-15-109(1)(b)).
3. See Instruction H:67.8 (affirmative defense of “exempt person or organization”), which provides an affirmative defense to the crime of collection of prohibited fees by a loan finder, see Instruction 15:08.
4. The Committee added this instruction in 2016.
5. In 2017, the Committee changed the word “himself” to the phrase “himself or herself” pursuant to a legislative amendment. See Ch. 246, sec. 5, § 18-15-109(1)(c), 2017 Colo. Sess. Laws 1030, 1041.

## **F:199.5 LOCAL JURISDICTION**

“Local jurisdiction” means a town, city, city and county, or the unincorporated area of a county.

### COMMENT

1. *See* § 18-10.5-102(4), C.R.S. 2020 (simulated gambling devices).
2. The Committee added this instruction in 2016.

**F:199.7 LOCAL LAW ENFORCEMENT AGENCY  
(PURCHASES OF VALUABLE ARTICLES)**

“Local law enforcement agency” means any marshal’s office, police department, or sheriff’s office with jurisdiction in the locality in which the purchaser makes the purchase.

COMMENT

1. See § 18-16-102(1), C.R.S. 2020.
2. See Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”).
3. The Committee added this instruction in 2016.

## **F:199.8 LOCAL LAW ENFORCEMENT AGENCY (SALE OF SECONDHAND PROPERTY)**

“Local law enforcement agency” means any marshal’s office, police department, or sheriff’s office with jurisdiction in the locality in which the sale or trade occurs.

### COMMENT

1. *See* § 18-13-114(5)(a), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:200 LOCKED SPACE**

“Locked space” means secured at all points of ingress or egress with a locking mechanism designed to limit access such as with a key or combination lock.

### **COMMENT**

1. *See* § 18-18-102(16.5), C.R.S. 2020 (defining the term for purposes of lawful marijuana cultivation).

## **F:201 LOITER**

“Loiter” means to be dilatory, to stand idly around, to linger, delay, or wander about, or to remain, abide, or tarry in a public place.

### COMMENT

1. *See* § 18-9-112(1), C.R.S. 2020.

## F:202 LOW-POWER SCOOTER

“Low-power scooter” means a self-propelled vehicle designed primarily for use on the roadways with not more than three wheels in contact with the ground, no manual clutch, and either: A cylinder capacity not exceeding fifty cubic centimeters if powered by internal combustion; or a wattage not exceeding four thousand four hundred seventy-six if powered by electricity.

“Low-power scooter” does not include a toy vehicle, bicycle, electrical assisted bicycle, electric scooter, wheelchair, or any device designed to assist people with mobility impairments who use pedestrian rights-of-way.

### COMMENT

1. See § 42-1-102(48.5), C.R.S. 2020 (vehicles and traffic).
2. See Instruction F:32 (defining “bicycle”); Instruction F:114.9 (defining “electric scooter”); Instruction F:115 (defining “electrical assisted bicycle”).
3. In 2019, pursuant to a legislative amendment, the Committee added the term “electric scooter” to the instruction’s second paragraph, and it changed the phrase “mobility-impaired people” to “people with mobility impairments.” See Ch. 271, sec. 1, § 42-1-102(48.5)(b), 2019 Colo. Sess. Laws 2557, 2557. The Committee also added Comment 2.

## **F:202.5 LOW-SPEED ELECTRIC VEHICLE**

“Low-speed electric vehicle” means a vehicle that is self-propelled utilizing electricity as its primary propulsion method, has at least three wheels in contact with the ground, does not use handlebars to steer, and exhibits the manufacturer’s compliance with federal regulations or displays a seventeen-character vehicle identification number as provided in federal regulations.

### **COMMENT**

1. *See* § 42-1-102(48.6), C.R.S. 2020 (vehicles and traffic).
2. *See* Instruction F:386 (defining “vehicle”).
3. Regarding compliance with federal regulations, *see* 49 C.F.R. 565.
4. The Committee added this instruction in 2019.

## F:203 MACHINE GUN

“Machine gun” means any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger.

### COMMENT

1. *See* § 18-12-101(1)(g), C.R.S. 2020 (offenses relating to firearms and weapons).
2. *See* Instruction F:154 (defining “firearm”).

## F:203.5 MAINTAIN

“Maintain” means to provide sustenance or care for a person less than eighteen years of age and includes but is not limited to providing shelter, food, clothing, drugs, medical care, or communication services.

### COMMENT

1. *See* § 18-3-502(6), C.R.S. 2020 (human trafficking and slavery).
2. *See* § 18-3-502(8), C.R.S. 2020 (defining “minor,” as incorporated above).
3. The Committee added this instruction in 2015.

## **F:204 MAJOR COMPONENT MOTOR VEHICLE PART**

“Major component motor vehicle part” means any of the following parts of a motor vehicle: the engine; the transmission; a front fender; the hood; any door allowing entrance to or egress from the passenger compartment of the vehicle; the front or rear bumper; a rear quarter panel; the deck lid, tailgate, or hatchback; the trunk floor pan; the cargo box of a pickup truck; the frame, or if the vehicle has a unitized body, the supporting structure or structures that serve as the frame; the cab of a truck; the body of a passenger vehicle; an airbag or airbag assembly; a wheel or tire; or any other part of a motor vehicle that is comparable in design or function to any of the parts that have been listed, or that have been labeled with a unique traceable identification number, by the manufacturer of the motor vehicle or part.

### COMMENT

1. *See* § 18-4-420(5)(b)(I)-(XVI), C.R.S. 2020 (chop shop activity).
2. *See* Instruction F:238 (defining “motor vehicle”).

## **F:204.5 MAKES AVAILABLE**

“Makes available” means to facilitate contact between a person less than eighteen years of age and another person.

### COMMENT

1. *See* § 18-3-502(7), C.R.S. 2020 (human trafficking and slavery).
2. *See* § 18-3-502(8), C.R.S. 2020 (defining “minor,” as incorporated above).
3. The Committee added this instruction in 2015.

## F:205 MALT LIQUORS

“Malt liquors” includes beer and means any beverage obtained by the alcoholic fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof, in water containing [more than three and two-tenths percent of alcohol by weight or four percent alcohol by volume] [not less than one-half of one percent alcohol by volume].

[For purposes of [insert relevant license found in section 44-3-401, C.R.S. 2020], “malt liquors” includes fermented malt beverages when purchased from a licensed retailer.]

### COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2020 (introducing contraband in the first degree; incorporating this definition from section 44-3-103(30), C.R.S. 2020).
2. *See* Instruction F:148 (defining “fermented malt beverage”).
3. In 2016, the Committee corrected the definition by changing the phrase “two-tenths alcohol” to “two-tenths percent of alcohol.”
4. In 2018, the Committee added brackets to one clause and added a second bracketed clause at the end of this definition. The Committee did so because the legislature provided two alternative versions of this definition, depending on the date. Therefore, for offenses allegedly committed prior to January 1, 2019, the first bracketed alternative should be used; for offenses allegedly committed on January 1, 2019, or after, the second alternative should be used. Furthermore, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 152, secs. 2, 8, §§ 44-3-103(30), 18-8-203(1)(a), 2018 Colo. Sess. Laws 949, 955, 1078.
5. In 2019, pursuant to a legislative amendment, the Committee added the second paragraph to this instruction, added Comment 2, and

renumbered the subsequent comments. *See* Ch. 1, sec. 4, § 44-3-103(30)(b), 2019 Colo. Sess. Laws 1, 5.

## **F:206 MANUFACTURE (CONTROLLED SUBSTANCES)**

“Manufacture” means to produce, prepare, propagate, compound, convert, or process a controlled substance, directly or indirectly, by extraction from substances of natural origin, chemical synthesis, or a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance by a practitioner as an incident to the practitioner’s administering or dispensing of a controlled substance in the course of the practitioner’s professional practice; or by a practitioner, or by the practitioner’s authorized agent under the practitioner’s supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

### COMMENT

1. *See* § 18-18-102(17), C.R.S. 2020.
2. *See* Instruction F:13 (defining “agent”).

## **F:207 MANUFACTURE (IMITATION CONTROLLED SUBSTANCE)**

“Manufacture” means the production, preparation, compounding, processing, encapsulating, packaging or repackaging, or labeling or relabeling of an imitation controlled substance.

### COMMENT

1. *See* § 18-18-420(4), C.R.S. 2020.
2. *See* Instruction F:287 (defining “production”).

## **F:207.5 MANUFACTURER**

“Manufacturer” means the person who actually makes a recording or causes a recording to be made.

“Manufacturer” does not include a person who manufactures a medium upon which sounds or images can be recorded or stored, or who manufactures the cartridge or casing itself, unless such person actually makes the recording or causes the recording to be made.

### COMMENT

1. *See* § 18-4-601(1.7), C.R.S. 2020 (theft of sound recordings).
2. *See* Instruction F:269.5 (defining “person” (theft of sound recordings)).
3. The Committee added this instruction in 2016.

## F:208 MARIJUANA

“Marijuana” means all parts of the plant *cannabis sativa* L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. It does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, or sterilized seed of the plant which is incapable of germination if these items exist apart from any other item defined as “marijuana” in this instruction.

“Marijuana” does not include “marijuana concentrate” or prescription drug products approved by the federal food and drug administration and dispensed by a pharmacy or prescription drug outlet registered by the state of Colorado.

### COMMENT

1. *See* § 18-18-102(18), C.R.S. 2020 (controlled substances offenses); *see also* Colo. Const. Art. XVIII, § 16(2)(f); § 27-80-203(15), C.R.S. 2020.
2. In 2018, the Committee modified the second paragraph of this instruction pursuant to a legislative amendment. *See* Ch. 367, sec. 2, § 18-18-102(18)(a), 2018 Colo. Sess. Laws 2210, 2211.

## **F:208.5 MARIJUANA (POSSESSION OR CONSUMPTION BY UNDERAGE PERSON)**

“Marijuana” or “marihuana” means all parts of the plant of the genus *cannabis* whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marihuana concentrate.

“Marijuana” or “marihuana” does not include industrial hemp, nor does it include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.

### COMMENT

1. *See* § 18-13-122(c), C.R.S. 2020 (incorporating the definition of “marijuana” from article XVIII, section 16(2)(f), of the Colorado Constitution).
2. The Committee added this instruction in 2016.

## **F:209 MARIJUANA ACCESSORIES**

“Marijuana accessories” means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(g).

## F:210 MARIJUANA CONCENTRATE

“Marijuana concentrate” means hashish, tetrahydrocannabinols, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinols.

### COMMENT

1. *See* § 18-18-102(19), C.R.S. 2020 (controlled substances offenses); *see also* § 27-80-203(16), C.R.S. 2020.

## **F:211 MARIJUANA CULTIVATION FACILITY**

“Marijuana cultivation facility” means an entity licensed to cultivate, prepare, and package marijuana and sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(h).

## F:212 MARIJUANA ESTABLISHMENT

“Marijuana establishment” means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(i).

## **F:213 MARIJUANA PRODUCT MANUFACTURING FACILITY**

“Marijuana product manufacturing facility” means an entity licensed to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(j).

## F:214 MARIJUANA PRODUCTS

“Marijuana products” means concentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(k).

## **F:215 MARIJUANA TESTING FACILITY**

“Marijuana testing facility” means an entity licensed to analyze and certify the safety and potency of marijuana.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(l).

## **F:216 MASTURBATION (SEXUAL EXPLOITATION OF CHILDREN)**

“Masturbation” means the real or simulated touching, rubbing, or otherwise stimulating of a person’s own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts, or developing or undeveloped breast area (if the person is a child), by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person.

### COMMENT

1. *See* § 18-6-403(2)(f), C.R.S. 2020.

## **F:217 MASTURBATION (PROSTITUTION)**

“Masturbation” means stimulation of the genital organs by manual or other bodily contact exclusive of sexual intercourse.

### COMMENT

1. *See* § 18-7-201(2)(c), C.R.S. 2020.

## **F:218 MASTURBATION (INDECENT EXPOSURE)**

“Masturbation” means the real or simulated touching, rubbing, or otherwise stimulating of a person’s own genitals or pubic area for the purpose of sexual gratification or arousal of the person, regardless of whether the genitals or pubic area is exposed or covered.

### COMMENT

1. *See* § 18-7-302(5), C.R.S. 2020.

## **F:219 MASTURBATION (CHILD PROSTITUTION)**

“Masturbation” means stimulation of the genital organs by manual or other bodily contact, or by any object, exclusive of sexual intercourse.

### COMMENT

1. *See* § 18-7-401(5), C.R.S. 2020.

## F:219.3 MATERIAL

“Material” means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three-dimensional obscene device.

### COMMENT

1. *See* § 18-7-101(1), C.R.S. 2020 (obscenity).
2. *See* Instruction F:246.3 (defining “obscene device”).
3. The Committee added this instruction in 2016.

## F:219.5 MATERIAL INFORMATION

“Material information” is a statement or assertion directly pertaining to an application for insurance or an insurance claim that a reasonable person making such an assertion knows or should know will affect the action, conduct, or decision of the person who receives or is intended to receive the asserted information in a manner that would directly or indirectly benefit the person making the assertion.

### COMMENT

1. *See* § 18-5-211(7)(e), C.R.S. 2020 (insurance fraud).
2. *See* Instruction F:54.5 (defining “claim”); Instruction F:183.7 (defining “insurance”).
3. The Committee added this instruction in 2015.

## **F:219.7 MATERIALLY (ELECTRONIC MAIL FRAUD)**

Header information or registration information is “materially” falsified if it is altered or concealed in a manner that would impair the ability of a recipient of the message, an internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation.

### COMMENT

1. *See* § 18-5-308(1), C.R.S. 2020 (incorporating 18 U.S.C. § 1037(a) (2014), which uses the term “materially,” as defined in 18 U.S.C. § 1037(d)(2) (2014)).
2. The Committee added this instruction in 2015.

## **F:220 MATERIALLY FALSE STATEMENT**

“Materially false statement” means any false statement, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of an official proceeding, or the action or decision of a public servant, or the performance of a governmental function.

### COMMENT

1. *See* § 18-8-501(1), C.R.S. 2020 (perjury and related offenses); § 18-8-801(1), C.R.S. 2020 (reporting use of excessive force by peace officers; incorporating the definition of section 18-8-501(1)).

**F:221 MEDICAL CAREGIVER (MANSLAUGHTER –  
AFFIRMATIVE DEFENSE OF “MEDICAL CAREGIVER”)**

“Medical caregiver” means a physician, registered nurse, nurse practitioner, physician assistant, or anesthesiologist assistant licensed by this state.

COMMENT

1. *See* § 18-3-104(4)(b)(II), C.R.S. 2020.

## **F:222 MEDICAL INFORMATION**

“Medical information” means any information contained in the medical records or any information pertaining to the medical, mental health, and health care services performed at the direction of a physician or other licensed health care provider which is protected by the physician patient privilege.

### **COMMENT**

1. *See* § 18-4-412(2)(b), C.R.S. 2020 (theft of medical records or medical information).

## **F:223 MEDICAL MARIJUANA CENTER**

“Medical marijuana center” means an entity licensed by a state agency to sell marijuana and marijuana products.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(m).

## **F:224 MEDICAL RECORD**

“Medical record” means the written or graphic documentation, sound recording, or computer record pertaining to medical, mental health, and health care services, including medical marijuana services, that are performed at the direction of a physician or other licensed health care provider on behalf of a patient by physicians, dentists, nurses, service providers, emergency medical service providers, mental health professionals, prehospital providers, or other health care personnel.

“Medical record” includes such diagnostic documentation as X rays, electrocardiograms, electroencephalograms, and other test results.

“Medical record” includes data entered into the prescription drug monitoring program.

### COMMENT

1. *See* § 18-4-412(2)(a), C.R.S. 2020 (theft of medical records or medical information).
2. *See* Instruction F:119 (defining “emergency medical service provider”).

## F:225 MEDICAL USE

“Medical use” means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient’s debilitating medical condition, which may be authorized only after a diagnosis of the patient’s debilitating medical condition by a physician or physicians.

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(b) (medical marijuana).
2. *See* Instruction F:89 (defining “debilitating medical condition”); Instruction F:259 (defining “patient”); Instruction F:279 (defining “physician”); Instruction F:287 (defining “production”).

## F:226 MENTAL DISEASE OR DEFECT

“Mental disease or defect” means only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance; except that it does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

### COMMENT

1. *See* + §§ 16-8-101.5(2)(c), 16-8-102(4.7), C.R.S. 2020 (insanity).
2. + In 2020, the Committee updated the statutory citation in Comment 1 pursuant to new legislation. *See* Ch. 279, sec. 2, § 16-8-101.5(2)(c), 2020 Colo. Sess. Laws 1364, 1365.

## F:226.5 MENTAL HEALTH DISORDER

“Mental health disorder” includes one or more substantial disorders of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior.

An intellectual or developmental disability is insufficient to either justify or exclude a finding of a mental health disorder.

### COMMENT

1. See § 18-6.5-102(11)(e), C.R.S. 2020 (defining “a person with a disability,” for purposes of defining the terms “at-risk adult” and “at-risk juvenile,” and incorporating the above definition from section 27-65-102(11.5), C.R.S. 2020).
2. Section 27-65-102(11.5) refers to an intellectual *or* developmental disability. The General Assembly has defined “developmental disability,” see Instruction F:98, which has the same meaning as “intellectual *and* developmental disability,” see Instruction F:184. However, the General Assembly has not provided a standalone definition of “intellectual disability.”
3. In 2017, pursuant to a legislative amendment, the Committee changed the phrase “person with a mental illness” to “mental health disorder,” updated the statutory cross-reference in Comment 1, and updated Comment 2. See Ch. 263, sec. 233, § 27-65-102(11.5), 2017 Colo. Sess. Laws 1249, 1340.

## **F:227 MENTAL HEALTH PROFESSIONAL**

“Mental health professional” means a mental health professional licensed to practice medicine, a person licensed as a mental health professional, a person licensed as a nurse, a certified nurse aide, or a licensed psychiatric technician.

### COMMENT

1. *See* § 18-1.3-501(1.7)(b), C.R.S. 2020 (sentence enhancement provision applicable to third degree assault and reckless endangerment).
2. In cases where there is a factual dispute relevant to the determination of whether a mental health professional was licensed or certified, draft a supplemental instruction based on the relevant provision referenced in section 18-1.3-501(1.7)(b).

## F:228 MENTALLY IMPAIRED

“Mental impairment” means any behavioral, mental or psychological disorder such as an intellectual and developmental disability, organic brain syndrome, behavioral or mental health disorder, or specific learning disability.

### COMMENT

1. *See* § 24-34-501(1.3)(b)(II), C.R.S. 2020 (housing practices).
2. *See* Instruction F:184 (defining “intellectual and developmental disability”); Instruction F:226.5 (defining “mental health disorder”).
3. In 2015, the Committee modified this instruction to reflect the legislative correction of an obsolete internal reference which the Committee had noted in COLJI-Crim. Comment 1 (2014)). *See* Ch. 259, sec. 40, § 18-6.5-102(11)(f), 2015 Colo. Sess. Laws 940, 952.
4. In 2017, pursuant to a legislative amendment, the Committee modified this definition pursuant to a legislative amendment, and it added Comment 2. *See* Ch. 263, sec. 179, § 24-34-501(1.3)(b)(II), 2017 Colo. Sess. Laws 1249, 1321–22.

## **F:229 METHAMPHETAMINE PRECURSOR DRUG**

“Methamphetamine precursor drug” means ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, isomers, or salts of isomers.

“Methamphetamine precursor drug” does not include a substance contained in any package or container that is labeled by the manufacturer as intended for pediatric use.

### COMMENT

1. *See* § 18-18-412.8(4)(a)(II), C.R.S. 2020 (retail sale of methamphetamine precursor drugs).

## **F:229.2 MINOR (DISPENSING VIOLENT FILMS)**

“Minor” means any person under eighteen years of age.

### COMMENT

1. *See* § 18-7-601(2), C.R.S. 2020.
2. The Committee added this instruction in 2016.

### **F:229.3 MINOR (OBSCENITY)**

“Minor” means a person under eighteen years of age.

#### COMMENT

1. *See* § 18-7-101(1.5), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:229.5 MISLABELED**

“Mislabeled” means varying from the standard of truth or disclosure in labeling prescribed or pursuant to [insert description of any statute of the state of Colorado or the United States providing criminal penalties for such variance], or set by established commercial usage.

### COMMENT

1. *See* § 18-5-301(1)(d), C.R.S. 2020 (fraud in effecting sales).
2. The Committee added this instruction in 2015.

## **F:230 MISSILE**

“Missile” means any object or substance.

### COMMENT

1. *See* § 18-9-116(3), C.R.S. 2020 (projecting missiles at vehicles or bicyclists).

## **F:230.5 MISTREATED OR MISTREATMENT (AT-RISK PERSONS)**

“Mistreated” or “mistreatment” means abuse, caretaker neglect, or exploitation.

### COMMENT

1. *See* § 18-6.5-102(10.5), C.R.S. 2020.
2. *See* Instruction F:03.7 (defining “abuse” (at-risk persons)); Instruction F:45 (defining “caretaker neglect”); Instruction F:132.5 (defining “exploitation”).
3. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 172, sec. 2, § 18-6.5-102(10.5), 2016 Colo. Sess. Laws 545, 547.

## **F:231 MISTREATMENT (CRUELTY TO ANIMALS)**

“Mistreatment” means every act or omission that causes or unreasonably permits the continuation of unnecessary or unjustifiable pain or suffering.

### COMMENT

1. *See* § 18-9-201(3), C.R.S. 2020.
2. *See* Instruction F:251 (defining “omission”).
3. In 2016, the Committee added the parenthetical to distinguish this instruction from Instruction F:230.5 (defining “mistreated” or “mistreatment” (at-risk persons)).

## **F:231.5 MOBILE IDENTIFICATION NUMBER**

“Mobile identification number” means the cellular phone number assigned to a cellular phone by the cellular phone telecommunications provider.

### COMMENT

1. *See* § 18-9-309(1)(c.7), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:48 (defining “cellular phone”); Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)).
3. The Committee added this instruction in 2016.

## **F:232 MOLOTOV COCKTAIL**

“Molotov cocktail” means a breakable container containing an explosive or flammable liquid or other substance, having a wick or similar device capable of being ignited, and may be described as either an explosive or incendiary device.

A Molotov cocktail is not a device commercially manufactured primarily for the purpose of illumination or other such uses.

### COMMENT

1. *See* § 9-7-103(5), C.R.S. 2020 (explosives; incorporated by section 18-12-101(1)(b), C.R.S. 2020 (defining “bomb”).

## **F:232.5 MONETARY INSTRUMENT**

“Monetary instrument” means coin or currency of the United States or any other country; a traveler’s check; a personal check; a bank check; a cashier’s check; a money order; a bank draft of any country; gold, silver, or platinum bullion or coins; an investment security or negotiable instrument in bearer form, or in another form such that title passes upon delivery; a gift card or other device that is the equivalent of money and can be used to obtain cash, property, or services.

### COMMENT

1. *See* § 18-5-309(3)(c)(I)-(III), C.R.S. 2020 (money laundering).
2. The Committee added this instruction in 2015.

## F:232.7 MORTGAGE BROKER

“Mortgage broker” means any person who, directly or indirectly, serves or offers to serve as an agent for any person to obtain a loan secured by a mortgage, deed of trust, or lien on real property.

### COMMENT

1. *See* § 18-15-109(1)(d), C.R.S. 2020 (loan finders).
2. *See also* § 5-1-301(25), C.R.S. 2020 (defining “loan,” and incorporated by reference by section 18-15-109(1)(b)).
3. The Committee added this instruction in 2016.

## **F:233 MORTGAGE LENDING PROCESS**

“Mortgage lending process” means the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

### COMMENT

1. *See* § 18-4-401(9)(e)(I), C.R.S. 2020 (theft; sentence enhancement).
2. *See* Instruction F:317 (defining “residential mortgage loan”).

## F:234 MOTION PICTURE

“Motion picture” means any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

### COMMENT

1. *See* § 18-6-403(2)(k), C.R.S. 2020 (sexual exploitation of a child).
2. *See* Instruction F:132 (defining “explicit sexual conduct”); Instruction F:389 (defining “video” and “recording or broadcast”).
3. In 2015, the Committee added a citation to Instruction F:389 in the preceding Comment in order to make clear that the terms “recording or broadcast” are defined in a separate instruction (even though the definitions are codified in the same statutory subsection).

## **F:235 MOTION PICTURE THEATER**

“Motion picture theater” means a movie theater, screening room, or other venue when used primarily for the exhibition of motion pictures.

### COMMENT

1. *See* § 18-4-516(6)(a), C.R.S. 2020 (criminal operation of a device in a motion picture theater).

## **F:236 MOTOR VEHICLE (GENERAL DEFINITION FOR TITLE 18)**

“Motor vehicle” includes any self-propelled device by which persons or property may be moved, carried, or transported from one place to another by land, water, or air, except devices operated on rails, tracks, or cables fixed to the ground or supported by pylons, towers, or other structures.

### COMMENT

1. *See* § 18-1-901(3)(k), C.R.S. 2020.

## **F:237 MOTOR VEHICLE (AGGRAVATED MOTOR VEHICLE THEFT)**

“Motor vehicle” means all vehicles of whatever description propelled by any power other than muscular, except vehicles running on rails.

### COMMENT

1. *See* § 18-4-409(1)(a), C.R.S. 2020.

## **F:238 MOTOR VEHICLE (CHOP SHOP ACTIVITY)**

“Motor vehicle” means all vehicles of whatever description that are propelled by any power other than muscular power; except that “motor vehicle” does not include vehicles that run on rails.

### COMMENT

1. *See* § 18-4-420(5)(c), C.R.S. 2020.

## **F:239 MOTOR VEHICLE (TRAFFIC OFFENSES IN TITLE 42)**

“Motor vehicle” means any self-propelled vehicle that is designed primarily for travel on the public highways and that is generally and commonly used to transport persons and property over the public highways or a low-speed electric vehicle; except that the term does not include electrical assisted bicycles, electric scooters, low-power scooters, wheelchairs, or vehicles moved solely by human power.

### COMMENT

1. *See* § 42-1-102(58), C.R.S. 2020 (vehicles and traffic; defining the term as set forth above, and further stating that: “For the purposes of the offenses described in sections 42-2-128, 42-4-1301, 42-4-1301.1, and 42-4-1401 for farm tractors and off-highway vehicles, as defined in section 33-14.5-101(3), C.R.S., operated on streets and highways, ‘motor vehicle’ includes a farm tractor or an off-highway vehicle that is not otherwise classified as a motor vehicle. For the purposes of sections 42-2-127, 42-2-127.7, 42-2-128, 42-2-138, 42-2-206, 42-4-1301, and 42-4-1301.1, ‘motor vehicle’ includes a low-power scooter.”).
2. *See* Instruction F:114.9 (defining “electric scooter”); Instruction F:115 (defining “electrical assisted bicycle”); Instruction F:202 (defining “low-power scooter”); Instruction F:202.5 (defining “low-speed electric vehicle”).
3. In 2017, the Committee modified this instruction and Comment 2 pursuant to a legislative amendment. *See* Ch. 98, sec. 1, § 42-1-102(58), 2017 Colo. Sess. Laws 295, 296.
4. In 2019, pursuant to a legislative amendment, the Committee added the term “electric scooters” to the instruction, and it added cross-references to Instruction F:114.9 and Instruction F:202.5 in Comment 2. *See* Ch. 271, sec. 1, § 42-1-102(58), 2019 Colo. Sess. Laws 2557, 2558.

## F:239.2 MOTORCYCLE

“Motorcycle” means an auticycle or a motor vehicle that uses handlebars or any other device connected to the front wheel to steer and that is designed to travel on not more than three wheels in contact with the ground.

“Motorcycle” does not include a farm tractor, low-speed electric vehicle, or low-power scooter.

### COMMENT

1. See § 42-1-102(55), C.R.S. 2020 (vehicles and traffic).
2. See Instruction F:28.5 (defining “auticycle”); Instruction F:146.2 (defining “farm tractor”); Instruction F:202 (defining “low-power scooter”); Instruction F:202.5 (defining “low-speed electric vehicle”); Instruction F:239 (defining “motor vehicle”).
3. The Committee added this instruction in 2019.

## **F:239.5 MULTIPLE (ELECTRONIC MAIL FRAUD)**

The term “multiple” means more than 100 electronic mail messages during a 24-hour period, more than 1,000 electronic mail messages during a 30-day period, or more than 10,000 electronic mail messages during a 1-year period.

### COMMENT

1. *See* § 18-5-308(1), C.R.S. 2020 (incorporating 18 U.S.C. § 1037(a) (2014), which uses the term “multiple,” as defined in 18 U.S.C. § 1037(d)(3) (2014)).
2. The Committee added this instruction in 2015.

## **F:240 NEGLECT**

“Neglect” means failure to provide food, water, protection from the elements, or other care generally considered to be normal, usual, and accepted for an animal’s health and well-being consistent with the species, breed and type of animal.

### COMMENT

1. *See* § 18-9-201(4), C.R.S. 2020 (cruelty to animals).

## **F:241 NEGLIGENCE**

### COMMENT

1. *See* Instruction F:79 (defining “criminal negligence”).

## **F:241.5 NEGOTIABLE ORDER OF WITHDRAWAL AND SHARE DRAFT**

“Negotiable order of withdrawal” and “share draft” mean negotiable or transferable instruments drawn on a negotiable order of withdrawal account or a share draft account, as the case may be, for the purpose of making payments to third persons or otherwise.

### COMMENT

1. *See* § 18-5-205(1)(f), C.R.S. 2020 (fraud by check).
2. *See* Instruction F:241.7 (defining “negotiable order of withdrawal account” and “share draft account”).
3. The Committee added this instruction in 2015.

## **F:241.7 NEGOTIABLE ORDER OF WITHDRAWAL ACCOUNT AND SHARE DRAFT ACCOUNT**

“Negotiable order of withdrawal account” means an account in a bank or savings and loan association and “share draft account” means an account in a credit union, on which payment of interest or dividends may be made on a deposit with respect to which the bank or savings and loan association or the credit union, as the case may be, may require the depositor to give notice of an intended withdrawal not less than thirty days before the withdrawal is made, even though in practice such notice is not required and the depositor is allowed to make withdrawal by negotiable order of withdrawal or share draft.

### **COMMENT**

1. *See* § 18-5-205(1)(g), C.R.S. 2020 (fraud by check).
2. *See* Instruction F:241.5 (defining “negotiable order of withdrawal” and “share draft”).
3. The Committee added this instruction in 2015.

## **F:241.8 NEWSPAPER**

“Newspaper” means a periodical that includes news, editorials, opinion, features, or other matters of public interest distributed on a complimentary basis. “Newspaper” includes any student periodical distributed at any institution of higher education.

### COMMENT

1. *See* § 18-9-314(3)(b), C.R.S. 2020 (interference with lawful distribution of newspapers).
2. *See* Instruction F:266.8 (defining “periodical”).
3. The Committee added this instruction in 2016.

## **F:241.9 NEWSWORTHY EVENT**

“Newsworthy event” means a matter of public interest, of public concern, or related to a public figure who is intimately involved in the resolution of important public questions or, by reason of his or her fame, shapes events in areas of concern to society.

### COMMENT

1. In 2018, the legislature repealed this definition, with an effective date of July 1, 2018. *See* Ch. 192, secs. 1-3, §§ 18-7-107(6), 18-7-108(6), 2018 Colo. Sess. Laws 1276, 1277-78. Accordingly, if the charged offense took place on or after July 1, 2018, the court should not provide this instruction.

## F:242 NOTICE

“Notice” includes either notice given in person or notice given in writing to the account holder.

### COMMENT

1. See § 18-5-702(2), C.R.S. 2020 (unauthorized use of a financial transaction device).
2. See *People v. Patton*, 2016 COA 187, ¶ 13, 425 P.3d 1152, 1156 (“We conclude that [section 18-5-702(2)] does not require notice only in person or in writing, because the word ‘includes’ is a word that is meant to extend rather than limit.”).
3. In 2019, the Committee added Comment 2.

## **F:243 NUMBER**

“Number” includes, without limitation, any grouping or combination of letters, numbers, or symbols.

### COMMENT

1. *See* § 18-5-901(10), C.R.S. 2020 (identity theft and related offenses).

## F:244 NUNCHAKU

“Nunchaku” means an instrument consisting of two sticks, clubs, bars, or rods to be used as handles, connected by a rope, cord, wire or chain, which is in the design of a weapon used in connection with the practice of a system of self-defense.

### COMMENT

1. *See* § 18-12-106(1)(e), C.R.S. 2020 (prohibited use of weapons).

## F:245 OATH

“Oath” includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.

A written statement is also an oath if:

[The statement was made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.]

[The statement recites that it was made under oath, the declarant was aware of such recitation at the time he made the statement and intended that the statement should be represented as a sworn statement, and the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.]

[The statement is made, used, or offered with the intent that it be accepted as compliance with a statute, rule or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement.]

An oath is “required or authorized by law” when the use of the oath is specifically provided for by statute, court rule, or appropriate regulatory provision.

### COMMENT

1. See § 18-8-501(2)(a), (b), C.R.S. 2020 (specifying that, in addition to the three foregoing examples, a written instrument constitutes an “oath” if “(IV) The statement meets the requirements for an unsworn declaration under the ‘Uniform Unsworn Declarations Act,’ article 27 of title 13.”).
2. See Instruction F:250 (defining “official proceeding”).

3. The term “jurat” is not defined by statute. *See Black’s Law Dictionary*, 979 (10th ed. 2014) (defining “jurat” as “A certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made.”).

4. In 2017, the Committee corrected a typo in the first bracketed paragraph, and it modified the parenthetical quotation in Comment 1 pursuant to a legislative amendment. *See* Ch. 130, sec. 5, § 18-8-501(2)(a)(IV), 2017 Colo. Sess. Laws 441, 442.

5. In 2018, the Committee modified the parenthetical quotation in Comment 1 pursuant to a legislative amendment. *See* Ch. 8, sec. 10, § 18-8-501(2)(a)(IV), 2018 Colo. Sess. Laws 145, 156.

## F:246 OBSCENE (HARASSMENT)

“Obscene” means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, analingus, or excretory functions.

### COMMENT

1. See § 18-9-111(1.5), C.R.S. 2020 (harassment; defining the term as set forth above, “[u]nless the context otherwise requires”).
2. See Instruction F:81 (defining “cunnilingus”); Instruction F:147 (defining “fellatio”).
3. The term “analingus” is not defined by statute. See, e.g., *State v. Kelly*, 728 S.W.2d 642, 648 (Mo. App. S.D. 1987) (“Apparently the term ‘analingus’ is not defined by Colorado statute. *Webster’s Third New International Dictionary* defines analingus as follows: ‘erotic stimulation achieved by mouth and anus.’”).

## F:246.2 OBSCENE (OBSCENITY)

“Obscene” means material or a performance that:

1. the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex, and
2. depicts or describes either: patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernibly turgid state, and
3. taken as a whole, lacks serious literary, artistic, political, or scientific value.

### COMMENT

1. *See* § 18-7-101(2), C.R.S. 2020.
2. *See* Instruction F:219.3 (defining “material”); Instruction F:258.7 (defining “patently offensive”); Instruction F:266.5 (defining “performance”); Instruction F:294.7 (defining “prurient interest”); Instruction F:345.2 (defining “simulated”).
3. The Committee added this instruction in 2016.

### **F:246.3 OBSCENE DEVICE**

“Obscene device” means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

#### COMMENT

1. *See* § 18-7-101(3), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:246.5 OBSCURE**

“Obscure” means to destroy, remove, alter, conceal, or deface so as to render illegible by ordinary means of inspection.

### COMMENT

1. See § 18-5-305(3), C.R.S. 2020 (altering an identification number).
2. The Committee added this instruction in 2015.

## F:246.8 OBSTACLE

“Obstacle” includes an unmanned aircraft system.

### COMMENT

1. See § 18-8-104(5)(b), C.R.S. 2020 (obstructing a service worker).
2. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 385, sec. 2, § 18-8-104(5)(b), 2018 Colo. Sess. Laws 2309, 2310.

## **F:247 OBSTRUCT**

“Obstruct” means to render impassable or to render passage unreasonably inconvenient or hazardous.

### COMMENT

1. *See* § 18-9-107(2), C.R.S. 2020 (obstructing a highway or other passageway).

## **F:248 OCCUPIED STRUCTURE**

“Occupied structure” means any area, place, facility, or enclosure which, for particular purposes, may be used by persons or animals upon occasion, whether or not it is a “building,” and which is in fact occupied by a person or animal, and known by the defendant to be thus occupied at the time of the alleged offense.

### COMMENT

1. *See* § 18-4-101(2), C.R.S. 2020 (offenses against property).
2. *See* Instruction F:40 (defining “building”).

## F:249 OF ANOTHER

“Of another” means that of a natural person, living or dead, or a business entity.

### COMMENT

1. *See* § 18-5-901(11), C.R.S. 2020 (identity theft and related offenses).
2. If necessary based on the facts of the case, draft a supplemental instruction defining the term “business entity.” *See* § 16-3-301.1(11)(b), C.R.S. 2020 (“‘Business entity’ means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; a foreign corporation qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including a federally chartered or authorized financial institution; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.”).

## F:249.5 OFF-HIGHWAY VEHICLE

“Off-highway vehicle” means any self-propelled vehicle which is designed to travel on wheels or tracks in contact with the ground, which is designed primarily for use off of the public highways, and which is generally and commonly used to transport persons for recreational purposes.

[“Off-highway vehicle” does not include: vehicles designed and used primarily for travel on, over, or in the water; snowmobiles; military vehicles; golf carts; vehicles designed and used to carry individuals with disabilities; vehicles designed and used specifically for agricultural, logging, or mining purposes; or vehicles registered pursuant to [insert a description of the relevant provision from article 3 of title 42].]

### COMMENT

1. *See* § 42-1-102(63), C.R.S. 2020 (incorporating this definition from section 33-14.5-101(3), C.R.S. 2020).

## **F:250 OFFICIAL PROCEEDING**

“Official proceeding” means a proceeding heard before any legislative, judicial, administrative, or other governmental agency, or official authorized to hear evidence under oath, including any magistrate, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceedings.

### COMMENT

1. *See* § 18-8-501(3), C.R.S. 2020 (perjury and related offenses); § 18-8-601, C.R.S. 2020 (incorporating the definition for offenses against witnesses and crime victims); § 18-8-702, C.R.S. 2020 (incorporating the definition for offenses against witnesses and crime victims).

## **F:251 OMISSION**

“Omission” means a failure to perform an act as to which a duty of performance is imposed by law.

### **COMMENT**

1. *See* § 18-1-501(7), C.R.S. 2020.

**F:252 ONE OR MORE DRUGS (VEHICULAR HOMICIDE;  
DRIVING UNDER THE INFLUENCE AND DRIVING WHILE  
ABILITY IMPAIRED)**

“One or more drugs” means [insert name(s) of relevant substances defined as “drug(s)” in section 27-80-203(13)], any controlled substance, and any inhaled glue, aerosol, or other toxic vapor or vapors.

COMMENT

1. *See* § 18-3-106(1)(b)(II), C.R.S. 2020 (vehicular homicide); § 42-4-1301(1)(d), C.R.S. 2020 (DUI and DWAI).
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); § 18-18-412(3), C.R.S. 2020 (defining “toxic vapors,” for which there is no model definitional instruction because the list of qualifying substances is lengthy).
3. In 2015, the Committee added the parenthetical to this instruction’s title to distinguish it from Instruction F:252.5.

## **F:252.5 ONE OR MORE DRUGS (AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY)**

“One or more drugs” means [insert name(s) of relevant substance(s) defined as a “drug” in section 12-280-103(16), C.R.S. 2020], any controlled substance, and glue-sniffing, aerosol inhalation, or the inhalation of any other toxic vapor or vapors.

### COMMENT

1. *See* § 18-3.5-108(1)(b)(II), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); § 18-18-412(3), C.R.S. 2020 (defining “toxic vapors,” for which there is no model definitional instruction because the list of qualifying substances is lengthy).
3. The Committee added this instruction in 2015.
4. In 2019, the Committee updated the statutory cross-reference in the instruction to reflect a legislative amendment. *See* Ch. 136, sec. 93, § 18-3.5-108(1)(b)(II), 2019 Colo. Sess. Laws 613, 1675.

## **F:253 ON-LINE EVENT TICKET SALE**

“On-line event ticket sale” means an electronic system utilized by the sponsor or promoter of a sporting or entertainment event to sell tickets to such event to the public over the internet.

### **COMMENT**

1. *See* § 18-5.5.102(1)(g), C.R.S. 2020 (cybercrime; incorporating the above definition from section 6-1-720(2)(b), C.R.S. 2020).

## **F:254 ON SCHOOL GROUNDS (MURDER IN THE FIRST DEGREE: CONTROLLED SUBSTANCE ON SCHOOL GROUNDS)**

“On school grounds” means within or upon the grounds of any public or private elementary school, middle school, junior high school, or high school, vocational school, or public housing development; within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that is accessible to the public; within any private dwelling that is accessible to the public for the purpose of the unlawful sale, distribution, use, exchange, manufacture, or attempted manufacture of controlled substances; or in any school vehicle while such school vehicle is engaged in the transportation of persons who are students.

### COMMENT

1. *See* § 18-18-407(1)(g)(I), C.R.S. 2020; *see also* § 18-3-102(1)(e), C.R.S. 2020 (murder in the first degree (controlled substance on school grounds)), which, to account for a legislative reorganization in 2013, refers to section 18-18-407(2) for offenses committed before October 1, 2013, and to section 18-18-407(1)(g)(I) for offenses committed on or after October 1, 2013, *see* Ch. 333, sec. 16, § 18-18-407, 2013 Colo. Sess. Laws 1900, 1917–22.
2. The term “school vehicle” is defined, for purposes of traffic and vehicle offenses, in section 42-1-102(88.5), C.R.S. 2020 (vehicles and traffic).
3. In 2019, the Committee modified the parenthetical explanation in Comment 1 pursuant to a legislative amendment. *See* Ch. 390, sec. 12, § 18-3-102(1)(e), 2019 Colo. Sess. Laws 3462, 3465.

## F:254.2 OPEN OR OPENLY

“Open” or “openly” means observable by the public or a substantial number of the public.

“Open and public” or “openly and publicly” does not include any activity occurring on private residential property by the occupant or his or her guests.

### COMMENT

1. *See* § 18-18-102(20.3)(a), (c), C.R.S. 2020 (controlled substances offenses).
2. *See* Instruction F:297.5 (defining “public or publicly”).
3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 315, sec. 4, § 18-18-102(20.3)(a), (c), 2019 Colo. Sess. Laws 2823, 2824.

### **F:254.3 OPERATOR**

“Operator” means any person who places slot machines upon the person’s business premises or any person who, individually or jointly, pursuant to an agreement whereby consideration is paid for the right to place slot machines on another’s business premises, engages in the business of placing and operating slot machines on retail premises within the cities of Central, Black Hawk, or Cripple Creek.

#### COMMENT

1. *See* § 44-30-103(23), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:345.6 (defining “slot machine”); Instruction F:392.8 (defining “within the cities of Central, Black Hawk, or Cripple Creek”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified this instruction and the statutory citation in Comment 1 pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 2, § 44-30-103(23), 2018 Colo. Sess. Laws 167, 171, 184–85.

## F:254.7 ORAL COMMUNICATION

“Oral communication” means any oral communication uttered by any person believing that such communication is not subject to interception, under circumstances justifying such belief, but does not include any electronic communication.

### COMMENT

1. *See* § 18-9-301(8), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:185.3 (defining “intercept”).
3. The Committee added this instruction in 2016.

## F:255 ORDER

“Order” means a prescription order which is any order, other than a chart order, authorizing the dispensing of drugs or devices that is written, mechanically produced, computer generated, transmitted electronically or by facsimile, or produced by other means of communication by a practitioner and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient’s authorization, and sufficient information for compounding, dispensing, and labeling; or a chart order which is an order for inpatient drugs or medications to be dispensed by a pharmacist, or pharmacy intern under the direct supervision of a pharmacist, which is to be administered by an authorized person only during the patient’s stay in a hospital facility. It shall contain the name of the patient and of the medicine ordered and such directions as the practitioner may prescribe concerning strength, dosage, frequency, and route of administration.

### COMMENT

1. *See* § 18-18-102(23), C.R.S. 2020 (controlled substances offenses).
2. In 2015, the Committee revised this instruction to accurately reflect the statutory language (by removing the bracketing that appeared in COLJI-Crim. F:255 (2014)).

## **F:255.5 OWNER (THEFT OF SOUND RECORDINGS)**

“Owner” means the person who owns the copyright on the original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded and from which the transferred recorded sounds are directly derived.

### COMMENT

1. *See* § 18-4-601(2), C.R.S. 2020.
2. *See* Instruction F:75.2 (defining “copyright”); Instruction F:269.5 (defining “person” (theft of sound recordings)).
3. The Committee added this instruction in 2016.

## F:256 OWNER OR OWNS

“Owner” or “owns” means any person, firm, corporation, or organization owning, possessing, harboring, keeping, having financial or property interest in, or having control or custody of a domestic animal, including a dangerous dog.

### COMMENT

1. *See* § 18-9-204.5(2)(e), C.R.S. 2020 (unlawful ownership of a dangerous dog).
2. *See* Instruction F:84 (defining “dangerous dog”); Instruction F:107 (defining “domestic animal”).

## F:257 PALLIATIVE CARE

“Palliative care” means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his [her] life.

### COMMENT

1. *See* § 18-3-104(4)(b)(III), C.R.S. 2020 (assisted suicide manslaughter – affirmative defense of “medical caregiver”).

## **F:258 PARENT**

“Parent” means a custodial mother or father of a patient under the age of eighteen years, any person having custody of a patient under the age of eighteen years, or any person serving as a legal guardian for a patient under the age of eighteen years.

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(c) (medical marijuana).

## F:258.2 PARTICIPANT IN THE ADDRESS CONFIDENTIALITY PROGRAM

“Participant in the address confidentiality program” means an individual accepted into the address confidentiality program in accordance with [insert a description of the procedure from Part 21 of Article 30 of Title 24].

### COMMENT

1. *See* § 18-9-313(1)(d), C.R.S. 2020 (unlawfully making available on the internet personal information about a law enforcement official).
2. The Committee added this instruction in 2016.
3. In 2019, the Committee updated the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 95, sec. 1, § 18-9-313(1)(d), 2019 Colo. Sess. Laws 349, 349–50.

## **F:258.3 PARTY LINE**

“Party line” means a subscribers’ line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

### COMMENT

1. *See* § 18-9-307(1)(a), C.R.S. 2020 (refusal to yield party line).
2. The Committee added this instruction in 2016.

## **F:258.5 PARTY OFFICER**

“Party officer” means a person who holds any position or office in a political party, whether by election, appointment, or otherwise.

### COMMENT

1. *See* § 18-8-301(2), C.R.S. 2020 (bribery and corrupt influences).
2. The Committee added this instruction in 2015.

## **F:258.7 PATENTLY OFFENSIVE**

“Patently offensive” means so offensive on its face as to affront current community standards of tolerance.

### COMMENT

1. *See* § 18-7-101(4), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:259 PATIENT**

“Patient” means a person who has a debilitating medical condition.

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(d) (medical marijuana).
2. *See* Instruction F:89 (defining “debilitating medical condition”).

## **F:260 PATTERN**

Manufacture, sale, dispensing, or distribution forms a “pattern” if it embraces criminal acts which have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events.

### COMMENT

1. *See* § 18-18-407(2)(d), C.R.S. 2020 (controlled substances, special offender).

## **F:260.5 PATTERN OF CRIMINAL GANG ACTIVITY**

“Pattern of criminal gang activity” means the commission, attempt, conspiracy, or solicitation of two or more predicate criminal acts which are committed on separate occasions or by two or more persons.

### COMMENT

1. *See* § 18-23-101(2), C.R.S. 2020 (gang recruitment).
2. *See* Instruction F:282.3 (defining “predicate criminal acts”); Instruction G2:01 (criminal attempt); Instruction G2:05 (conspiracy); Instruction G2:09 (criminal solicitation).
3. The Committee added this instruction in 2016.

## **F:261 PATTERN OF RACKETEERING ACTIVITY**

“Pattern of racketeering activity” means engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years [(excluding any period of imprisonment)] after a prior act of racketeering activity.

### COMMENT

1. *See* § 18-17-103(3), C.R.S. 2020 (Colorado Organized Crime Control Act).
2. *See* Instruction F:307 (defining “racketeering activity”).

## **F:262 PATTERN OF SEXUAL ABUSE**

“Pattern of sexual abuse” means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

### **COMMENT**

1. *See* § 18-3-401(2.5), C.R.S. 2020 (sexual offenses).

## F:262.5 PAYMENT CARD

“Payment card” means a credit card, charge card, debit card, or any other card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

### COMMENT

1. See § 18-5.5-101(7.5), C.R.S. 2020 (cybercrime).
2. See Instruction F:335 (defining “services”); Instruction F:371 (defining “thing of value”).
3. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 379, sec. 1, § 18-5.5-101(7.5), 2018 Colo. Sess. Laws 2290, 2290.

## **F:263 PEACE OFFICER**

A person who is included within the provision[s] set forth below, and who meets all standards imposed by law as described in the provision[s] set forth below, is a “peace officer”: [Insert the relevant definition(s), from sections 16-2.5-102 to 16-2.5-151].

### COMMENT

1. *See* § 16-2.5-101, C.R.S. 2020.

**F:264 PEACE OFFICER (RESISTING ARREST,  
OBSTRUCTING A PEACE OFFICER)**

The term “peace officer” means a peace officer in uniform or, if out of uniform, one who has identified himself [herself] by exhibiting his [her] peace officer credentials as such peace officer to the person whose arrest is attempted.

COMMENT

1. *See* § 18-8-103(3), C.R.S. 2020 (stating that the definition is applicable to resisting arrest under this section, and obstructing under section 18-8-104, C.R.S. 2020).

## **F:265 PEACE OFFICER (DISARMING A PEACE OFFICER)**

“Peace officer” means a peace officer in uniform or, if out of uniform, one who has identified himself by exhibiting his credentials as such peace officer to the person.

### COMMENT

1. *See* § 18-8-116(3), C.R.S. 2020 (disarming a peace officer).

## **F:265.2 PEACE OFFICER (PURCHASES OF VALUABLE ARTICLES)**

“Peace officer” means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summons and civil process, police officer, state patrol officer, town marshal, or investigator for a district attorney or the attorney general who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.

### COMMENT

1. *See* § 18-16-102(2), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:265.3 PEACE OFFICER (SALE OF SECONDHAND PROPERTY)**

“Peace officer” means any undersheriff, deputy sheriff other than one appointed with authority only to receive and serve summons and civil process, police officer, Colorado state patrol officer, town marshal, or investigator for a district attorney or the attorney general who is engaged in full-time employment by the state, a city, city and county, town, judicial district, or county within this state.

### COMMENT

1. *See* § 18-13-114(5)(b), C.R.S. 2020.
2. If necessary, the court should draft a special instruction explaining its determination of any legal question(s) regarding an appointment with limited authority.
3. The Committee added this instruction in 2016.

## **F:265.5 PECUNIARY BENEFIT**

“Pecuniary benefit” means benefit in the form of money, property, commercial interests, or anything else, the primary significance of which is economic gain.

### COMMENT

1. *See* § 18-1-901(3)(m), C.R.S. 2020.
2. *See* Instruction F:30 (defining “benefit”).

## **F:265.7 PECUNIARY BENEFIT (BRIBERY AND CORRUPT INFLUENCES; ABUSE OF PUBLIC OFFICE)**

“Pecuniary benefit” is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

### COMMENT

1. *See* § 18-8-301(3), C.R.S. 2020.
2. Although this instruction is virtually identical to Instruction F:265.5 (defining “pecuniary benefit”), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to offenses involving bribery and corrupt influences. *See* § 18-8-301.
3. The Committee added this instruction in 2015.
4. In 2016, the Committee added the phrase “abuse of public office” to the parenthetical.

## F:266 PECUNIARY VALUE

“Pecuniary value” means anything of value in the form of money, a negotiable instrument, or a commercial interest or anything else, the primary significance of which is economic advantage; or any other property or service that has a value in excess of one hundred dollars.

### COMMENT

1. *See* § 18-17-105(4), C.R.S. 2020 (Colorado Organized Crime Control Act).

## **F:266.2 PEN REGISTER**

“Pen register” means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached but shall not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

### COMMENT

1. *See* § 18-9-301(8.3), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.4 (defining “electronic communication service”).
3. The Committee added this instruction in 2016.

## **F:266.5 PERFORMANCE**

“Performance” means a play, motion picture, dance, or other exhibition performed before an audience.

### COMMENT

1. *See* § 18-7-101(5), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:266.8 PERIODICAL**

“Periodical” means a publication produced on a regular interval.

### COMMENT

1. *See* § 18-9-314(3)(c), C.R.S. 2020 (interference with lawful distribution of newspapers).
2. The Committee added this instruction in 2016.

## F:267 PERSON (HOMICIDE)

“Person,” when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

### COMMENT

1. See § 18-3-101(2), C.R.S. 2020.
2. See *People v. Lage*, 232 P.3d 138, 140 (Colo. App. 2009) (unborn child was not a “person” within the meaning of section 18-3-101(2)); see also Instruction F:20 (defining “another person” as including a fetus born dead, but only for purposes of the offense of concealing a death in violation of section 18-8-109, C.R.S. 2020).

## **F:268 PERSON (CONTROLLED SUBSTANCES OFFENSES)**

“Person” means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government or governmental subdivision or agency, or any other legal or commercial entity.

### COMMENT

1. *See* § 18-18-102(25), C.R.S. 2020.
2. *See* Instruction F:162 (defining “government”).

## **F:268.5 PERSON (LIMITED GAMING OFFENSES)**

“Person” includes corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to the Limited Gaming Act of 1991.

### COMMENT

1. *See* § 18-20-103(2), C.R.S. 2020.
2. This definition applies exclusively to offenses involving taxation provisions. *See* Instructions 20:01-04.
3. The Committee added this instruction in 2016.

**F:269 PERSON (RETAIL SALE OF METHAMPHETAMINE  
PRECURSOR DRUGS)**

“Person” means an individual who owns, operates, is employed by, or is an agent of a store.

COMMENT

1. *See* § 18-18-412.8(4)(b), C.R.S. 2020.

## **F:269.5 PERSON (THEFT OF SOUND RECORDINGS)**

“Person” means any individual, firm, partnership, corporation, or association.

### COMMENT

1. *See* § 18-4-601(3), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## **F:270 PERSONAL IDENTIFICATION CODE**

“Personal identification code” means any grouping of letters, numbers, or symbols assigned to the account holder of a financial transaction device by the issuer to permit authorized electronic use of that financial transaction device.

### COMMENT

1. *See* § 18-5-701(5), C.R.S. 2020 (financial transaction device crimes).
2. *See* Instruction F:153 (defining “financial transaction device”); Instruction F:189 (defining “issuer”).

## **F:271 PERSONAL IDENTIFICATION NUMBER**

“Personal identification number” means a number assigned to an account holder by an issuer to permit authorized use of an account or financial device.

### COMMENT

1. *See* § 18-5-901(12), C.R.S. 2020 (identity theft and related offenses).
2. *See* Instruction F:150 (defining “financial device”); Instruction F:243 (defining “number”).

## **F:272 PERSONAL IDENTIFYING INFORMATION**

“Personal identifying information” means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver’s license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

### COMMENT

1. *See* § 18-5-901(13), C.R.S. 2020 (identity theft and related offenses); § 18-5-113(3), C.R.S. 2020 (criminal impersonation, incorporating this definition by reference).
2. *See* Instruction F:164 (defining “government”); Instruction F:243 (defining “number”).

## F:272.5 PERSONAL INFORMATION

“Personal information” means the home address, home telephone number, personal mobile telephone number, pager number, personal e-mail address, or a personal photograph of a law enforcement official, participant in the address confidentiality program, or + human services worker; or directions to the home of a law enforcement official, participant in the address confidentiality program, or human services worker; or photographs of the home or vehicle of a law enforcement official, participant in the address confidentiality program, or human services worker.

### COMMENT

1. *See* § 18-9-313(1)(e), C.R.S. 2020 (unlawfully making available on the internet personal information about a law enforcement official).
2. *See* Instruction F:45.5 (defining “human services worker”); Instruction F:196.3 (defining “law enforcement official”); Instruction F:258.2 (defining “participant in the address confidentiality program”).
3. The Committee added this instruction in 2016.
4. In 2019, pursuant to a legislative amendment, the Committee added the phrase “or caseworker” to this definition, updated the statutory citation in Comment 1, and added the cross-reference to Instruction F:45.5 in Comment 2. *See* Ch. 95, sec. 1, § 18-9-313(1)(e), 2019 Colo. Sess. Laws 349, 350.
5. + In 2020, pursuant to a legislative amendment, the Committee changed the term “caseworker” to “human services worker” throughout this instruction. *See* Ch. 77, sec. 1, § 18-9-313(1)(e), 2020 Colo. Sess. Laws 315, 316.

## F:273 PERSON WITH A DISABILITY

“Person with a disability” means any person who is [impaired because of [the [loss] [permanent loss of use] of a [hand] [foot]] [[blindness] [the permanent impairment of vision of both eyes to such a degree as to constitute virtual blindness]] [unable to [walk] [see] [hear] [speak]] [unable to breathe without mechanical assistance] [a person with an intellectual and developmental disability] [a person with a mental health disorder] [mentally impaired] [blind] [receiving care and treatment for a developmental disability under [insert description of relevant provision from Article 10.5 of Title 27]].

### COMMENT

1. *See* § 18-6.5-102(11)(a)-(h), C.R.S. 2020 (crimes against at-risk persons).
2. *See* Instruction F:35 (defining “blind”); Instruction F:98 (defining “developmental disability”); Instruction F:184 (defining “intellectual and developmental disability”); Instruction F:226.5 (defining “mental health disorder”); Instruction F:228 (defining “mentally impaired”).
3. In 2017, pursuant to a legislative amendment, the Committee changed the phrase “mental illness” to “mental health disorder,” and it replaced the cross-reference to Instruction F:274 with a cross-reference to Instruction F:226.5. *See* Ch. 263, sec. 142, § 18-6.5-102(11)(e), 2017 Colo. Sess. Laws 1249, 1307.

## **F:274 PERSON WITH A MENTAL ILLNESS**

### COMMENT

1. *See* Instruction F:226.5 (defining “mental health disorder”).
2. In 2017, pursuant to a legislative amendment, the Committee deleted this definition and replaced it with a cross-reference to Instruction F:226.5. *See* Ch. 263, sec. 233, § 27-65-102(11.5), 2017 Colo. Sess. Laws 1249, 1340.

## F:275 PHARMACY

“Pharmacy” means any registered pharmacy outlet where prescriptions are compounded and dispensed.

### COMMENT

1. *See* § 18-18-102(27), C.R.S. 2020 (controlled substances offenses; incorporating the definition of “prescription drug outlet” as defined in section 12-280-103(43), C.R.S. 2020).
2. *See* § 12-42.5-102(7)(a), C.R.S. 2020 (“‘Compounding’ means the preparation, mixing, assembling, packaging, or labeling of a drug or device . . .”).
3. In 2019, the Committee updated the statutory cross-reference in Comment 1 to reflect a legislative amendment. *See* Ch. 136, sec. 102, § 18-18-102(27), 2019 Colo. Sess. Laws 613, 1678.

## **F:276 PHOTOGRAPH**

“Photograph” includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, or chemically produced or reproduced visual material.

### COMMENT

1. *See* § 18-3-405.6(3), C.R.S. 2020 (invasion of privacy for sexual gratification).

## **F:276.5 PHOTOGRAPH (CRIMINAL INVASION OF PRIVACY)**

“Photograph” includes a photograph, motion picture, videotape, live feed, print, negative, slide, or other mechanically, electronically, digitally, or chemically reproduced visual material.

### COMMENT

1. *See* § 18-7-801(3), C.R.S. 2020.
2. Although this instruction is virtually identical to Instruction F:276 (defining “photograph”), the Committee has created a separate instruction because the General Assembly specifically created this definition to apply to the offense of criminal invasion of privacy. *See* § 18-7-801(3) (specifying that this definition applies “[f]or the purposes of this section”).
3. The Committee added this instruction in 2015.

## F:277 PHYSICAL EVIDENCE

“Physical evidence” includes any article, object, document, record, or other thing of physical substance.

“Physical evidence” does not include a human body, part of a human body, or human remains.

### COMMENT

1. See § 18-8-610(2), C.R.S. 2020 (tampering with physical evidence).
2. See *People v. Rieger*, 2019 COA 14, ¶ 13, 436 P.3d 610 (holding that “electronically stored documents or information falls within the ambit of the phrase ‘physical evidence’”).
3. In 2016, the Committee added the second paragraph pursuant to a legislative amendment. See Ch. 72, sec. 2, § 18-8-610(2), 2016 Colo. Sess. Laws 191, 191.
4. In 2019, the Committee added Comment 2.

## **F:278 PHYSICALLY HELPLESS**

“Physically helpless” means unconscious, asleep, or otherwise unable to indicate willingness to act.

### COMMENT

1. *See* § 18-3-401(3), C.R.S. 2020 (sexual offenses).

## **F:279 PHYSICIAN**

“Physician” means a doctor of medicine who maintains, in good standing, a license to practice medicine issued by the state of Colorado.

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(e) (medical marijuana).

## F:279.3 PLANT

“Plant” means any cannabis plant in a cultivating medium which is more than four inches wide or four inches high or a flowering cannabis plant regardless of the plant’s size.

### COMMENT

1. *See* § 18-18-406(3)(c)(II), C.R.S. 2020 (cultivating, growing, or producing marijuana).
2. *See* Instruction F:157.8 (defining “flowering”).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 402, sec. 2, § 18-18-406(3)(c)(II), 2017 Colo. Sess. Laws 2094, 2096.

## F:279.5 POKER

“Poker” means a card game played by a player or players who are dealt cards by a dealer. The object of the game is [for each player to bet the superiority of such player’s hand and win the other players’ bets by either making a bet no other player is willing to match or proving to hold the most valuable cards after all the betting is over] [for each player, whether by reason of the skill of the player or application of the element of chance, or both, to hold a poker hand entitled to a monetary or premium return based upon a publicly available pay schedule].

[In a variation of poker in which there can be more than one winning hand and the dealer’s participation is necessary or desirable to improve the game for players other than the dealer, the dealer may play, but under no circumstances may the dealer place a wager in any game in which he or she is dealing. A game in which the player holding the highest-scoring hand splits his or her winnings with the player holding the lowest-scoring hand does not qualify as a “variation of poker in which there can be more than one winning hand.”]

### COMMENT

1. See § 44-30-103(25), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. See Instruction F:31.2 (defining “bet”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. See Ch. 14, sec. 2, § 44-30-103(25), 2018 Colo. Sess. Laws 167, 172.

## F:280 POSITION OF TRUST

One in a “position of trust” includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent’s rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child’s welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

### COMMENT

1. See § 18-3-101(2.5), C.R.S. 2020 (homicide and related offenses); § 18-3-401(3.5), C.R.S. 2020 (sexual offenses, Article 3, Part 4); § 18-6-401(7)(e)(I), C.R.S. 2020 (child abuse).
2. In *People v. Roggow*, 2013 CO 70, ¶ 15, 318 P.3d 446, 450, the supreme court analyzed the definition of “position of trust” and held as follows:

We conclude that the statutory definition of “position of trust” in section 18-3-401(3.5) expressly includes two general categories of persons: (1) persons who are parents or acting in the place of parents, and (2) persons who are charged with a duty or responsibility for the health, education, welfare, or supervision [of] the child. However, these categories are only illustrative, and the broad definition of position of trust adopted by the legislature “is not limited to” these categories. Rather, these general categories reflect the General Assembly’s overarching intent to target those offenders who are entrusted with special access to a child victim and who exploit that access to commit an offense against the child. Thus, we hold that for purposes of section 18-3-405.3, a defendant need not be expressly charged with a particular duty or responsibility over the child at the time of the unlawful act in order to occupy a position of trust. Rather, a defendant may occupy a position of trust with respect to the victim where an existing relationship or other conduct or circumstances

establish that the defendant is entrusted with special access to the child victim.

+ See also *People v. Manjarrez*, 2020 CO 53, ¶ 27, 465 P.3d 547, 552 (clarifying the holding in *Roggow*, and stating that “a defendant’s special access to the victim by virtue of an existing relationship or other conduct or circumstances is evidence of an implied duty or responsibility for the welfare or supervision of the victim during those periods of special access”).

3. See *Pellman v. People*, 252 P.3d 1122, 1125 (Colo. 2011) (“[A] defendant need not be performing a specific supervisory task at the time of the unlawful act in order to occupy a position of trust. Instead, a defendant may assume a position of trust through an ongoing and continuous supervisory relationship with the victim.”).

4. + In 2020, the Committee added the citation to *Manjarrez* in Comment 2.

## F:281 POSSESSION

Possession constitutes a “voluntary act” if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to have terminated it.

### COMMENT

1. See § 18-1-501(9), C.R.S. 2020 (defining “possession” in the context of a “voluntary act”).
2. See Instruction F:391 (defining “voluntary act”).
3. See *People v. Martinez*, 780 P.2d 560, 561 (Colo. 1989) (explaining, in the context of reviewing judgment of acquittal for the offense of possession of a weapon by a previous offender, that: “In [*People v. Garcia*, 595 P.2d 228, 231 n.4 (Colo. 1979)], we did not include the requirement of exclusive control in our definition of ‘possession.’ We believe that imposing the requirement of exclusive control alters the generally accepted meaning of the term, making it both unduly restrictive and a potential source of confusion for jurors.”).
4. An earlier version of this instruction stated that “‘possession’ means actual or physical control” over an item. See COLJI-Crim. F:199 (2008). Presumably, that instruction relied on *People v. Garcia*, 595 P.2d 228, 231 (Colo. 1979), which held that “[t]he commonsense definition of “possession” as it is used in [the statute prohibiting the use of weapons], is the actual or physical control of a firearm.” But following the publication of the 2008 instructions, the court of appeals recognized that the supreme court’s opinion in *Garcia* was narrow. *People v. Warner*, 251 P.3d 556, 565 (Colo. App. 2010) (“Defendant relies on *People v. Garcia* for the proposition that possession of a weapon requires ‘actual or physical control of a firearm.’ However, *Garcia* is distinguishable because there the supreme court limited its holding to possession of a weapon by an intoxicated person.” (citation omitted)). In any event, because Chapter F is reserved for terms that are defined by statute, the Committee has not included the “actual or physical control” language in its model instruction.

5. In 2015, the Committee removed a citation to *People v. Warner, supra*, from Comment 3, and it added Comment 4.

## **F:281.2 POSSESSION OF ETHYL ALCOHOL**

“Possession of ethyl alcohol” means that a person has or holds any amount of ethyl alcohol anywhere on his or her person or that a person owns or has custody of ethyl alcohol or has ethyl alcohol within his or her immediate presence and control.

### COMMENT

1. *See* § 18-13-122(2)(e), C.R.S. 2020 (illegal possession or consumption of ethyl alcohol or marijuana).
2. *See* Instruction F:129.5 (defining “ethyl alcohol”).
3. The Committee added this instruction in 2016.

## **F:281.3 POSSESSION OF MARIJUANA**

“Possession of marijuana” means that a person has or holds any amount of marijuana anywhere on his or her person or that a person owns or has custody of marijuana or has marijuana within his or her immediate presence and control.

### COMMENT

1. *See* § 18-13-122(2)(f), C.R.S. 2020 (illegal possession or consumption of ethyl alcohol or marijuana).
2. The Committee added this instruction in 2016.

## **F:281.5 POTENTIAL CONFLICTING INTEREST**

A “potential conflicting interest” exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

### COMMENT

1. *See* § 18-8-308(2), C.R.S. 2020 (failing to disclose a conflict of interest).
2. The Committee added this instruction in 2015.

## **F:282 PRACTITIONER**

“Practitioner” means a physician, a podiatrist, dentist, optometrist, veterinarian, researcher, pharmacist, pharmacy, hospital or other person licensed, registered, or otherwise permitted, by this state, to distribute, dispense, conduct research with respect to, administer, or to use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

### **COMMENT**

1. *See* § 18-18-102(29), C.R.S. 2020 (controlled substances offenses).

## **F:282.2 PRECIOUS OR SEMIPRECIOUS METALS OR STONES**

“Precious or semiprecious metals or stones” means such metals as, but not limited to, gold, silver, platinum, and pewter and such stones as, but not limited to, alexandrite, diamonds, emeralds, garnets, opals, rubies, sapphires, and topaz. Ivory, coral, pearls, jade, and such other minerals, stones, or gems as are customarily regarded as precious or semiprecious are deemed to be precious or semiprecious stones.

### COMMENT

1. *See* § 18-16-102(3), C.R.S. 2020 (purchases of valuable articles).
2. The Committee added this instruction in 2016.

## F:282.3 PREDICATE CRIMINAL ACTS

“Predicate criminal acts” means the commission of or attempt, conspiracy, or solicitation to commit [racketeering activity] [retaliation against a witness or victim] [insert a description of any criminal act committed in any jurisdiction of the United States which, if committed in this state, would constitute retaliation against a witness or victim].

### COMMENT

1. *See* § 18-23-101(3), C.R.S. 2020 (gang recruitment).
2. *See* Instruction F:307 (defining “racketeering activity”); Instruction G2:01 (criminal attempt); Instruction G2:05 (conspiracy); Instruction G2:09 (criminal solicitation); Instruction 8-7:08 (retaliation against a witness or victim).
3. The Committee added this instruction in 2016.

## **F:282.5 PREGNANCY**

“Pregnancy” means the presence of an implanted human embryo or fetus within the uterus of a woman.

### COMMENT

1. *See* § 18-3.5-101(4), C.R.S. 2020 (offenses against pregnant women).
2. The Committee added this instruction in 2015.

## **F:283 PREMISES (BURGLARY AND RELATED OFFENSES)**

“Premises” means any real estate and all improvements erected thereon.

### COMMENT

1. *See* § 18-4-201(1), C.R.S. 2020.

## **F:284 PREMISES (SECOND AND THIRD DEGREE CRIMINAL TRESPASS)**

“Premises” means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

### COMMENT

1. *See* § 18-4-504.5, C.R.S. 2020.

## F:285 PRIMARY CARE-GIVER

“Primary care-giver” means a person, other than the patient and the patient’s physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.

### COMMENT

1. See Colo. Const. art. XVIII, § 14(1)(f) (medical marijuana).
2. See Instruction F:89 (defining “debilitating medical condition”); Instruction F:259 (defining “patient”); Instruction F:279 (defining “physician”).
3. See *People v. Clendenin*, 232 P.3d 210, 214 (Colo. App. 2009) (“[W]e conclude that the act of supplying marijuana for medical use, by itself, is insufficient to constitute significant management responsibility for a patient’s well-being, and consequently is insufficient to constitutionally qualify a person doing so as a ‘primary care-giver.’”).

## **F:285.5 PRIVATE EMPLOYMENT AGENCY**

“Private employment agency” means any nongovernmental person, firm, association, or corporation which secures or attempts to secure employment, arranges an interview between an applicant and a specific employer other than itself, or, by any form of advertising or representation, holds itself out to a prospective applicant as able to secure employment for the applicant with any person, firm, association, or corporation other than itself, or engages in employment counseling and in connection therewith supplies or represents that it is able to supply employers or available jobs, where an applicant may become liable for the payment of a fee, either directly or indirectly.

“Private employment agency” also means any nongovernmental person, firm, association, or corporation which provides a list of potential employers or available jobs in a publication, if the primary purpose of the publication, as represented by the provider, is to enable applicants to find employment or to list available jobs and if the applicant is charged more than twenty dollars within any period of time of thirty days or less for access to the publication or revisions or updates thereof, unless the listings of all jobs in the publication are initiated by employers rather than the provider.

### **COMMENT**

1. *See* § 18-5-307(c)(I)-(II), C.R.S. 2020 (prohibited practice by a private employment agency).
2. *See* Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”).
3. The Committee added this instruction in 2015.

## F:285.6 PRIVATE INTIMATE PARTS

“Private intimate parts” means external genitalia or the perineum or the anus or the pubes of any person or the breast of a female.

### COMMENT

1. See §§ 18-7-107(6)(c), 18-7-108(6)(c), C.R.S. 2020 (posting a private image).
2. See also Instruction F:186 (defining “intimate parts” in the context of Chapter 3-4, Unlawful Sexual Behavior).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citations in Comment 1 pursuant to a legislative amendment. See Ch. 192, secs. 1, 2, §§ 18-7-107(6)(c), 18-7-108(6)(c), 2018 Colo. Sess. Laws 1276, 1277–78.

## F:285.7 PRIZE

“Prize” means a gift, award, gratuity, good, service, credit, or anything else of value, including a thing of value for a gain, that may be transferred to an entrant, whether or not possession of the prize is actually transferred or placed on an account or other record as evidence of the intent to transfer the prize.

“Prize” does not include:

1. free or additional play;
2. any intangible or virtual award that cannot be converted into money, goods, or services; or
3. a paper or electronic coupon, whether issued to a player as a single ticket or token or as multiple tickets or tokens, that is won in return for a single play of a device; has a value that does not exceed the equivalent of twenty-five dollars; cannot be exchanged or returned for money, monetary credits, or any financial consideration; and cannot be used to acquire or exchanged for any product that is, contains, or can be used as a constituent part of or accessory for: alcohol beverages; tobacco, tobacco products, marijuana, or smoking; or firearms or ammunition.

### COMMENT

1. *See* § 18-10.5-102(5), C.R.S. 2020 (simulated gambling devices).
2. *See* Instruction F:154 (defining “firearm”); Instruction F:160.1 (defining “gain”); Instruction F:161.5 (defining “goods”); Instruction F:281 (defining “possession”); Instruction F:371 (defining “thing of value”).
3. The Committee added this instruction in 2016.

4. In 2018, pursuant to a legislative amendment, the Committee modified this instruction, and it added cross-references to Instruction F:154 and F:160.1 in Comment 2. *See* Ch. 381, sec. 3, § 18-10.5-102(5), 2018 Colo. Sess. Laws 2297, 2298-99.

## **F:285.9 PROCURE**

“Procure” means to obtain by any means, with or without consideration.

### **COMMENT**

1. See § 18-13-125(2)(b), C.R.S. 2020 (unauthorized trading in telephone records).
2. The Committee added this instruction in 2016.

## **F:286 PRODUCE**

“Produce” includes alter, authenticate, or assemble.

### COMMENT

1. *See* § 18-5-101(7.5), C.R.S. 2020 (forgery, simulation, impersonation, and related offenses).

## **F:287 PRODUCTION**

“Production,” includes the manufacturing of a controlled substance and the planting, cultivating, growing, or harvesting of a plant from which a controlled substance is derived.

### COMMENT

1. *See* § 18-18-102(30), C.R.S. 2020 (controlled substances offenses).

## F:287.2 PROFESSIONAL GAMBLING

“Professional gambling” means: aiding or inducing another to engage in gambling, with the intent to derive a profit therefrom; or participating in gambling and having, other than by virtue of skill or luck, a lesser chance of losing or a greater chance of winning than one or more of the other participants.

### COMMENT

1. See § 18-10-102(8), C.R.S. 2020 (gambling offenses).
2. See Instruction F:14 (defining “to aid”); Instruction F:160.2 (defining “gambling”); Instruction F:287.4 (defining “profit”); see also *People v. Wheatridge Poker Club*, 569 P.2d 324, 326–27 (Colo. 1977) (noting that, although the gambling statute does not define the term “to aid,” a “definition of ‘to aid’ is provided . . . in the general definitional section of the Colorado Criminal Code” and seeing “no reason . . . why the general statutory definition of ‘to aid’ should not apply to the gambling statute”).
3. See *People v. Wheatridge Poker Club*, 569 P.2d 324, 327 (Colo. 1977) (“The term ‘to induce[,]’ while not statutorily defined, may be ascribed its ordinary dictionary definition. Among the definitions of ‘induce’ in Webster’s Dictionary we find, ‘effect, cause; to cause the formation of.’”).
4. The Committee added this instruction in 2016.

## F:287.4 PROFIT

“Profit” means any realized or unrealized benefit other than gain, direct or indirect, including without limitation benefits from proprietorship, management, or unequal advantage in a series of transactions.

### COMMENT

1. See § 18-10-102(1), C.R.S. 2020 (gambling offenses).
2. Because “profit” involves any benefit other than “gain,” the court should always define “gain” whenever issuing this instruction. See Instruction F:160.1 (defining “gain”).
3. See *People v. Wheatridge Poker Club*, 569 P.2d 324, 328 (Colo. 1977) (holding that the definition of “profit” in the gambling statute is not unconstitutionally vague because “[w]hen this section is read in the context of the gambling statute it is perfectly apparent that its thrust is to prohibit activities which derive a substantial benefit from the promotion and operation of gambling”).
4. The Committee added this instruction in 2016.

## **F:287.6 PROMOTE**

“Promote” means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

### COMMENT

1. *See* § 18-7-101(6), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:287.8 PROOF OF OWNERSHIP**

“Proof of ownership” means: the name, address, telephone number, and signature of the seller or the seller’s authorized representative; the name and address of the buyer or consignee if not sold; and a description and quantity of the product.

### COMMENT

1. *See* § 18-13-114.5(3)(e), C.R.S. 2020 (sale without proof of ownership).
2. The Committee added this instruction in 2016.

## F:288 PROPER AUTHORIZATION

“Proper Authorization” means a written authorization signed by the patient or his [her] duly assigned representative; or an appropriate order of court; or authorized possession pursuant to law or regulation for claims processing, possession for medical audit or quality assurance purposes, possession by a consulting physician to the patient, or possession by hospital personnel for record-keeping and billing purposes; or authorized possession pursuant to [insert description(s) of relevant provision(s) from sections 18-3-415 (acquired immune deficiency syndrome testing for persons charged with any sexual offense), 18-3-415.5 (acquired immune deficiency syndrome testing for persons charged with certain sexual offenses), 25-1-122 (named reporting of certain diseases and conditions), or 30-10-606(6) (coroner inquiries)]; or authorized possession by a law enforcement officer or agency, acting in official capacity and pursuant to an official investigation.

### COMMENT

1. See § 18-4-412(2)(c), C.R.S. 2020 (theft of medical records).
2. In 2016, the Committee modified the list of statutory cross-references pursuant to a legislative amendment. See Ch. 230, sec. 11, § 18-4-412(2)(c)(IV), 2016 Colo. Sess. Laws 895, 918.

## F:289 PROPERTY (CYBERCRIME)

“Property” includes, but is not limited to, financial instruments, information, including electronically produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

### COMMENT

1. See § 18-5.5-101(8), C.R.S. 2020 (cybercrime).
2. See Instruction F:63 (defining “computer program”); Instruction F:64 (defining “computer software”); Instruction F:152 (defining “financial instrument”).
3. In 2018, the Committee changed the instruction title’s parenthetical from “computer crime” to “cybercrime” pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## **F:290 PROPERTY (REFUSAL TO PERMIT INSPECTIONS)**

“Property” means any real or personal property, including books, records, and documents which are owned, possessed, or otherwise subject to the control of the defendant.

### COMMENT

1. *See* § 18-8-106(2), C.R.S. 2020 (refusal to permit inspections).

## F:291 PROPERTY OF ANOTHER

Property is that “of another” if anyone other than the defendant has a possessory or proprietary interest therein.

### COMMENT

1. See § 18-4-101(3), C.R.S. 2020 (offenses against property).
2. In *People v. Clayton*, 728 P.2d 723, 726 (Colo. 1986), the supreme court concluded that this definition did not apply to the theft statute and held that, “without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime.” However, in 1987, the General Assembly amended the theft statute and added a definition that mirrors the language of section 18-4-101(3). See § 18-4-401(1.5), C.R.S. 2020; see also Instruction F:18 (defining a thing of value belonging to “another,” for purposes of the theft statute).
3. See *People ex. rel. VanMeveren v. District Court*, 619 P.2d 494, 496-99 (Colo. 1980) (even though defendant held legal title to motor home, credit union’s security interest constituted a sufficient proprietary interest to render defendant subject to prosecution for first-degree arson committed against “property of another”); *People v. Sullivan*, 53 P.3d 1181, 1183 (Colo. App. 2002) (evidence of wife’s ownership of clothing was sufficient to support defendant’s conviction for second degree arson committed against “property of another”; for purposes of this determination, it was immaterial that the wife’s clothes may have been acquired by her during the course of the marriage and, therefore, constituted a part of the parties’ “marital property” under the dissolution statute); *People v. Espinoza*, 989 P.2d 178, 180 (Colo. App. 1999) (building was the property of “another,” within the meaning of the first degree arson statute, where the parties stipulated that the prior owner had a proprietary interest in the building and was still owed money by the defendant).

## F:291.5 PROSECUTOR

“Prosecutor” means the attorney general, deputy attorney general, assistant attorney general, district attorney, deputy district attorney, assistant district attorney, appointed special prosecutor, city attorney, United States attorney, deputy United States attorney, assistant United States attorney, or special assistant United States attorney.

### COMMENT

1. *See* § 18-8-616(3), C.R.S. 2020 (retaliation against a prosecutor).
2. In 2015, the Committee added this instruction to reflect the enactment of section 18-8-616(1), C.R.S. 2015 (retaliation against a prosecutor). *See* Ch. 239, sec. 1, § 18-8-616(3), 2015 Colo. Sess. Laws 884, 885.

## **F:292 PROSTITUTION BY A CHILD**

“Prostitution by a child” means either a child performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child’s spouse in exchange for money or other thing of value or any person performing or offering or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any child not the person’s spouse in exchange for money or other thing of value.

### COMMENT

1. *See* § 18-7-401(6), C.R.S. 2020 (child prostitution).
2. *See* Instruction F:16 (defining “anal intercourse”); Instruction F:81 (defining “cunnilingus”); Instruction F:147 (defining “fellatio”); Instruction F:219 (defining “masturbation”).

## F:293 PROSTITUTION OF A CHILD

“Prostitution of a child” means either inducing a child to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child’s spouse by coercion or by any threat or intimidation or inducing a child, by coercion or by any threat or intimidation or in exchange for money or other thing of value, to allow any person not the child’s spouse to perform or offer or agree to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with or upon such child. Such coercion, threat, or intimidation need not constitute an independent criminal offense and shall be determined solely through its intended or its actual effect upon the child.

### COMMENT

1. See § 18-7-401(7), C.R.S. 2020 (child prostitution).
2. See Instruction F:16 (defining “anal intercourse”); Instruction F:81 (defining “cunnilingus”); Instruction F:147 (defining “fellatio”); Instruction F:219 (defining “masturbation”).
3. See *People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of “prostitution of a child” in section 18-7-401(7); “the crime of ‘patronizing a prostituted child’ requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron – i.e., the person having the sexual contact with the child – or between the patron and the one inducing the child to participate in the sexual act, the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.”).

## **F:293.5 PROTECTED PERSON**

“Protected person” means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

### COMMENT

1. *See* § 18-6-803.5(1.5)(a), C.R.S. 2020 (violation of a protection order); § 18-13-126(4)(a), C.R.S. 2020 (providing virtually the identical definition for the offense of locating protected persons).
2. In 2016, the Committee added the second statutory citation to Comment 1.

## F:294 PROTECTION ORDER

“Protection order” means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person or protected animal, or from entering or remaining on premises, or from coming within a specified distance of a protected person or protected animal or premises or any other provision to protect the protected person or protected animal from imminent danger to life or health, that is issued by a court of this state or a municipal court.

### COMMENT

1. *See* § 18-6-803.5(1.5)(a.5)(I), C.R.S. 2020 (violation of a protection order).
2. *See* Instruction F:319 (defining “restrained person”).
3. The question of whether a protection order was issued by a court of this state or a municipal court pursuant to one of the provisions identified in subsections (A), (B), (C), or (D) of section 18-6-803.5(a.5)(I) is a matter of law for the court to determine. Likewise, the question of whether a protection order is an order that amends, modifies, supplements, or supersedes an initial protection order, as described in subsection (II) of the same statute, is a question of law for the court to determine.

## **F:294.3 PROTECTION ORDER (LOCATING PROTECTED PERSONS)**

“Protection order” means any order that prohibits a restrained person from contacting a protected person, and that is issued by a court of this state or a municipal court.

### COMMENT

1. *See* § 18-13-126(4)(b), C.R.S. 2020.
2. *See* Instruction F:293.5 (defining “protected person”); Instruction F:319 (defining “restrained person”).
3. The Committee added this instruction in 2016.

## **F:294.7 PRURIENT INTEREST**

“Prurient interest” means a shameful or morbid interest.

### COMMENT

1. *See* § 18-7-101(6.5), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:295 PSYCHOTHERAPIST**

“Psychotherapist” means any person who performs or purports to perform psychotherapy, whether or not such person is licensed or certified by the state.

### COMMENT

1. *See* § 18-3-405.5(4)(b), C.R.S. 2020 (sexual assault on a client by a psychotherapist).

## F:296 PSYCHOTHERAPY

“Psychotherapy” means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate behavioral or mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors that interfere with effective emotional, social, or intellectual functioning.

### COMMENT

1. *See* § 18-3-405.5(4)(c), C.R.S. 2020 (sexual assault on a client by a psychotherapist).
2. *See* Instruction F:226.5 (defining “mental health disorder”).
3. In 2017, pursuant to a legislative amendment, the Committee modified this definition, and it added Comment 2. *See* Ch. 263, sec. 141, § 18-3-405.5(4)(c), 2017 Colo. Sess. Laws 1249, 1307.

## **F:297 PUBLIC**

“Public” means offered or available to the public generally, either free or upon payment of a fare, fee, rate, or tariff, or offered or made available by a school or school district to pupils regularly enrolled in public or nonpublic schools in preschool through grade twelve.

### COMMENT

1. *See* § 18-9-115(2), C.R.S. 2020 (endangering public transportation).

## F:297.5 PUBLIC OR PUBLICLY

“Public” or “publicly” means a place to which the public or a substantial number of the public has access without restriction, including but not limited to streets and highways, transportation facilities, places of amusement, parks, playgrounds, and the common areas of buildings and other facilities.

“Open and public” or “openly and publicly” does not include any activity occurring on private residential property by the occupant or his or her guests.

### COMMENT

1. See § 18-18-102(20.3)(b), (c), C.R.S. 2020 (controlled substances offenses).
2. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 315, sec. 4, § 18-18-102(20.3)(b), (c), 2019 Colo. Sess. Laws 2823, 2824.

## **F:298 PUBLIC BUILDING**

The term “public building” includes any premises being temporarily used by a public officer or employee in the discharge of his official duties.

### COMMENT

1. *See* § 18-9-110(7), C.R.S. 2020 (public buildings – trespass, interference).

## F:299 PUBLIC CONVEYANCE

“Public conveyance” includes a passenger or freight train, airplane, bus, truck, car, boat, tramway, gondola, lift, elevator, escalator, or other device intended, designed, adapted, and used for the public carriage of persons or property.

### COMMENT

1. *See* § 18-9-115(3), C.R.S. 2020 (endangering public transportation).
2. *See* Instruction F:297 (defining “public”).

## **F:300 PUBLIC HOUSING DEVELOPMENT**

“Public housing development” means any low-income housing project of any state, county, municipal, or other governmental entity or public body owned and operated by a public housing authority that has an on-site manager. “Public housing development” does not include single-family dispersed housing or small or large clusters of dispersed housing having no on-site manager.

### **COMMENT**

1. *See* § 18-18-407(1)(g)(III), C.R.S. 2020 (controlled substances, special offender).

## **F:301 PUBLIC OR PRIVATE PROPERTY**

“Public or private property” includes, but is not limited to, the right-of-way of any road or highway, any body of water or water course, including frozen areas thereof, or the shores or beaches thereof, any park, playground or building, any refuge, conservation, or recreation area, and any residential, farm, or ranch properties or timberlands.

### COMMENT

1. *See* § 18-4-511(3)(b), C.R.S. 2020 (littering).
2. *See* Instruction F:197 (defining “litter”).

## **F:302 PUBLIC LAND SURVEY MONUMENT**

“Public land survey monument” means any land boundary monument established on the ground by a cadastral survey of the United States government and any mineral survey monument established by a United States mineral surveyor and made a part of the United States public land records.

### COMMENT

1. *See* § 18-4-508, C.R.S. 2020 (defacing, destroying, or removing landmarks, monuments, or accessories, incorporating this definition from section 38-53-103(18), C.R.S. 2020).

## **F:303 PUBLIC PLACE**

“Public place” means a place to which the public or a substantial number of the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities.

### COMMENT

1. *See* § 18-1-901(3)(n), C.R.S. 2020.

## **F:304 PUBLIC RECORD**

The term “public record” includes all official books, papers, or records created, received, or used by or in any governmental office or agency.

### COMMENT

1. *See* § 18-8-114(2), C.R.S. 2020 (abuse of public records).

## **F:305 PUBLIC SAFETY ORDER**

A “public safety order” is an order designed to prevent or control disorder or promote the safety of persons or property issued by an authorized member of the police, fire, military, or other forces concerned with the riot.

### COMMENT

1. *See* § 18-9-105, C.R.S. 2020 (disobedience of public safety orders).

## F:306 PUBLIC SERVANT

“Public servant” means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

### COMMENT

1. See § 18-1-901(3)(o), C.R.S. 2020.
2. See Instruction F:162 (defining “government”).
3. See also § 18-8-101(3), C.R.S. 2020 (incorporating this definition for all offenses in Title 18, Article 8, unless the context requires otherwise).
4. See *People v. Sena*, 2016 COA 161, ¶ 12, 395 P.3d 1148, 1151 (holding that “a police officer, as an employee of the government, is a public servant”).
5. In 2015, the Committee added Comment 3.
6. In 2017, the Committee added Comment 4.

## **F:306.5 PUBLIC SERVANT (BRIBERY AND CORRUPT INFLUENCES; ABUSE OF PUBLIC OFFICE)**

“Public servant” means any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses.

“Public servant” includes persons who presently occupy the position of a public servant or have been elected, appointed, or designated to become a public servant although not yet occupying that position.

### COMMENT

1. *See* § 18-8-301(4), C.R.S. 2020 (incorporating the definition of “public servant” in section 18-8-101(3), C.R.S. 2020, which, in turn, incorporates the definition from section 18-1-901(3)(o), C.R.S. 2020, found in Instruction F:306).
2. The first paragraph of this definition is identical to that in Instruction F:306 (defining “public servant”); the second paragraph is unique to the chapter on bribery and corrupt influences. *See* § 18-8-301(4).
3. The Committee added this instruction in 2015.
4. *See People v. Sena*, 2016 COA 161, ¶ 12, 395 P.3d 1148, 1151 (holding that “a police officer, as an employee of the government, is a public servant”).
5. In 2016, the Committee added the phrase “abuse of public office” to the parenthetical.
6. In 2017, the Committee added Comment 4.

## **F:306.7 PURCHASE**

“Purchase” means giving money to acquire any valuable article, taking valuable articles in full or part satisfaction of a debt, taking valuable articles for resale for the purpose of full or part satisfaction of a debt, or taking valuable articles for sale on consignment.

### COMMENT

1. *See* § 18-16-102(4), C.R.S. 2020 (purchases of valuable articles).
2. *See* Instruction F:385.3 (defining “valuable article”).
3. The Committee added this instruction in 2016.

## F:306.8 PURCHASER

“Purchaser” means any person holding himself [herself] out to the public as being engaged in the business of buying valuable articles or any person who purchases five or more valuable articles during any thirty-day period.

“Purchaser” does not include a person purchasing valuable articles from an estate or from a retail or wholesale merchant.

### COMMENT

1. See § 18-16-102(5), C.R.S. 2020 (purchases of valuable articles).
2. See Instruction F:385.3 (defining “valuable article”).
3. See *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 945 (Colo. 1985) (“When considered as a whole, the definition of ‘purchaser’ – including its utilization of the readily comprehensible terms ‘estate’ and ‘retail or wholesale merchant’ – when read together with section 18-16-109, makes clear the scope of the Act’s applicability, provides guidance for law-abiding behavior, and does not create a danger of arbitrary enforcement.”).
4. The Committee added this instruction in 2016.

## **F:307 RACKETEERING ACTIVITY**

“Racketeering activity” means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit [insert name(s) of qualifying predicate offense(s) from section 18-17-103(5)(a), (b)(I)–(XVII), C.R.S. 2020].

### COMMENT

1. *See* § 18-17-103(5), C.R.S. 2020 (Colorado Organized Crime Control Act).

## **F:307.3 READILY ACCESSIBLE TO THE GENERAL PUBLIC**

“Readily accessible to the general public” means, with respect to a radio communication, that such communication is not: scrambled or encrypted; transmitted using modulation techniques having essential parameters withheld from the public with the intention of preserving the privacy of such communication; carried on a subcarrier or other signal subsidiary to a radio transmission; transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or transmitted on frequencies allocated under the federal communications commission, unless, in the case of a communication transmitted on a frequency that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

### COMMENT

1. *See* § 18-9-301(8.5), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:58.5 (defining “common carrier” (wiretapping and eavesdropping)).
3. The Committee added this instruction in 2016.

## **F:307.5 REAL PROPERTY**

“Real property” means land and any interest or estate in land [and includes a manufactured home].

### COMMENT

1. *See* § 18-5-801(2), C.R.S. 2020 (equity skimming and related offenses).
2. If necessary, draft an instruction defining the term “manufactured home” based on section 42-1-102(106)(b), C.R.S. 2020.
3. The Committee added this instruction in 2015.

## **F:308 RECKLESSLY**

A person acts “recklessly” when he [she] consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

### COMMENT

1. *See* § 18-1-501(8), C.R.S. 2020.

## **F:308.5 REGISTRY IDENTIFICATION CARD**

“Registry identification card” means that document, issued by the state health agency, which identifies a patient authorized to engage in the medical use of marijuana and such patient’s primary care-giver, if any has been designated.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 14(1)(g) (medical marijuana).

## **F:309 REMAINS UNLAWFULLY**

### COMMENT

1. *See* Instruction F:126 (defining the terms “enters unlawfully” and “remains unlawfully”).

## F:310 REMUNERATION

“Remuneration” means anything of value, including money, real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or employment or promises or agreements connected therewith.

### COMMENT

1. *See* § 18-18-102(31), C.R.S. 2020 (controlled substances offenses).
2. *See* Instruction F:21 (defining “anything of value” by reference to Instruction F:371 (defining “thing of value”)).

## F:311 RENDER ASSISTANCE

“Render assistance” means to harbor or conceal the other; or harbor or conceal the victim or a witness to the crime; or warn such person of impending discovery or apprehension, except that this does not apply to a warning given in an effort to bring such person into compliance with the law; or provide such person with money, transportation, weapon, disguise, or other thing to be used in avoiding discovery or apprehension; or by force, intimidation, or deception, obstruct anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person; or conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction or punishment of such person.

### COMMENT

1. *See* § 18-8-105(2), C.R.S. 2020 (accessory to crime); § 18-8-201(3), C.R.S. 2020 (“‘Assist’ includes any activity characterized as ‘rendering assistance’ in section 18-8-105.”).

## **F:311.5 RENT**

“Rent” means any moneys or any other thing of value received as a payment or as a deposit for the privilege of living in or using real property.

### COMMENT

1. *See* § 18-5-801(3), C.R.S. 2020 (equity skimming and related offenses).
2. The Committee added this instruction in 2015.

## F:311.7 REPAYMENT

“Repayment” of an extension of credit includes the repayment, satisfaction, or discharge, in whole or in part, of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

### COMMENT

1. *See* § 18-15-101(7), C.R.S. 2020 (unlawful lending practices).
2. *See* Instruction F:135.5 (defining “extend credit”).
3. The Committee added this instruction in 2016.

## **F:312 REPEATED OR REPEATEDLY**

“Repeated” or “repeatedly” means on more than one occasion.

### COMMENT

1. *See* § 18-3-602(2)(d), C.R.S. 2020 (stalking).

## **F:312.5 REPRESENT (MONEY LAUNDERING)**

“Represent” includes, but is not limited to, the making of a representation by a peace officer, a federal officer, or another person acting at the direction of, or with the approval of, a peace officer or federal officer.

### COMMENT

1. *See* § 18-5-309(3)(d), C.R.S. 2020 (money laundering).
2. The Committee added this instruction in 2015.

## **F:313 REPRESENTING**

“Representing” means describing, depicting, containing, constituting, reflecting, or recording.

### COMMENT

1. *See* § 18-4-408(1)(c), C.R.S. 2020 (theft of trade secrets).

## **F:314 RESCUE SPECIALIST**

“Rescue specialist” means a member of a public or private rescue agency, whether that person is a volunteer or receives compensation for services rendered as such rescue specialist.

### COMMENT

1. *See* § 18-8-104(5)(c), C.R.S. 2020 (obstructing a rescue specialist).
2. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 385, sec. 2, § 18-8-104(5)(c), 2018 Colo. Sess. Laws 2309, 2310.

## **F:315 RESEARCHER**

“Researcher” means any person licensed by the Department of Public Health and Environment to experiment with, study, or test any controlled substance within this state and includes analytical laboratories.

### COMMENT

1. *See* § 18-18-102(32), C.R.S. 2020 (controlled substances offenses).

## **F:316 RESIDENCE**

“Residence” means any single-family or multi-family dwelling unit that is not being used as a targeted occupant’s sole place of business or as a place of public meeting.

### COMMENT

1. *See* § 18-9-108.5(2)(a), C.R.S. 2020 (targeted residential picketing).

## **F:317 RESIDENTIAL MORTGAGE LOAN**

“Residential mortgage loan” means a loan or agreement to extend credit, made to a person and secured by a mortgage or lien on residential real property, including, but not limited to, the refinancing or renewal of a loan secured by residential real property.

### COMMENT

1. *See* § 18-4-401(9)(e)(II), C.R.S. 2020 (theft; sentence enhancement).

## **F:317.5 RESIDENTIAL PROPERTY**

“Residential property” means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation.

“Residential property” also includes the real property surrounding a structure, owned in common with the structure, that includes one or more single units providing complete independent living facilities.

### COMMENT

1. *See* § 18-18-406(3)(c)(III), C.R.S. 2020 (cultivating, growing, or producing marijuana).
2. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 402, sec. 2, § 18-18-406(3)(c)(III), 2017 Colo. Sess. Laws 2094, 2096.

## **F:318 RESIDENTIAL REAL PROPERTY**

“Residential real property” means real property used as a residence and containing no more than four families housed separately.

### COMMENT

1. *See* § 18-4-401(9)(e)(III), C.R.S. 2020 (theft; sentence enhancement).

## **F:319 RESTRAINED PERSON**

“Restrained person” means the person identified in the order as the person prohibited from doing the specified act[s].

### COMMENT

1. *See* § 18-6-803.5(1.5)(c), C.R.S. 2020; § 18-13-126(4)(c), C.R.S. 2020 (providing virtually the identical definition for the offense of locating protected persons).
2. In 2016, the Committee added the second statutory citation to Comment 1.

## **F:320 RESTRAINT**

“Restraint” or “restrained” means any denial, revocation, or suspension of a person’s license or privilege to drive a motor vehicle in this state or another state.

### COMMENT

1. *See* § 42-2-138(4)(b), C.R.S. 2020 (driving under restraint).

## **F:321 RETAIL MARIJUANA STORE**

“Retail marijuana store” means an entity licensed to purchase marijuana from marijuana cultivation facilities and marijuana and marijuana products from marijuana product manufacturing facilities and to sell marijuana and marijuana products to consumers.

### COMMENT

1. *See* Colo. Const. Art. XVIII, § 16(2)(n).
2. *See* Instruction F:210 (defining “marijuana”); Instruction F:211 (defining “marijuana cultivation facility”); Instruction F:213 (defining “marijuana product manufacturing facility”); Instruction F:214 (defining “marijuana products”).

## **F:322 RETAIL VALUE**

“Retail value” means the counterfeiter’s regular selling price for the goods or services that bear or are identified by a counterfeit mark.

In the case of items bearing a counterfeit mark that are components of a finished product, “retail value” means the counterfeiter’s regular selling price for the finished product.

### COMMENT

1. *See* § 18-5-110.5(3)(b), C.R.S. 2020 (trademark counterfeiting).

## F:322.5 RETAILER

“Retailer” means any licensee who maintains gaming at his or her place of business within the cities of Central, Black Hawk, or Cripple Creek for use and operation by the public.

### COMMENT

1. *See* § 44-30-103(27), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:196.8 (defining “licensee”); Instruction F:392.8 (defining “within the cities of Central, Black Hawk, or Cripple Creek”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified this instruction and the statutory citation in Comment 1 pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 2, § 44-30-103(27), 2018 Colo. Sess. Laws 167, 173.

## **F:323 RETALIATE**

“Retaliate” includes threats of kidnapping, death, serious bodily injury, or extreme pain.

### COMMENT

1. *See* § 18-3-402(4)(c), C.R.S. 2020 (sexual assault).
2. The term “retaliation” has a different meaning in other contexts. *See* § 18-8-615, C.R.S. 2020 (retaliation against a judge); § 18-8-706, C.R.S. 2020 (retaliation against a witness or victim); Instructions 8:66, 8:70.

## **F:324 RIOT**

“Riot” means a public disturbance involving an assemblage of three or more persons which, by tumultuous and violent conduct, creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.

### COMMENT

1. *See* § 18-9-101(2), C.R.S. 2020 (public peace and order offenses).

## F:324.5 ROULETTE

“Roulette” means a game in which a ball is spun on a rotating wheel and drops into a numbered slot on the wheel, and bets are placed on which slot the ball will come to rest in.

### COMMENT

1. *See* § 44-30-103(29), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:31.2 (defining “bet”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(29), 2018 Colo. Sess. Laws 167, 173.

## F:325 SABOTAGE

“Sabotage” means intentionally tampering with an animal belonging to or owned by another person that has been registered, entered, or exhibited in any exhibition or raised for the apparent purpose of being entered in an exhibition.

### COMMENT

1. *See* § 18-9-207(1)(c), C.R.S. 2020 (tampering with livestock).
2. *See* Instruction F:131 (defining “exhibition”); Instruction F:185 (defining “intentionally”); Instruction F:361 (defining “tamper”).

## **F:326 SADOMASOCHISM**

“Sadomasochism” means real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or the real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

### COMMENT

1. *See* § 18-6-403(2)(g), C.R.S. 2020 (sexual exploitation of a child).

## **F:327 SALE**

“Sale” includes a barter, an exchange, or a gift, or an offer therefor, and each such transaction made by any person, whether as the principal, proprietor, agent, servant, or employee, with or without remuneration.

### COMMENT

1. *See* § 18-18-403(1), C.R.S. 2020 (controlled substances).
2. *See* Instruction F:13 (defining “agent”); Instruction F:310 (defining “remuneration”).

## **F:328 SALVIA DIVINORUM**

“*Salvia divinorum*” means *salvia divinorum*, salvinorin A, and any part of the plant classified as *salvia divinorum*, whether growing or not, including the seeds thereof, any extract from any part of the plant, and any compound, manufacture, salts, derivative, mixture, or preparation of the plant, its seeds, or its extracts.

### COMMENT

1. *See* § 18-18-102(33.5), C.R.S. 2020 (controlled substances offenses).

## F:328.5 SCANNING DEVICE

“Scanning device” means a scanner, reader, wireless access device, radio-frequency identification scanner, near-field communications technology, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information from a payment card.

### COMMENT

1. *See* § 18-5.5-101(8.5), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:262.5 (defining “payment card”).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 379, sec. 1, § 18-5.5-101(8.5), 2018 Colo. Sess. Laws 2290, 2290.

## **F:329 SCHOOL RESOURCE OFFICER**

“School resource officer” means a peace officer who has specialized training, pursuant to a training curriculum approved by the Peace Officers Standards and Training Board, to work with school staff and students and who is assigned to a public school or charter school for the purpose of creating a safe learning environment and responding to all-hazard threats that may impact the school.

### COMMENT

1. *See* § 18-12-105.5(3)(e), C.R.S. 2020 (exceptions to unlawfully carrying a weapon on school, college, or university grounds; incorporating section 22-32-109.1(1)(g.5), C.R.S. 2020).
2. *See* Instruction F:263 (defining “peace officer”).
3. The definition includes language referring to the P.O.S.T. curriculum, from section 24-31-312, which is incorporated by section 22-32-109.1(1)(g.5).

## F:329.2 SECONDHAND DEALER

“Secondhand dealer” means any person whose principal business is that of engaging in selling or trading secondhand property.

The term also includes the following: any person whose principal business is not that of engaging in selling or trading secondhand property but who sells or trades secondhand property through means commonly known as flea markets or any similar facilities in which secondhand property is offered for sale or trade; any person who sells or trades secondhand property from a nonpermanent location; and any person who purchases for resale any secondhand property which carries a manufacturer or serial number.

[The term does not include: [insert relevant excluding language from section 18-13-114(5)(c)(I)-(VII)].]

### COMMENT

1. *See* § 18-13-114(5)(c), C.R.S. 2020 (sale of secondhand property).
2. *See* Instruction F:329.3 (defining “secondhand property”).
3. The Committee added this instruction in 2016.

### **F:329.3 SECONDHAND PROPERTY**

“Secondhand property” means the following items of tangible personal property sold or traded by a secondhand dealer: cameras, camera lenses, slide or movie projectors, projector screens, flashguns, enlargers, tripods, binoculars, telescopes, and microscopes; televisions, phonographs, tape recorders, video recorders, radios, tuners, speakers, turntables, amplifiers, record changers, citizens' band broadcasting units and receivers, and video games; skis, ski poles, ski boots, ski bindings, golf clubs, guns, jewelry, coins, luggage, boots, and furs; typewriters, adding machines, calculators, computers, portable air conditioners, cash registers, copying machines, dictating machines, automatic telephone answering machines, and sewing machines; bicycles, bicycle frames, bicycle derailleur assemblies, bicycle hand brake assemblies, and other bicycle components; and any item of tangible personal property which is marked with a serial or identification number and the selling price of which is thirty dollars or more, except motor vehicles, off-highway vehicles, snowmobiles, ranges, stoves, dishwashers, refrigerators, garbage disposals, boats, airplanes, clothes washers, clothes driers, freezers, mobile homes, and nonprecious scrap metal.

#### COMMENT

1. *See* § 18-13-114(5)(d), C.R.S. 2020 (sale of secondhand property).
2. *See* Instruction F:249.5 (defining “off-highway vehicle”).
3. The Committee added this instruction in 2016.

## **F:329.5 SECURITY INTEREST**

“Security interest” means an interest in personal property which secures payment or performance of an obligation.

### COMMENT

1. *See* § 18-5-801(4), C.R.S. 2020 (equity skimming and related offenses).
2. The Committee added this instruction in 2015.

## F:330 SELF-INDUCED INTOXICATION

“Self-induced intoxication” means intoxication caused by substances that the defendant knows or ought to know have the tendency to cause intoxication and that he knowingly introduced or allowed to be introduced into his body.

### COMMENT

1. See § 18-1-804(5), C.R.S. 2020.
2. See Instruction F:188 (defining “intoxication”); *see also* Instruction H:34 (voluntary intoxication).

## **F:330.5 SELLER**

“Seller” means any person offering a valuable article for money to any purchaser, offering a valuable article in full or part satisfaction of a debt, or offering a valuable article for resale for the purpose of full or part satisfaction of a debt.

### COMMENT

1. *See* § 18-16-102(6), C.R.S. 2020 (purchases of valuable articles).
2. *See* Instruction F:306.8 (defining “purchaser”); Instruction F:385.3 (defining “valuable article”).
3. The Committee added this instruction in 2016.

## **F:331 SEMIAUTOMATIC ASSAULT WEAPON**

“Semiautomatic assault weapon” means any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

### **COMMENT**

1. See § 18-1.3-406(7)(b), C.R.S. 2020 (crime of violence sentence enhancement).

## F:332 SERIOUS BODILY INJURY

“Serious bodily injury” means bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

### COMMENT

1. See § 18-1-901(3)(p), C.R.S. 2020; § 42-4-1601(4)(b), C.R.S. 2020 (defining the term identically, except that the provision uses the phrase “means injury” (without “bodily”) and includes an “or” immediately before the words: “a substantial risk of protracted loss.”)
2. See Instruction F:36 (defining “bodily injury”).
3. See *People v. Daniels*, 240 P.3d 409, 411 (Colo. App. 2009) (“[W]e . . . hold that ‘of the second or third degree’ in section 18-1-901(3)(p) refers only to burns and not to breaks or fractures. Accordingly, we conclude that *any* break or fracture is sufficient to establish ‘serious bodily injury.’”).

## **F:333 SERIOUS PHYSICAL HARM**

“Serious physical harm” means any physical harm that [carries a substantial risk of death] [causes permanent maiming or that involves some temporary, substantial maiming] [causes acute pain of a duration that results in substantial suffering].

### COMMENT

1. *See* § 18-9-201(4.5), C.R.S. 2020 (cruelty to animals).
2. In 2016, the Committee modified the statutory citation pursuant to a legislative amendment. *See* Ch. 236, sec. 1, § 18-9-201(4.5), 2016 Colo. Sess. Laws 952, 952; Ch. 236, sec. 2, § 18-9-202(1.6), 2016 Colo. Sess. Laws 952, 953.

## F:334 SERVICE ANIMAL

“Service animal” means any animal, the services of which are used to aid the performance of official duties by a fire department, fire protection district, or governmental search and rescue agency.

Unless otherwise specified, “service animal” does not include a “certified police working dog” or a “police working horse.”

### COMMENT

1. See § 18-9-201(4.7), C.R.S. 2020 (cruelty to a service animal).
2. See Instruction F:17 (defining “animal”); Instruction F:48.2 (defining “certified police working dog”); Instruction F:48.25 (defining “police working horse”).
3. In 2016, the Committee modified this instruction and the first two comments pursuant to a legislative amendment. See Ch. 236, sec. 1, § 18-9-201(4.7), 2016 Colo. Sess. Laws 952, 953; Ch. 236, sec. 2, § 18-9-202(1.5)(c), 2016 Colo. Sess. Laws 952, 953.
4. In 2018, pursuant to a legislative amendment, the Committee added “certified police working horse” to the second paragraph of this definition, and it added the cross-reference to Instruction F:48.25 in Comment 2. See Ch. 19, sec. 1, § 18-9-201(4.7), 2018 Colo. Sess. Laws 266, 266–67.
5. In 2019, the Committee changed the phrase “certified police working horse” to “police working horse” pursuant to a legislative amendment. See Ch. 75, sec. 1, § 18-9-201(4.7), 2019 Colo. Sess. Laws 276, 276.

## **F:334.5 SERVICE-ANIMAL-IN-TRAINING**

“Service-animal-in-training” means a dog or miniature horse that is being individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.

### COMMENT

1. *See* § 18-13-107.7(4)(d), C.R.S. 2020 (intentional misrepresentation of a service animal).
2. *See* § 18-13-107.7(4)(b) (defining “qualified individual with a disability” as having “the same meaning as set forth in the federal ‘Americans with Disabilities Act of 1990’, 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations”).
3. The Committee added this instruction in 2016.

## **F:335 SERVICES**

“Services” includes, but is not limited to, computer time, data processing, and storage functions.

### COMMENT

1. *See* § 18-5.5-101(9), C.R.S. 2020 (cybercrime).

## F:335.5 SEXUAL ACTIVITY

“Sexual activity” means sexual contact, sexual intrusion, sexual penetration, sexual exploitation of a child, or an obscene performance.

### COMMENT

1. See § 18-3-502(11), C.R.S. 2020 (human trafficking and slavery).
2. See Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”); Instruction 6-4:17 (sexual exploitation of a child (explicit sexual conduct for sexually exploitative material)); Instruction 6-4:21 (sexual exploitation of a child (explicit sexual conduct for a performance)); *see also* § 18-7-101(2), (5), C.R.S. 2020 (defining “obscene” and “performance”).
3. The Committee added this instruction in 2015.

## **F:336 SEXUAL ACT WITH AN ANIMAL**

“Sexual act with an animal” means an act between a person and an animal involving direct physical contact between the genitals of one and the mouth, anus, or genitals of the other.

A sexual act with an animal may be proven without allegation or proof of penetration.

The definition of “sexual act with an animal” does not include accepted animal husbandry practices.

### **COMMENT**

1. *See* § 18-9-201(5), C.R.S. 2020 (cruelty to animals).

## F:336.2 SEXUAL ACTS

“Sexual acts” means sexual intrusion or sexual penetration.

### COMMENT

1. See §§ 18-7-107(6)(d), 18-7-108(6)(d), C.R.S. 2020 (posting a private image).
2. See Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 192, secs. 1, 2, §§ 18-7-107(6)(d), 18-7-108(6)(d), 2018 Colo. Sess. Laws 1276, 1277-78.

## F:336.5 SEXUAL CONDUCT

“Sexual conduct” means sexual contact, sexual intrusion, or sexual penetration, as these terms are defined in these instructions.

“Sexual conduct” does not include acts of an employee of a correctional institution or a person who has custody of another person that are performed to carry out the necessary duties of the employee or the person with custody.

### COMMENT

1. *See* § 18-7-701(2)(b), C.R.S. 2020 (sexual conduct in a correctional institution).
2. *See* Instruction F:75.5 (defining “correctional institution”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. The Committee added this instruction in 2015.

## F:337 SEXUAL CONTACT

“Sexual contact” means:

[the knowing touching of the victim’s intimate parts by the actor, or of the actor’s intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.]

[the knowing emission or ejaculation of seminal fluid onto any body part of the victim or the clothing covering any body part of the victim.]

[knowingly causing semen, blood, urine, feces, or a bodily substance to contact any body part of the victim or the clothing covering any body part of the victim if that contact with semen, blood, urine, feces, or a bodily substance is for the purpose of sexual arousal, gratification, or abuse.]

### COMMENT

1. See § 18-3-401(4), C.R.S. 2020 (sexual offenses).
2. See Instruction F:186 (defining “intimate parts”).
3. See *People v. Lovato*, 2014 COA 113, ¶ 32, 357 P.3d 212, 223 (recognizing that, in the context of the phrase “sexual arousal, gratification, or abuse,” the word “abuse” means “sexual abuse,” but nevertheless holding that such abuse does not require a “sexual motivation” on the part of the perpetrator); + see also *People v. Espinosa*, 2020 COA 63, ¶¶ 7, 15, 20–21, 26, 465 P.3d 114, 116–19 (holding that, where the trial court defined “sexual abuse” in part as “behavior done with an intent to cause pain, injury, or discomfort . . . [which] can be either of a physical or an emotional nature,” that part of the instruction correctly stated the law; but further holding that when the court instructed the jury that “[i]t is the nature of the act that renders the abuse ‘sexual’ and not the motivation of the

perpetrator,” this was reversible error because, although “the sexual nature of the act may be viewed from the victim’s perspective rather than the perpetrator’s” (per *Lovato*), the requirement of *sexual* abuse nevertheless requires that the perpetrator act “for the purpose of causing sexual humiliation, sexual degradation, or other physical or emotional discomfort of a sexual nature”; declining to suggest language for an appropriate instruction, and instead leaving that task to the Committee).

4. In 2017, the Committee added Comment 3.

5. In 2019, the Committee added the second and third bracketed alternatives pursuant to a legislative amendment. *See* Ch. 76, sec. 1, § 18-3-401(4), 2019 Colo. Sess. Laws 279, 279.

6. + In 2020, the Committee added the citation to *Espinosa* in Comment 3.

## **F:338 SEXUAL EXCITEMENT**

“Sexual excitement” means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

### COMMENT

1. *See* § 18-6-403(2)(h), C.R.S. 2020 (sexual exploitation of children).

## **F:339 SEXUAL INTERCOURSE (SEXUAL EXPLOITATION OF CHILDREN)**

“Sexual intercourse” means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

### COMMENT

1. *See* § 18-6-403(2)(i), C.R.S. 2020 (sexual exploitation of children).

## **F:340 SEXUAL INTRUSION**

“Sexual intrusion” means any intrusion, however slight, by an object or any part of a person’s body, except the mouth, tongue, or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

### COMMENT

1. *See* § 18-3-401(5), C.R.S. 2020 (sexual offenses).

## F:340.5 SEXUALLY EXPLICIT IMAGE

“Sexually explicit image” means any electronic or digital photograph, video, or video depiction of the external genitalia or perineum or anus or buttocks or pubes of any person or the breast of a female person.

### COMMENT

1. See § 18-7-109(8)(b), C.R.S. 2020 (private image by a juvenile).
2. The terms “perineum” and “pubes” are not defined by statute. See, e.g., *United States v. Crosby*, 106 F. Supp. 2d 53, 57 n.7 (D. Me. 2000) (“The *Random House Dictionary of the English Language* provides two definitions for the perineum. The first defines it as ‘the area in front of the anus extending to the fourchette of the vulva in the female and to the scrotum in the male’ and the second as ‘the diamond-shaped area corresponding to the outlet of the pelvis, containing the anus and vulva or the roots of the penis.’ *Random House Dictionary of the English Language* 1440 (2d ed. unabridged 1987). In an illustration of the male perineum (absent the skin) in *Grant’s Atlas of Anatomy*, the urogenital and anal region are depicted as part of the male perineum, and described as such in the accompanying description. See *Grant’s Atlas of Anatomy* 185 (9th ed. 1991).”); *Nickerson v. State*, 69 S.W.3d 661, 666 n.3 (Tex. Ct. App. 2002) (“The perineum is ‘the area between the anus and the posterior part of the external genitalia.’ *Merriam Webster’s Collegiate Dictionary* 864 (10th ed. 1993).”); *Webster’s Third New International Dictionary* 1836 (2002) (defining “pubes” as “the hair that appears upon the lower part of the hypogastric region at the age of puberty,” “the lower part of the hypogastric region,” or “the pubic region”).
3. The Committee added this instruction in 2017 pursuant to new legislation. See Ch. 390, sec. 4, § 18-7-109(8)(b), 2017 Colo. Sess. Laws 2012, 2016.

## **F:341 SEXUALLY EXPLOITATIVE MATERIAL**

“Sexually exploitative material” means any photograph, motion picture, video, recording or broadcast of moving visual images, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

### COMMENT

1. *See* § 18-6-403(2)(j), C.R.S. 2020 (sexual exploitation of children).
2. *See* Instruction F:132 (defining “explicit sexual conduct”); Instruction F:389 (defining “video” and “recording or broadcast”).
3. In 2015, the Committee modified this instruction to reflect a legislative amendment by replacing the words “video tape” with “recording or broadcast of moving visual images.” In addition, the Committee modified the citation to Instruction F:389 that appears in the preceding Comment. *See* Ch. 274, sec. 1, § 18-6-403(2)(j), 2015 Colo. Sess. Laws 1113, 1115.

## **F:342 SEXUAL ORIENTATION**

“Sexual orientation” means a person’s actual or perceived orientation toward heterosexuality, homosexuality, bisexuality, or transgender status.

### COMMENT

1. *See* § 18-9-121(5)(b), C.R.S. 2020.

## F:343 SEXUAL PENETRATION

“Sexual penetration” means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration during sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse, however slight, is sufficient.

### COMMENT

1. See § 18-3-401(6), C.R.S. 2020 (sexual offenses).
2. See Instruction F:16 (defining “anal intercourse”); Instruction F:81 (defining “cunnilingus”); Instruction F:147 (defining “fellatio”).
3. The term “analingus” is not defined by statute. See, e.g., *State v. Kelly*, 728 S.W.2d 642, 648 (Mo. App. S.D. 1987) (“Apparently the term ‘analingus’ is not defined by Colorado statute. *Webster’s Third New International Dictionary* defines analingus as follows: ‘erotic stimulation achieved by mouth and anus.’”).

## **F:344 SHORT RIFLE**

“Short rifle” means a rifle having a barrel less than sixteen inches long or an overall length of less than twenty-six inches.

### COMMENT

1. *See* § 18-12-101(1)(h), C.R.S. 2020 (offenses relating to firearms and weapons).

## **F:345 SHORT SHOTGUN**

“Short shotgun” means a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches.

### COMMENT

1. *See* § 18-12-101(1)(i), C.R.S. 2020 (offenses relating to firearms and weapons).

## F:345.2 SIMULATED

“Simulated” means the explicit depiction or description of any of the following types of conduct, which creates the appearance of such conduct: patently offensive representations or descriptions of ultimate sex acts, normal or perverted, including sexual intercourse, sodomy, and sexual bestiality; or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, or covered male genitals in a discernibly turgid state.

### COMMENT

1. See § 18-7-101(7), C.R.S. 2020 (obscenity).
2. See Instruction F:258.7 (defining “patently offensive”).
3. The statute provides that “simulated” means “the explicit depiction or description of any of the types of conduct set forth in paragraph (b) of subsection (2) of this section, which creates the appearance of such conduct.” § 18-7-101(7). In turn, section 18-7-101(2)(b) describes two different examples of “patently offensive representations or descriptions.” As a result, this definition arguably includes a redundancy, as it refers to “the explicit depiction or description of . . . patently offensive representations or descriptions.” However, the Committee has elected to track the language of the statute, as much of the case law surrounding obscenity discusses the term “patently offensive.” See *People v. Ford*, 773 P.2d 1059, 1067 (Colo. 1989) (“We hold that defining ‘patently offensive’ in terms of community standards of tolerance does not impermissibly reach speech protected by either the United States or Colorado Constitutions, and therefore is not overbroad.”).

However, section 18-7-101(2)(b)(I) also refers to acts that are “actual or simulated.” The Committee has removed this language from this instruction, as including the term “simulated” in an instruction that defines the term “simulated” would likely confuse jurors.

4. The Committee added this instruction in 2016.

### **F:345.3 SIMULATED GAMBLING DEVICE**

“Simulated gambling device” means a mechanically or electronically operated machine, network, system, program, or device that is used by an entrant and that displays simulated gambling displays on a screen or other mechanism at a business location, including a private club, that is owned, leased, or otherwise possessed, in whole or in part, by a person conducting the game or by that person’s partners, affiliates, subsidiaries, agents, or contractors.

“Simulated gambling device” includes: a video poker game or any other kind of video card game; a video bingo game; a video craps game; a video keno game; a video lotto game; a video roulette game; a pot-of-gold; an eight-liner; a video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols; an electronic gaming machine, including a personal computer of any size or configuration that performs any of the functions of an electronic gaming machine; a slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both; and a device that functions as, or simulates the play of, a slot machine, where results are determined by reason of the skill of the player or the application of the element of chance, or both.

“Simulated gambling device” does not include: bona fide amusement devices that pay nothing of value, cannot be adjusted to pay anything of value, and are not used for gambling; or any pari-mutuel totalisator equipment that is used for pari-mutuel wagering on live or simulcast racing events and that has been approved by the director of the division of racing events for entities authorized and licensed under Colorado’s racing laws.

#### **COMMENT**

1. See § 18-10.5-102(6), C.R.S. 2020.
2. See Instruction F:115.8 (defining “electronic gaming machine”); Instruction F:126.5 (defining “entrant”); Instruction F:160.2 (defining

“gambling”); Instruction F:371 (defining “thing of value”); *see also Webster’s Third New International Dictionary* 1237 (2002) (defining “keno” as “a game resembling lotto in which numbers printed on pellets taken from a keno goose are announced to the players who cover the same numbers on cards and in which five numbers covered in the same horizontal row win for the player”).

3. *See* Instruction F:345.6 (defining “slot machine,” for offenses related to limited gaming, pursuant to the Colorado Limited Gaming Act); Colo. Const. art. XVIII, § 9(4)(c) (incorporated by this statute, *see* § 18-10.5-102(6)(a)(XI), and defining “slot machine” in virtually identical terms as those in Instruction F:345.6).

4. The Committee added this instruction in 2016.

5. In 2018, pursuant to a legislative amendment, the Committee modified this instruction, added cross-references to Instruction F:160.2 and F:371 in Comment 2, and modified Comment 3. *See* Ch. 381, sec. 3, § 18-10.5-102(6), 2018 Colo. Sess. Laws 2297, 2299–300.

## F:345.6 SLOT MACHINE

“Slot machine” means any mechanical, electrical, video, electronic, or other device, contrivance, or machine which, after insertion of a coin, token, or similar object, or upon payment of any required consideration whatsoever by a player, is available to be played or operated, and that, whether by reason of the skill of the player or application of the element of chance, or both, may deliver or entitle the player operating the machine to receive cash premiums, merchandise, tokens, or redeemable game credits, or any other thing of value other than unredeemable free games, whether the payoff is made automatically from the machines or in any other manner.

“Slot machine” does not include a vintage slot machine model that was introduced on the market before 1984, does not contain component parts manufactured in 1984 or thereafter, and is not used for gambling purposes or in connection with limited gaming. “Slot machine” also does not include crane games.

### COMMENT

1. See § 44-30-103(30), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. See Instruction F:76.3 (defining “crane game”); Instruction F:196.9 (defining “limited gaming”); Instruction F:371 (defining “thing of value”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified this instruction and the statutory citation in Comment 1 pursuant to a legislative amendment and reorganization. See Ch. 14, sec. 2, § 44-30-103(30), 2018 Colo. Sess. Laws 167, 173.

## **F:345.7 SLOT MACHINE DISTRIBUTOR**

“Slot machine distributor” means any person who imports into this state, or first receives in this state, slot machines, or who sells, leases, for a fixed or flat fee, or distributes slot machines in this state.

“Slot machine distributor” does not include operators licensed in this state.

### COMMENT

1. *See* § 44-30-103(31), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:254.3 (defining “operator”); Instruction F:345.6 (defining “slot machine”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(31), 2018 Colo. Sess. Laws 167, 173.

## **F:345.8 SLOT MACHINE MANUFACTURER**

“Slot machine manufacturer” means any person who designs, assembles, fabricates, produces, constructs, or otherwise prepares a complete or component part of a slot machine, other than tables or cabinetry.

“Slot machine manufacturer” does not include licensed operators performing incidental repairs on their own slot machines or slot machines leased or distributed by them. A licensed slot machine manufacturer may sell slot machines, or components of slot machines, of its own manufacture to licensed slot machine distributors or operators. A licensed manufacturer may also import those slot machine parts or components necessary for its manufacturing operations.

### COMMENT

1. *See* § 44-30-103(32), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See* Instruction F:254.3 (defining “operator”); Instruction F:345.6 (defining “slot machine”); Instruction F:345.7 (defining “slot machine distributor”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(32), 2018 Colo. Sess. Laws 167, 173–74.

## F:346 SLUG

“Slug” means any object or article which, by virtue of its size, shape, or any other quality, is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token, and of thereby enabling a person to obtain without valid consideration the property or service sold through the machine.

### COMMENT

1. See § 18-5-111(3), C.R.S. 2020.
2. The term “consideration” is not defined in section 18-5-111. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

## F:346.5 SOCIAL MEDIA

“Social media” means any electronic medium, including an interactive computer service, telephone network, or data network, that allows users to create, share, and view user-generated content, including but not limited to videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail, or internet website profiles.

### COMMENT

1. *See* §§ 18-7-107(6)(e), 18-7-108(6)(e), 18-7-901(3)(b), C.R.S. 2020 (posting a private image; posting an image of suicide of a minor).
2. The Committee added this instruction in 2016.
3. In 2018, the Committee modified the statutory citations in Comment 1 pursuant to a legislative amendment, and it changed the phrase “web site” to “website.” *See* Ch. 192, secs. 1, 2, §§ 18-7-107(6)(e), 18-7-108(6)(e), 2018 Colo. Sess. Laws 1276, 1277-78.
4. In 2019, pursuant to new legislation, the Committee added the citation to section 18-7-901(3)(b) in Comment 1, and it added “posting an image of suicide of a minor” to the parenthetical. *See* Ch. 388, sec. 1, § 18-7-901(3)(b), 2019 Colo. Sess. Laws 3455, 3456.

## **F:347 SPECIAL SKILL OR EXPERTISE**

“Special skill or expertise” in manufacture, sale, dispensing, or distribution includes any unusual knowledge, judgment, or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, directing, managing, supervising, executing, or concealing of such manufacture, sale, dispensing, or distributing, the enlistment of accomplices in such manufacture, sale, dispensing, or distribution, the escape from detection or apprehension for such manufacture, sale, dispensing, or distribution, or the disposition of the fruits or proceeds of such manufacture, sale, dispensing, or distribution.

### COMMENT

1. *See* § 18-18-407(2)(c), C.R.S. 2020 (controlled substances; special offender).

## F:348 SPELEOGEN

“Speleogen” means relief features on the walls, ceiling, or floor of any cave that are part of the surrounding rock, including, but not limited to, anastomoses, scallops, meander niches, petromorphs, and rock pendants in solution caves and similar features unique to volcanic caves.

### COMMENT

1. *See* § 18-4-509(1)(c)(II)(C), C.R.S. 2020 (defacing property).
2. *See* Instruction F:46 (defining “cave”).

## **F:349 SPELEOTHEM**

“Speleothem” means any natural mineral formation or deposit occurring in a cave, including, but not limited to, any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or mud.

### COMMENT

1. *See* § 18-4-509(1)(c)(II)(D), C.R.S. 2020 (defacing property).
2. *See* Instruction F:46 (defining “cave”).

## F:350 SPIRITUOUS LIQUORS

“Spirituous liquors” means any alcohol beverage obtained by distillation, mixed with water and other substances in solution, and includes among other things brandy, rum, whiskey, gin, powdered alcohol, and every liquid or solid, patented or not, containing at least one-half of one percent alcohol by volume and which is fit for use for beverage purposes. Any liquid or solid containing beer or wine in combination with any other liquor, except malt and vinous liquors, shall not be construed to be fermented malt or vinous liquor but shall be construed to be spirituous liquor.

### COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2020 (introducing contraband in the first degree; incorporating this definition from section 44-3-103(54), C.R.S. 2020).
2. *See* Instruction F:205 (defining “malt liquors”); Instruction F:390 (defining “vinous liquors”).
3. In 2016, the Committee corrected the definition by adding the phrase “powdered alcohol.”
4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 152, secs. 2, 8, §§ 44-3-103(54), 18-8-203(1)(a), 2018 Colo. Sess. Laws 949, 958, 1078.

### **F:350.3 SPORTS CONTEST**

“Sports contest” means any professional or amateur sport or athletic game, race, or contest viewed by the public.

#### COMMENT

1. *See* § 18-5-403(1)(a), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **F:350.5 SPORTS OFFICIAL**

“Sports official” means any person who acts or expects to act in a sports contest as an umpire, referee, judge, or otherwise to officiate at a sports contest.

### COMMENT

1. *See* § 18-5-403(1)(c), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **F:350.7 SPORTS PARTICIPANT**

“Sports participant” means any person who participates or expects to participate in a sports contest as a player, contestant, or member of a team, or as a coach, manager, trainer, owner, or other person directly associated with a player, contestant, team, or entry.

### COMMENT

1. *See* § 18-5-403(1)(b), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **F:351 STADIUM**

“Stadium” means a sports facility which is designed for use primarily as a major league baseball stadium, which meets the criteria established by the board, which meets criteria which may be established by major league baseball, and which may include, but is not limited to, such features as parking areas, sky boxes, and press boxes which are necessary or desirable for such a sports facility.

### **COMMENT**

1. *See* § 18-9-123(1), C.R.S. 2020 (bringing alcohol beverages, bottles, or cans into the major league baseball stadium; incorporating the above definition from section 32-14-103(10), C.R.S. 2020).

## **F:352 STAFF SECURE FACILITY**

“Staff secure facility” means a group facility or home at which each juvenile is continuously under staff supervision and at which all services, including but not limited to education and treatment, are provided on site. A staff secure facility may or may not be a locked facility.

### COMMENT

1. *See* § 18-8-208.1(7), C.R.S. 2020 (attempt to escape; incorporating the above definition from section 19-1-103(101.5), C.R.S. 2020).

## **F:353 STORE**

“Store” means any establishment primarily engaged in the sale of goods at retail.

### COMMENT

1. *See* § 18-18-412.8(4)(c), C.R.S. 2020 (retail sale of methamphetamine precursor drugs).

## **F:354 STUN GUN**

“Stun gun” means a device capable of temporarily immobilizing a person by the infliction of an electrical charge.

### COMMENT

1. *See* § 18-12-101(1)(i.5), C.R.S. 2020 (offenses relating to firearms and weapons).

## **F:355 SUBSTANTIAL SOURCE OF THAT PERSON'S INCOME**

A “substantial source of that person’s income” means a source of income which, for any period of one year or more, exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, or which, for the same period, exceeds fifty percent of the defendant’s declared adjusted gross income under Colorado or any other state law or under federal law, whichever adjusted gross income is less.

### **COMMENT**

1. *See* § 18-18-407(2)(b), C.R.S. 2020 (controlled substances; special offender).

## F:356 SUBSTANTIAL STEP

A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

### COMMENT

1. See § 18-2-101(1), C.R.S. 2020 (attempt).
2. See Instruction F:251 (defining "omission").
3. See *People v. Lehnert*, 163 P.3d 1111, 1115 (Colo. 2007) ("By actually defining a 'substantial step' as 'any conduct . . . which is strongly corroborative of the firmness of the actor's purpose,' the Colorado statute has no need to further enumerate particular circumstances in which strongly corroborative conduct may constitute a substantial step. Conduct strongly corroborative of the firmness of the actor's criminal purpose is sufficient in itself. Drawn as they are largely from decisional law, however, the acts enumerated in the former statute and Model Penal Code, such as searching out a contemplated victim, reconnoitering the place contemplated for commission of a crime, and possessing materials specially designed for unlawful use and without lawful purpose, remain useful examples of conduct considered capable of strongly corroborating criminal purpose, and in those instances where they do, of being sufficient to establish criminal attempt.").

## **F:357 SUBSTANTIAL THREAT**

“Substantial threat” means a threat that is reasonably likely to induce a belief that the threat will be carried out and is one that threatens that significant confinement, restraint, injury, or damage will occur.

### COMMENT

1. *See* § 18-3-207(3), C.R.S. 2020 (criminal extortion).

## F:357.5 SWEEPSTAKES

“Sweepstakes” means any game, advertising scheme or plan, or other promotion that, with or without payment of any consideration, allows a person to enter to win or become eligible to receive a prize.

### COMMENT

1. See § 18-10.5-102(7), C.R.S. 2020 (simulated gambling devices).
2. See Instruction F:124.5 (defining “enter”); Instruction F:285.7 (defining “prize”); see also *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee”).
3. The Committee added this instruction in 2016.

## **F:358 SWITCHBLADE KNIFE**

### COMMENT

1. Effective August 9, 2017, section 18-12-101(1)(j), defining “switchblade knife,” was repealed. *See* Ch. 74, secs. 1, 3, § 18-12-101(1)(j), 2017 Colo. Sess. Laws 234, 234-35. Accordingly, the Committee deleted this definition in 2017.

## F:359 SYNTHETIC CANNABINOID

“Synthetic cannabinoid” means any chemical compound that is chemically synthesized and either has been demonstrated to have binding activity at one or more cannabinoid receptors; or is a chemical analog or isomer of a compound that has been demonstrated to have binding activity at one or more cannabinoid receptors.

“Synthetic cannabinoid” includes but is not limited to [insert relevant language from section 18-18-102(34.5)(b)].

“Synthetic cannabinoid” does not mean tetrahydrocannabinols, as that term is defined in your instructions, or Nabilone.

Further, as used in this instruction, “analog” means any chemical that is substantially similar in chemical structure to a chemical compound that has been determined to have binding activity at one or more cannabinoid receptors.]

### COMMENT

1. See § 18-18-102(34.5), C.R.S. 2020 (controlled substances offenses).
2. See Instruction F:366 (defining “tetrahydrocannabinols”).

## **F:360 TAMPER (GENERAL)**

“Tamper” means to interfere with something improperly, to meddle with it, or to make unwarranted alterations in its condition.

### COMMENT

1. *See* § 18-1-901(3)(q), C.R.S. 2020.

## **F:361 TAMPER (LIVESTOCK)**

“Tamper” means:

[treatment of livestock in such a manner that food derived from the livestock would be considered adulterated, as defined in these instructions.]

[the injection, use, or administration of any drug that is [prohibited by any federal, state, or local law] [used in a manner prohibited by federal law or Colorado law, or any Colorado locality], as defined in these instructions.]

[the injection or other internal or external administration of any product or material, whether gas, solid, or liquid, to an animal for the purposes of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[the use or administration for cosmetic purposes of steroids, growth stimulants, or internal artificial filling, including paraffin, silicone injection, or any other substance.]

[the use or application of any drug or feed additive affecting the central nervous system of the animal.]

[the use or administration of diuretics for cosmetic purposes.]

[the manipulation or removal of tissue, by surgery or otherwise, so as to change, transform, or enhance the true conformation or configuration of the animal.]

[subjecting the animal to inhumane conditions or procedures for the purpose of concealing, enhancing, or transforming the true conformation, configuration, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[attaching to the animal's hide foreign objects, including hair or hair substitutes, cloth, and fibers, for the purpose of deception, including concealing, enhancing, or transforming the true conformation, configuration, color, breed, condition, or age of the animal or making the animal appear more sound than the animal would appear otherwise.]

[substituting a different animal for the animal registered or entered in the exhibition without the permission of a responsible official of the exhibition.]

["Tamper" does not include any action taken or activity performed or administered by a licensed veterinarian or in accordance with instructions of a licensed veterinarian if the action or activity was undertaken for accepted medical purposes during the course of a valid veterinarian-client-patient relationship or any action taken as part of accepted grooming, ranching, commercial, or medical practices.]

["Tampering" does include normal ranching practices.]

#### COMMENT

1. *See* § 18-9-207(d)(I), (II), C.R.S. 2020 (tampering with livestock).
2. *See* Instruction F:198 (defining "livestock").

## **F:362 TARGETED PICKETING**

“Targeted picketing” means picketing, with or without signs, that is specifically directed toward a residence, or one or more occupants of the residence, and that takes place on that portion of a sidewalk or street in front of the residence, in front of an adjoining residence, or on either side of the residence.

### COMMENT

1. *See* § 18-9-108.5(2)(b), C.R.S. 2020 (targeted residential picketing).

## F:363 TELECOMMUNICATIONS DEVICE

“Telecommunications device” means any instrument, apparatus, method, system, or equipment which controls, measures, directs, or facilitates telecommunications service. The term includes, but is not limited to, computer hardware, software, programs, electronic mail systems, voice mail systems, identification validation systems, and private branch exchanges.

### COMMENT

1. See § 18-9-309(1)(d), C.R.S. 2020; *see also* § 18-8-204(2)(n), C.R.S. 2020 (introducing contraband in the second degree; incorporating the definition of a “cloned cellular phone” from section 18-9-309(1)(a.7), which incorporates the definition of a “cellular phone” from section 18-9-309(1)(a.5), which uses the term “telecommunications device”).
2. See Instruction F:364 (defining “telecommunications service”).

### **F:363.3 TELECOMMUNICATIONS PROVIDER (TELECOMMUNICATIONS CRIME)**

“Telecommunications provider” means any person, firm, association, or any corporation, private or municipal, owning, operating, or managing any facilities used to provide telecommunications service.

#### COMMENT

1. *See* § 18-9-309(1)(e), C.R.S. 2020.
2. *See* Instruction F:364 (defining “telecommunications service”).
3. The Committee added this instruction in 2016.

## **F:363.7 TELECOMMUNICATIONS PROVIDER (TELEPHONE RECORDS)**

“Telecommunications provider” means a company and its affiliates that provide commercial telephone service to a customer, irrespective of the technology employed, including, without limitation, wired, wireless, cable, broadband, satellite, or voice-over-internet protocol.

### COMMENT

1. See § 18-13-125(2)(c), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## F:364 TELECOMMUNICATIONS SERVICE

“Telecommunications service” means a service which, in exchange for pecuniary consideration, provides or offers to provide transmission of messages, signals, facsimiles, or other communication between persons who are physically separated from each other, by means of telephone, telegraph, cable, wire, or the projection of energy without physical connection.

### COMMENT

1. See § 18-9-309(1)(f), C.R.S. 2020; see also § 18-8-204(2)(n), C.R.S. 2020 (introducing contraband in the second degree; incorporating the definition of a “cloned cellular phone” from section 18-9-309(1)(a.7), which incorporates the definition of a “cellular phone” from section 18-9-309(1)(a.5), which uses the term “telecommunications service”).
2. The term “consideration” is not defined in section 18-9-309. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

### **F:364.3 TELEPHONE COMPANY**

“Telephone company” means any telecommunications provider which provides local exchange telecommunications service.

#### COMMENT

1. *See* § 18-9-309(1)(g), C.R.S. 2020 (telecommunications crime).
2. *See* Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)); Instruction F:364 (defining “telecommunications service”).
3. The Committee added this instruction in 2016.

## F:364.7 TELEPHONE RECORD

“Telephone record” means information retained by a telecommunications provider that relates to the number dialed by the customer or subscriber, to the number of a person who dialed the customer, or to other data that are typically contained on a customer's telephone bill for either wired or wireless telephone service, including, without limitation, the time a call was made, the duration of a call, or the charges for a call.

“Telephone record” does not include a directory listing or information collected and retained by customers utilizing caller identification technology or similar technology.

### COMMENT

1. *See* § 18-13-125(2)(d), C.R.S. 2020 (unauthorized trading in telephone records).
2. *See* Instruction F:363.7 (defining “telecommunications provider” (telephone records)).
3. The Committee added this instruction in 2016.

## F:365 TESTIMONY

“Testimony” includes oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding.

### COMMENT

1. *See* § 18-8-601(2), C.R.S. 2020 (offenses relating to judicial and other proceedings).
2. *See* Instruction F:250 (defining “official proceeding”).

## F:366 TETRAHYDROCANNABINOLS

“Tetrahydrocannabinols” means synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as the following:

- (I) <sup>1</sup>Cis or trans tetrahydrocannabinol, and their optical isomers;
- (II) <sup>6</sup>Cis or trans tetrahydrocannabinol, and their optical isomers;
- (III) <sup>3,4</sup>Cis or trans tetrahydrocannabinol, and their optical isomers.

Since the nomenclature of the substances listed is not internationally standardized, the foregoing definitions include compounds of these structures, regardless of the numerical designation of atomic positions.

### COMMENT

1. See § 18-18-102(35), C.R.S. 2020 (controlled substances offenses).

## **F:367 THEFT DETECTION DEACTIVATING DEVICE**

“Theft detection deactivating device” means any tool, instrument, mechanism, or other article adapted, designed, engineered, used, or operated to inactivate, incapacitate, or remove a theft detection device without authorization.

“Theft detection deactivating device” includes, but is not limited to, jumper wires, wire cutters, and electronic article surveillance removal devices.

### COMMENT

1. *See* § 18-4-417(2)(a), C.R.S. 2020.

## **F:368 THEFT DETECTION DEVICE**

“Theft detection device” means an electronic or magnetic mechanism, machine, apparatus, tag, or article designed and operated for the purpose of detecting the unauthorized removal of merchandise from a store or mercantile establishment.

### COMMENT

1. *See* § 18-4-417(2)(b), C.R.S. 2020.

## **F:369 THEFT DETECTION SHIELDING DEVICE**

“Theft detection shielding device” means any tool, instrument, mechanism, or article adapted, designed, engineered, used, or operated to avoid detection by a theft detection device during the commission of an offense involving theft. “Theft detection shielding device” includes, but is not limited to, foil lined or otherwise modified clothing, bags, purses, or containers capable of and for the sole purpose of avoiding detection devices.

### COMMENT

1. *See* § 18-4-417(2)(c), C.R.S. 2020.

## **F:370 THERAPEUTIC DECEPTION**

“Therapeutic Deception” means the representation by a psychotherapist that sexual contact, penetration or intrusion by the psychotherapist is consistent with or part of the client’s treatment.

### **COMMENT**

1. *See* § 18-3-405.5, C.R.S. 2020 (sexual assault on a client by a psychotherapist).

## **F:371 THING OF VALUE**

“Thing of value” includes real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith.

### COMMENT

1. *See* § 18-1-901(3)(r), C.R.S. 2020.

## **F:372 THROWING STAR**

“Throwing star” means a disk having sharp radiating points or any disk-shaped bladed object which is hand-held and thrown and which is in the design of a weapon used in connection with the practice of a system of self-defense.

### COMMENT

1. *See* § 18-12-106(1)(e), C.R.S. 2020 (prohibited use of weapons).

## **F:373 TRADEMARK**

“Trademark” means any trademark registered under the laws of this state or of the United States.

### COMMENT

1. *See* § 18-5-110.5(3)(c), C.R.S. 2020 (trademark counterfeiting).

## **F:374 TRADE SECRET**

“Trade secret” means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a trade secret the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

### **COMMENT**

1. *See* § 18-4-408(2)(d), C.R.S. 2020 (theft of trade secrets).

## **F:374.5 TRANSACTION (MONEY LAUNDERING)**

“Transaction” includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition and, with respect to a financial institution, includes a deposit; a withdrawal; a transfer between accounts; an exchange of currency; a loan; an extension of credit; a purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument; the use of a safe deposit box; or any other payment, transfer, or delivery by, through, or to a financial institution by whatever means.

### COMMENT

1. *See* § 18-5-309(3)(e), C.R.S. 2020 (money laundering).
2. The Committee added this instruction in 2015.

## **F:375 TRANSFEREE**

“Transferee” means a person who desires to receive or acquire a firearm from a transferor. [If a transferee is not a natural person, then each natural person who is authorized by the transferee to possess the firearm after the transfer must undergo a background check before taking possession of the firearm].

### COMMENT

1. *See* § 18-12-112(1)(b), C.R.S. 2020 (private firearms transfers).

## F:375.5 TRAP AND TRACE DEVICE

“Trap and trace device” means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

### COMMENT

1. *See* § 18-9-301(8.7), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:392.2 (defining “wire communication”).
3. The Committee added this instruction in 2016.

## F:375.8 TRAVEL SERVICES

“Travel services” includes, but is not limited to, the following services, offered either on a wholesale or retail basis:

1. transportation by air, sea, road, or rail;
2. related ground transportation;
3. hotel accommodations; or
4. package tours.

### COMMENT

1. *See* § 18-3-502(11.5), C.R.S. 2020 (human trafficking and slavery).
2. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 250, sec. 1, § 18-3-502(11.5), 2017 Colo. Sess. Laws 1049, 1049.

## **F:376 ULTIMATE USER**

“Ultimate user” means an individual who lawfully possesses a controlled substance for the individual’s own use or for the use of a member of the individual’s household or for administering to an animal owned by the individual or by a member of the individual’s household.

### COMMENT

1. *See* § 18-18-102(36), C.R.S. 2020 (controlled substances offenses).

## **F:377 UNDER COLOR OF HIS [HER] OFFICIAL AUTHORITY (RESISTING ARREST)**

A peace officer acts “under color of his [her] official authority” when, in the regular course of assigned duties, he [she] is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him [her].

### COMMENT

1. *See* § 18-8-103(2), C.R.S. 2020 (resisting arrest).
2. *See People in Interest of J.J.C.*, 854 P.2d 801, 807 (Colo. 1993) (evidence was insufficient to prove that off-duty police officer working as a security guard at a private business made arrest “under color of his official authority”; “However, insofar as the court of appeals opinion may be understood to suggest an off-duty peace officer serving a private employer may never act ‘under color of his official authority,’ we disapprove of such a reading.”).

## **F:378 UNDER COLOR OF HIS [HER] OFFICIAL AUTHORITY (OBSTRUCTING A PEACE OFFICER)**

A peace officer acts “under color of his [her] official authority” if, in the regular course of assigned duties, he [she] makes a judgment in good faith based on surrounding facts and circumstances that he [she] must act to enforce the law or preserve the peace.

### COMMENT

1. *See* § 18-8-104(2), C.R.S. 2020 (obstructing a peace officer).

## F:379 UNDUE INFLUENCE

“Undue influence” means the use of influence to take advantage of an at-risk person’s vulnerable state of mind, neediness, pain, or emotional distress.

### COMMENT

1. *See* § 18-6.5-102(13), C.R.S. 2020; § 18-6.5-103(7.5)(a), C.R.S. 2020 (criminal exploitation of an at-risk person).
2. In 2016, the Committee replaced the phrase “at-risk elder’s” with “at-risk person’s” pursuant to a legislative amendment. *See* Ch. 172, sec. 2, § 18-6.5-102(13), 2016 Colo. Sess. Laws 545, 547.

## F:379.5 UNLAWFUL ABANDONMENT

“Unlawful abandonment” means the intentional and unreasonable desertion of an at-risk person in a manner that endangers the safety of that person.

### COMMENT

1. *See* § 18-6.5-102(14), C.R.S. 2020 (crimes against at-risk persons).
2. *See* Instruction F:26.5 (defining “at-risk person”); Instruction F:185 (defining “intentionally”).
3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 365, sec. 2, § 18-6.5-102(14), 2019 Colo. Sess. Laws 3359, 3359.

## F:380 UNLAWFUL DEBT

“Unlawful debt” means a debt [incurred or contracted in an illegal gambling activity or business] [which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury].

### COMMENT

1. *See* § 18-17-103(6), C.R.S. 2020 (Colorado Organized Crime Control Act).
2. When instructing the jury concerning the usury provision, draft a supplemental instruction explaining the relevant principles of law. *See* § 18-15-104, C.R.S. 2020.

## **F:381 UNLAWFULLY OBTAINED**

“Unlawfully obtained” means obtained by theft, fraud, or deceit or obtained without the permission of the owner.

### COMMENT

1. *See* § 18-4-420(5)(d), C.R.S. 2020 (chop shop activity).

## **F:381.5 UNLAWFUL TERMINATION OF PREGNANCY**

“Unlawful termination of pregnancy” means the termination of a pregnancy by any means other than birth or a medical procedure, instrument, agent, or drug, for which the consent of the pregnant woman [, or a person authorized by law to act on her behalf,] has been obtained [, or for which the pregnant woman’s consent is implied by law].

### COMMENT

1. *See* § 18-3.5-101(6), C.R.S. 2020 (offenses against pregnant women).
2. *See* Instruction F:282.5 (defining “pregnancy”); § 18-3.5-101(1), C.R.S. 2020 (“‘Consent’ has the same meaning as provided in section 18-1-505.”); Instructions H:03 and H:04 (defense of “consent” based on section 18-1-505).
3. In cases involving implied consent, the court should draft a supplemental instruction explaining the concept.
4. The Committee added this instruction in 2015.

## **F:382 USABLE FORM OF MARIJUANA**

“Usable form of marijuana” means the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use, but excludes the plant’s stalks, stems, and roots.

### COMMENT

1. *See* Colo. Const. art. XVIII, § 14(1)(i) (medical marijuana).

## **F:383 USE**

To “use” means to instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network.

### COMMENT

1. *See* § 18-5.5-101(10), C.R.S. 2020 (cybercrime).
2. *See* Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:65 (defining “computer system”).

## **F:383.5 USER**

“User” means any person or entity which uses an electronic communication service and is duly authorized by the provider of such service to engage in such use.

### COMMENT

1. *See* § 18-9-301(8.9), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:115.4 (defining “electronic communication service”).
3. The Committee added this instruction in 2016.

## **F:384 UTILITY**

“Utility” means an enterprise which provides gas, sewer, electric, steam, water, transportation, or communication services, and includes any carrier, pipeline, transmitter, or source, whether publicly or privately owned or operated.

### COMMENT

1. *See* § 18-1-901(3)(s), C.R.S. 2020.

## **F:385 UTTER**

“Utter” means to transfer, pass, or deliver, or attempt to cause to be transferred, passed, or delivered, to another person any written instrument, article, or thing.

### COMMENT

1. *See* § 18-5-101(8), C.R.S. 2020 (forgery and impersonation offenses).

## F:385.3 VALUABLE ARTICLE

“Valuable article” means any tangible personal property consisting, in whole or in part, of precious or semiprecious metals or stones, whether solid, plated, or overlaid, including, but not limited to, household goods, jewelry, United States commemorative medals or tokens, and gold and silver bullion.

“Valuable article” also includes foreign currency when purchased for more than its face value or foreign currency exchange value.

“Valuable article” also includes a store credit, gift card, or merchandise card of any value not issued by the person.

### COMMENT

1. See § 18-16-102(7), C.R.S. 2020 (purchases of valuable articles).
2. See Instruction F:282.2 (defining “precious or semiprecious metals or stones”).
3. In *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 946 (Colo. 1985), the court held that the word “bullion” was not unconstitutionally vague based on the following dictionary definition: “Gold or silver, considered merely as so much metal without regard to any value imparted by its form . . . specif., uncoined gold or silver, in the shape of bars, ingots, or the like” (alteration in original) (quoting *Merriam Webster’s New International Dictionary* (2d ed. 1959)).
4. In the third paragraph, it is unclear whom “the person” is meant to refer to.
5. The Committee added this instruction in 2016.
6. In 2019, the Committee added the third paragraph in the definition pursuant to new legislation, and it added Comment 4. See Ch. 87, sec. 2, § 18-16-102(7)(c), 2019 Colo. Sess. Laws 322, 323.

## **F:385.5 VEHICLE (EQUITY SKIMMING AND RELATED OFFENSES)**

“Vehicle” means any device of conveyance capable of moving itself or of being moved from place to place upon wheels or a track or by water or air, whether or not intended for the transport of persons or property, and includes any space within such “vehicle” adapted for overnight accommodation of persons or animals or for the carrying on of business.

[“Vehicle” does not include a manufactured home.]

### **COMMENT**

1. *See* § 18-5-801(5), C.R.S. 2020.
2. If necessary, draft an instruction defining the term “manufactured home” based on section 42-1-102(106)(b), C.R.S. 2020.
3. The Committee added this instruction in 2015.

## **F:385.7 VEHICLE (HAZARDOUS WASTE VIOLATIONS)**

“Vehicle” means any device which is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. The term includes but is not limited to any motor vehicle, trailer, or semitrailer.

### COMMENT

1. *See* § 18-13-112(2)(e), C.R.S. 2020.
2. The Committee added this instruction in 2016.

## F:386 VEHICLE (TRAFFIC CODE)

“Vehicle” means a device that is capable of moving itself, or of being moved, from place to place upon wheels or endless tracks. “Vehicle” includes a bicycle, electrical assisted bicycle, electric scooter, or electric personal assistive mobility device.

[The definition of a “vehicle” does not include a wheelchair, off-highway vehicle, snowmobile, farm tractor, or implement of husbandry designed primarily or exclusively for use and used in agricultural operations or any device moved exclusively over stationary rails or tracks or designed to move primarily through the air.]

### COMMENT

1. See § 42-1-102(112), C.R.S. 2020.
2. See Instruction F:32 (defining “bicycle”); Instruction F:114.8 (defining “electric personal assistive mobility device”); Instruction F:114.9 (defining “electric scooter”); Instruction F:115 (defining “electrical assisted bicycle”); Instruction F:146.2 (defining “farm tractor”); Instruction F:179.5 (defining “implement of husbandry”); Instruction F:249.5 (defining “off-highway vehicle”).
3. In 2019, pursuant to a legislative amendment, the Committee removed the phrase “without limitation” and added the term “electric scooter” to the first paragraph of the instruction. See Ch. 271, sec. 1, § 42-1-102(112), 2019 Colo. Sess. Laws 2557, 2558. In addition, the Committee added several cross-references in Comment 2, and it deleted the prior Comment 3.

## **F:387 VEHICLE IDENTIFICATION NUMBER**

“Vehicle identification number” means the serial number placed upon the motor vehicle by the manufacturer thereof or assigned to the motor vehicle by the department of revenue.

### COMMENT

1. *See* § 18-4-409(1)(b), C.R.S. 2020 (aggravated motor vehicle theft).

## **F:388 VICTIM**

“Victim” means any natural person against whom any crime has been perpetrated or attempted, as crime is defined under the laws of this state or of the United States.

### COMMENT

1. *See* § 18-8-702(1), C.R.S. 2020 (retaliation, intimidation, and bribery of crime victims).
2. *See also* § 18-3-401(7), C.R.S. 2020 (“‘Victim’ means the person alleging to have been subjected to a criminal sexual assault.”).

## F:389 VIDEO OR RECORDING OR BROADCAST

“Video” and “recording or broadcast” both mean any material that depicts a moving image of a child engaged in, participating in, observing, or being used for explicit sexual conduct.

### COMMENT

1. *See* § 18-6-403(2)(k), C.R.S. 2020 (sexual exploitation of a child).
2. *See* Instruction F:132 (defining “explicit sexual conduct”); Instruction F:234 (defining “motion picture”).
3. In 2015, the Committee replaced the words “video tape” with the words “recording or broadcast” to reflect a legislative amendment. *See* Ch. 274, sec. 1, § 18-6-403(2)(k), 2015 Colo. Sess. Laws 1113, 1115. In addition, to make clear that “motion picture” is defined in a separate instruction (even though it is codified in the same statutory subsection), the Committee added a citation to Instruction F:234 in the preceding Comment.

## F:390 VINOUS LIQUORS

“Vinous liquors” means wine and fortified wines that contain not less than one-half of one percent and not more than twenty-one percent alcohol by volume and means an alcohol beverage obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar.

### COMMENT

1. *See* § 18-8-203(1)(a), C.R.S. 2020 (introducing contraband in the first degree; incorporating this definition from section 44-3-103(59), C.R.S. 2020).
2. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 152, secs. 2, 8, §§ 44-3-103(59), 18-8-203(1)(a), 2018 Colo. Sess. Laws 949, 958, 1078.

## **F:390.5 VINTAGE SLOT MACHINE**

“Vintage slot machine” means any model slot machine that was introduced on the market prior to January 1, 1984.

### COMMENT

1. *See* § 18-10-102(10), C.R.S. 2020 (gambling offenses).
2. *See* Instruction F:345.6 (defining “slot machine”).
3. The Committee added this instruction in 2016.

## F:391 VOLUNTARY ACT

“Voluntary act” means an act performed consciously as a result of effort or determination [, and includes the possession of property if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to terminate it].

### COMMENT

1. *See* § 18-1-501(9), C.R.S. 2020.
2. *See also* Instruction F:281 (defining “possession”).

## **F:391.5 WAREHOUSE**

“Warehouse” means a person engaged in the business of storing goods for hire.

### COMMENT

1. *See* § 4-7-102(a)(13), C.R.S. 2020 (offenses relating to the Uniform Commercial Code).
2. *See* Instruction F:161.5 (defining “goods”).
3. The Committee added this instruction in 2015.

## **F:391.8 WHOLESALE PROMOTE**

“Wholesale promote” means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purpose of resale.

### COMMENT

1. *See* § 18-7-101(8), C.R.S. 2020 (obscenity).
2. The Committee added this instruction in 2016.

## **F:392 WILLFULLY**

### COMMENT

1. *See* Instruction F:195 (defining “knowingly” or “willfully”).

## **F:392.2 WIRE COMMUNICATION**

“Wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection, including the use of such connection in a switching station, between the point of origin and the point of reception, furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and includes any electronic storage of such communication.

### COMMENT

1. *See* § 18-9-301(9), C.R.S. 2020 (wiretapping and eavesdropping).
2. *See* Instruction F:27.5 (defining “aural transfer”); Instruction F:116.2 (defining “electronic storage”).
3. The Committee added this instruction in 2016.

## **F:392.5 WITHIN COLORADO**

“Within Colorado” means within the exterior limits of Colorado and includes all territory within these limits owned or ceded to the United States of America.

### COMMENT

1. *See* § 18-13-113(1)(c), C.R.S. 2020 (unlawful sale of metal beverage container with detachable opening device).
2. The Committee added this instruction in 2016.

## **F:392.8 WITHIN THE CITIES OF CENTRAL, BLACK HAWK, OR CRIPPLE CREEK**

“Within the cities of Central, Black Hawk, or Cripple Creek” means within the commercial district of any of those cities.

### COMMENT

1. *See* § 44-30-103(35), C.R.S. 2020 (incorporated by section 18-20-102(1), C.R.S. 2020) (limited gaming offenses).
2. *See also* § 44-30-105, C.R.S. 2020 (defining “the commercial districts” of these cities as those “respectively defined in the city ordinances adopted by the city of Central on October 7, 1981; the city of Black Hawk on May 4, 1978; and the city of Cripple Creek on December 3, 1973”).
3. The Committee added this instruction in 2016.
4. In 2018, the Committee modified the statutory citations in Comments 1 and 2 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-103(35), 2018 Colo. Sess. Laws 167, 174.

## F:393 WITNESS

“Witness” means any natural person [who would have been believed, by any reasonable person, to be a person]: [who had knowledge of the existence or nonexistence of facts relating to any crime] [whose declaration under oath was received or had been received as evidence for any purpose] [who had reported any crime to any peace officer, correctional officer, or judicial officer] [who had been served with a subpoena issued under the authority of any court in this state, of any other state, or of the United States].

### COMMENT

1. *See* § 18-8-702(1), C.R.S. 2020 (retaliation, intimidation, and bribery of crime victims).

## **F:393.5 WRITTEN DOCUMENTATION**

“Written documentation” means a statement signed by a patient’s physician or copies of the patient’s pertinent medical records.

### **COMMENT**

1. *See* Colo. Const. art. XVIII, § 14(1)(j) (medical marijuana).

## **F:394 WRITTEN INSTRUMENT (FORGERY AND IMPERSONATION OFFENSES)**

“Written instrument” means any paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, credit card, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, which is capable of being used to the advantage or disadvantage of some person.

+ [For purposes of the crime of [second-degree forgery] [criminal possession of a second-degree forged instrument], “written instrument” cannot be a written instrument of a kind listed below:

part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency;

part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property;

a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status;

a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant;

a written instrument officially issued or created by a public office, public servant, or government agency;

part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation;

part of an issue of lottery tickets or shares designed for use in the state lottery;

a document-making implement that may be used or is used in the production of a false identification document or in the production of another document-making implement to produce false identification documents; or

a bona fide academic record of an institution of secondary or higher education.]

#### COMMENT

1. *See* § 18-5-101(9), C.R.S. 2020 (forgery and impersonation offenses).
2. *See* + Instruction F:04 (defining “academic record”); Instruction F:373 (defining “trademark”).
3. + The court should only give the bracketed paragraph (and its accompanying list) in prosecutions for either second-degree forgery or criminal possession of a second-degree forged instrument. *See* Instruction 5-1:10, Comment 4; Instruction 5-1:13, Comment 4.
4. + In 2020, the Committee added the second bracketed paragraph; it also added Comment 3, and the cross-reference to Instruction F:04 in Comment 2.

## **F:395 WRITTEN INSTRUMENT (IDENTITY THEFT AND RELATED OFFENSES)**

“Written instrument” means a paper, document, or other instrument containing written or printed matter or the equivalent thereof, used for purposes of reciting, embodying, conveying, or recording information, and any money, token, stamp, seal, badge, or trademark or any evidence or symbol of value, right, privilege, or identification, that is capable of being used to the advantage or disadvantage of another.

### COMMENT

1. *See* § 18-5-901(15), C.R.S. 2020.

## CHAPTER G1

### INDIVIDUAL AND CORPORATE CULPABILITY

<a href="#"><u>G1:01</u></a>	REQUIREMENTS FOR CRIMINAL LIABILITY
<a href="#"><u>G1:02</u></a>	STRICT LIABILITY CRIMES
<a href="#"><u>G1:03</u></a>	CRIMINAL LIABILITY OF BUSINESS ENTITIES
<a href="#"><u>G1:04</u></a>	CRIMINAL LIABILITY OF AN INDIVIDUAL FOR CORPORATE CONDUCT

### CHAPTER COMMENTS

1. In 2018, the Committee moved several instructions previously in this Chapter to the new Chapter J, and it renumbered the remaining instructions accordingly.

## **G1:01 REQUIREMENTS FOR CRIMINAL LIABILITY**

A crime is committed when the defendant has committed a voluntary act prohibited by law, together with a culpable state of mind.

“Voluntary act” means an act performed consciously as a result of effort or determination [, and includes the possession of property if the actor was aware of his [her] physical possession or control thereof for a sufficient period to have been able to terminate it].

Proof of the voluntary act alone is insufficient to prove that the defendant had the required state of mind.

The culpable state of mind is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

In this case, the applicable state[s] of mind is [are] explained below:

[The term “after deliberation” means not only intentionally, but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.]

[A person acts “intentionally” or “with intent” when his [her] conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.]

[A person acts “knowingly” or “willfully” with respect to conduct or to a circumstance described by a statute defining an offense when he [she] is aware that his [her] conduct is of such nature or that such a circumstance exists. A person acts “knowingly” or “willfully”, with respect to a result of his [her] conduct, when he [she] is aware that his [her] conduct is practically certain to cause the result.]

[A person acts “recklessly” when he [she] consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.]

[A person acts “with criminal negligence” when, through a gross deviation from the standard of care that a reasonable person would exercise, he [she] fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.]

#### COMMENT

1. *See* § 18-1-501(3)–(6), (8)–(9), C.R.S. 2020; § 18-3-101(3), C.R.S. 2020.
2. *See* Instruction F:08 (defining “act”); Instruction F:10 (defining “after deliberation”); Instruction F:66 (defining “conduct”); Instruction F:79 (defining “criminal negligence”); Instruction F:80 (defining “culpable state of mind”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly or willfully”); Instruction F:308 (defining “recklessly”); Instruction F:391 (defining “voluntary act”).

## G1:02 STRICT LIABILITY CRIMES

The crime[s] of [insert name(s) of offense(s) here] [is a] [are] “strict liability” offense[s] that [is] [are] established by proof beyond a reasonable doubt of conduct which includes a voluntary act or the omission to perform an act which the person is physically capable of performing.

### COMMENT

1. See § 18-1-502, C.R.S. 2020 (defining the principle of strict liability); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”); § 18-1-704(4), C.R.S. 2020 (provision allowing for evidence of self-defense, where self-defense is not available as an affirmative defense, “shall not apply to strict liability crimes”).
2. See Instruction F:66 (defining “conduct”); Instruction F:251 (defining “omission”); Instruction F:391 (defining “voluntary act”).
3. See, e.g., § 18-3-106(1)(b)(I), C.R.S. 2020 (vehicular homicide “is a strict liability crime”); § 18-3-205(1)(b)(I), C.R.S. 2020 (vehicular assault “is a strict liability crime”); § 18-13-122(2)(a), C.R.S. 2020 (“Illegal possession or consumption of ethyl alcohol by an underage person is a strict liability offense.”); *People v. Manzo*, 144 P.3d 551, 552 (Colo. 2006) (leaving the scene of an accident with serious bodily injury, in violation of section 42-4-1601, C.R.S. 2020, constitutes a strict liability offense because the plain language of the statute does not require or imply a culpable mental state); *People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (concluding that “the plain language of the public indecency statute reflects the General Assembly’s intent to make the offense a strict liability crime without a culpable mental state”); *People v. Wilson*, 972 P.2d 701, 703 (Colo. App. 1998) (prohibited use of a weapon – possession while under the influence, in violation of section 18-12-106(1)(d) – is a strict liability offense).

4. This instruction should not be used for offenses with a partially applicable mental state. *See, e.g., Copeland v. People*, 2 P.3d 1283, 1287 (Colo. 2000) (“[O]ur legislature has . . . determined to focus its fourth degree arson mens rea requirement on the actor’s conduct in starting or maintaining the fire, while continuing to hold the arsonist responsible for the fire’s result, whether or not he or she was aware of or intended the consequences.”). For this type of offense, the elemental instruction should be drafted in a manner that clearly indicates which element(s) the mens rea modifies (as the Committee has endeavored to do throughout this volume).

5. In cases where the defendant is charged with one or more strict liability offenses and one or more offenses having a mens rea, it may be appropriate to add the following language: “Strict liability crimes are different from other crimes because the prosecution does not have to prove that the person acted, or failed to act, with a culpable mental state.”

## G1:03 CRIMINAL LIABILITY OF BUSINESS ENTITIES

A business entity is guilty of an offense if the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body, individual authorized to manage the affairs of the business entity, or by a high managerial agent acting within the scope of his employment or in behalf of the business entity.

### COMMENT

1. See § 18-1-606(1)(a), (b), C.R.S. 2020.
2. See Instruction F:11 (defining “agent”); Instruction F:42 (defining “business entity”); Instruction F:170 (defining “high managerial agent”); Instruction F:251 (defining “omission”).
3. See *S. Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) (“substantial” fines against organizational defendants implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).
4. In 2018, the Committee renumbered this instruction from G1:04 to G1:03.

## **G1:04 CRIMINAL LIABILITY OF AN INDIVIDUAL FOR CORPORATE CONDUCT**

A person is criminally liable for conduct constituting an offense which he [she] performs or causes to occur in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him [her] in his [her] own name or behalf.

### COMMENT

1. *See* § 18-1-607, C.R.S. 2020.
2. *See* Instruction F:66 (defining “conduct”).
3. In 2018, the Committee renumbered this instruction from G1:05 to G1:04.



## CHAPTER G2

### INCHOATE OFFENSES

<a href="#"><u>G2:01</u></a>	CRIMINAL ATTEMPT
<a href="#"><u>G2:02</u></a>	CRIMINAL ATTEMPT (NON-GUILT OF OTHER PERSON NOT A DEFENSE)
<a href="#"><u>G2:03</u></a>	CRIMINAL ATTEMPT (FACTUAL OR LEGAL IMPOSSIBILITY NOT A DEFENSE)
<a href="#"><u>G2:04</u></a>	CRIMINAL ATTEMPT (COMPLETION NOT A DEFENSE)
<a href="#"><u>G2:05</u></a>	CONSPIRACY
<a href="#"><u>G2:06</u></a>	CONSPIRACY (IDENTITY OF A CO-CONSPIRATOR UNKNOWN)
<a href="#"><u>G2:07</u></a>	CONSPIRACY (LACK OF POSITION OR CHARACTERISTIC NOT A DEFENSE)
<a href="#"><u>G2:08</u></a>	CONSPIRACY (CO-CONSPIRATOR'S IMMUNITY OR LACK OF RESPONSIBILITY NOT A DEFENSE)
<a href="#"><u>G2:09</u></a>	CRIMINAL SOLICITATION
<a href="#"><u>G2:10</u></a>	CRIMINAL SOLICITATION (NON-GUILT OF PERSON SOLICITED NOT A DEFENSE)

## G2:01 CRIMINAL ATTEMPT

The elements of the crime of attempt to commit [insert name(s) of crime(s) here] are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. [insert the culpable mental state for the offense attempted],
4. engaged in conduct constituting a substantial step toward the commission of [insert name(s) of offense(s)]. [and,]
- [5. that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

A "substantial step" is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

After considering the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal attempt to commit [insert name(s) of offense(s)].

After considering the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal attempt to commit [insert name(s) of offense(s)].

### COMMENT

1. See § 18-2-101(1), C.R.S. 2020 (defining criminal attempt).
2. See Instruction F:10 (defining "after deliberation"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly or

willfully”); Instruction F:251 (defining “omission”); Instruction F:308 (defining “recklessly”); Instruction F:356 (defining “substantial step”).

3. Always give instructions explaining the elements and culpable mental state(s) of the attempted crime. Where the defendant is charged with both the completed crime and an attempt of that same offense, arrange the instructions so that the instructions for the completed crime precede the attempt instruction.

In cases where the defendant is charged only with an attempt to commit an offense, an elemental instruction defining the attempted crime should immediately follow the instruction defining an attempt (omit the last two paragraphs of the instruction defining the attempted offense, which describe the burden of proof and begin with the words: “After considering the evidence”). The instructions defining the mental state and relevant terms for the attempted offense should follow the elemental instruction.

4. Always include a complete description of the mens rea for the attempted offense as part of the attempt instruction. For example, where the defendant is charged with attempted first degree murder after deliberation, the mens rea should be described, in the third element, as “after deliberation and with the intent to kill.” See *Gann v. People*, 736 P.2d 37, 39 (Colo. 1987) (“[The instruction defining attempt] was erroneous because the jury was instructed on only one of the elements of culpability. The instruction omitted any reference to the requirement that the defendant must have acted after deliberation and with the intent to kill.”).

5. Compare *People v. Castro*, 657 P.2d 932, 937 (Colo. 1983) (attempted extreme indifference murder is a cognizable crime), and *People v. Thomas*, 729 P.2d 972, 975-77 (Colo. 1986) (attempted reckless crimes are cognizable), with *People v. Eggert*, 923 P.2d 230, 236 (Colo. App. 1995) (attempted negligent crimes are not cognizable).

6. See Instruction H:37 (criminal attempt—affirmative defense of abandonment and renunciation).

7. In 2015, the Committee modified Comment 4 to correct a potentially misleading quotation.

8. In 2019, in the final sentence of the first paragraph of Comment 3, the Committee corrected the phrase “attempted crime” to “completed crime.”

## **G2:02 CRIMINAL ATTEMPT (NON-GUILT OF OTHER PERSON NOT A DEFENSE)**

A person who engages in conduct intending to aid another to commit an offense commits criminal attempt if his [her] conduct would establish his [her] complicity were the offense committed by the other person, even if the other person is not guilty of committing or attempting the offense.

### COMMENT

1. *See* § 18-2-101(2), C.R.S. 2020.

## **G2:03 CRIMINAL ATTEMPT (FACTUAL OR LEGAL IMPOSSIBILITY NOT A DEFENSE)**

Factual or legal impossibility is not a defense to criminal attempt if the underlying offense could have been committed if the facts were as the defendant believed them to be.

### COMMENT

1. See § 18-2-101(1), C.R.S. 2020.
2. See *People v. Hrapski*, 658 P.2d 1367, 1369 (Colo. 1983) (probable cause existed to bind inmate over on charge of attempt to possess contraband, even though confiscated bullet failed to discharge when tested; because factual impossibility is not a defense under the attempt statute, it was immaterial that the bullet in the defendant's possession was defective).

## **G2:04 CRIMINAL ATTEMPT (COMPLETION NOT A DEFENSE)**

It is no defense to the charge of criminal attempt that the crime attempted was actually completed by the defendant.

### COMMENT

1. *See* § 18-2-101(1), C.R.S. 2020.

## G2:05 CONSPIRACY

The elements of the crime of conspiracy are:

1. That the defendant.
2. in the State of Colorado, at or about the date and place charged,
3. with the intent to promote or facilitate the commission of the crime of [insert name of offense here],
- [4. agreed with another person or persons that they, or one or more of them, would engage in conduct which constituted the crime of [insert name of offense] or an attempt to commit the crime of [insert name of offense], and]
- [4. agreed to aid another person or persons in the planning or commission of the crime of [insert name of offense] or an attempt to commit the crime of [insert name of offense], and]
5. the defendant, or a co-conspirator, performed an overt act to pursue the conspiracy.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

“Overt act” means any act knowingly committed by one of the conspirators, in an effort to accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature. It must, however, be an act that tends toward accomplishment of a plan or scheme, knowingly done in furtherance of some object or purpose of the charged conspiracy.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conspiracy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of conspiracy.

#### COMMENT

1. See § 18-2-201(1), (2) C.R.S. 2020.
2. Always give instructions that define the object crime(s), the crime of attempt (when applicable), and all terms that are relevant to the object crime(s).
3. Section 18-2-201(4), C.R.S. 2020, provides as follows: “If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode.” This rule governs issues relating to merger, *see, e.g., People v. Rodriguez*, 914 P.2d 230, 283 (Colo. 1996), and joinder. *See, e.g., Pinelli v. District Court*, 595 P.2d 225, 228 (Colo. 1979). However, it is not necessary to instruct the jury concerning this rule, as it is the prosecution’s prerogative to file a separate conspiracy count for each offense alleged to be an object of the conspiracy. *See, e.g., People v. Montoya*, 141 P.3d 916, 918 (Colo. App. 2006) (defendant charged with seven conspiracy counts).
4. Section 18-2-206(2), C.R.S. 2020, provides as follows: “A person may not be convicted of conspiracy to commit an offense if he is acquitted of the offense which is the object of the conspiracy where the sole evidence of conspiracy is the evidence establishing the commission of the offense which is the object of the conspiracy.” This section codifies the rule announced in *Robles v. People*, 417 P.2d 232, 234 (Colo. 1966). *See People v. Frye*, 898 P.2d 559, 567 n. 12 (Colo. 1995).

In *Frye*, the supreme court explained that the inconsistent verdict doctrine is in accord with this statute:

We believe that the rule announced in *Robles*, prohibiting verdicts where a defendant is convicted of conspiring to commit a substantive offense and acquitted of that substantive offense, where the same evidence relied on to establish the conspiracy is the evidence that was

found insufficient to establish the substantive offense, should be strictly limited to the terms of section 18-2-206(2).

*Id.* at 570. Thus, when this doctrine is litigated at the appellate level, the result turns on the question of whether there is “independent evidence in the record [that] implicates the defendant in the conspiracy [for which he was convicted], separate and distinct from that supporting the substantive crime [for which he was acquitted].” *People v. Searce*, 87 P.3d 228, 232 (Colo. App. 2003).

5. Colorado follows the “Wharton Rule” relating to conspiracies, under which “[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.” *People v. Bloom*, 577 P.2d 288, 290–91 (Colo. 1978) (quoting 1 Anderson, *Wharton’s Criminal Law and Procedure* 89). In cases with factual scenarios implicating this rule, it may be necessary to have the jury make a factual finding regarding the number of participants to the illicit agreement. Although that can be accomplished by means of a special verdict form, a simpler method is to incorporate the determination into the elemental instruction by modifying the language concerning the number of participants. *See, e.g., People v. Weathersby*, 514 N.W.2d 493, 500 (Mich. Ct. App. 1994) (stating that Wharton’s rule, though inapplicable to the statute at issue, was nevertheless adequately embodied in an elemental instruction that required the jury to find that “defendant and *two or more* people” knowingly agreed to violate the gambling law (emphasis added)).

6. *See* Instruction H:38 (renunciation as an affirmative defense to conspiracy).

7. The Colorado Criminal Code does not define the term “overt act.” The above definition first appeared in the 2003 draft revisions of the model criminal jury instructions. It is substantially similar to an earlier version that appeared in COLJI-Crim. 8(1), (1983). The “Notes on Use” section for the 1983 instruction states that it was “taken from the Federal Jury Practice and Instructions.” *See also People v. Schruder*, 735 P.2d 905, 907 (Colo. App. 1986) (the absence of an instruction defining “overt act” was not plain error

because “[t]he plain meaning of ‘overt act’ is not so abstruse as to be incomprehensible to the average juror”).

8. See *People v. Davis*, 2017 COA 40M, ¶¶ 15, 21, \_\_ P.3d \_\_ (“[C]ommitting a number of crimes, or engaging in a number of noncriminal overt acts, does not necessarily mean there is more than one conspiracy. . . . Though the prosecution alleged numerous overt acts in furtherance of the single conspiracy, that did not require unanimous agreement by the jurors as to the precise overt act [the] defendant committed.”).

9. In 2019, the Committee added Comment 8.

## **G2:06 CONSPIRACY (IDENTITY OF A CO-CONSPIRATOR UNKNOWN)**

If the defendant knows that one with whom he [she] conspires to commit a crime has conspired with another person or persons to commit the same crime, he [she] is guilty with such other person or persons, whether or not he [she] knows their identity.

### COMMENT

1. *See* § 18-2-201(3), C.R.S. 2020.
2. *See People v. Serrano*, 804 P.2d 253, 254 (Colo. App. 1990) (“In proving that a ‘wheel and hub’ conspiracy is a single conspiracy, rather than multiple conspiracies, there must be evidence of an agreement among all of the actors. However, there need not be evidence of a formal agreement; rather, it is sufficient to show that each conspirator knew or had reason to know of the existence and scope of the conspiracy and that each had reason to believe that his benefit depended upon the success of the entire venture. Further, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown.” (citations omitted)).

## **G2:07 CONSPIRACY (LACK OF POSITION OR CHARACTERISTIC NOT A DEFENSE)**

It is no defense to a charge of conspiracy that the defendant or the person with whom he [she] conspires did not occupy a particular position or have a particular characteristic which is an element of the crime, if the defendant believes that one of them did.

### COMMENT

1. *See* § 18-2-205, C.R.S. 2020.

## **G2:08 CONSPIRACY (CO-CONSPIRATOR'S IMMUNITY OR LACK OF RESPONSIBILITY NOT A DEFENSE)**

It is no defense to a charge of conspiracy that the person with whom the defendant conspires [is not legally responsible] [has immunity to prosecution or conviction] for the commission of the crime.

### COMMENT

1. *See* § 18-2-205, C.R.S. 2020.

## G2:09 CRIMINAL SOLICITATION

The elements of the crime of criminal solicitation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent to promote or facilitate the commission of [insert name of offense here, which must be a felony],
4. under circumstances that strongly corroborate that intent,
- [5. commanded, induced, entreated, or otherwise attempted to persuade another person,]
- [5. offered his [her] services or another's services to a third party,]
6. to commit [insert name of the offense here, which must be a felony].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal solicitation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal solicitation.

### COMMENT

1. See § 18-2-301(1), (5), C.R.S. 2020.

2. Always give instructions defining the object crime, and all relevant terms. *See also Webster's Third New International Dictionary* 759 (2002) (defining "entreat" as meaning "beg" or "prevail upon by pleading").
3. The supreme court has explained that "[a]lthough encouragement of a criminal offense is prohibited under both [the solicitation and complicity] statutes, the solicitation statute concerns incomplete acts, and the complicity statute covers consummated criminal offenses." *Alonzi v. People*, 597 P.2d 560, 564 n.3 (Colo. 1979).
4. In *Melina v. People*, 161 P.3d 633, 641 (Colo. 2007), the court held that the defendant's numerous statements to several individuals regarding his desire to have the victim killed constituted a single transaction of solicitation. Therefore, the court rejected the defendant's claim of instructional error (which was premised on the fact that the elemental instruction used the singular term, "another person"), as well as his claim that the court had erred by not giving the jury a unanimity instruction. However, users should note that the holding of *Melina* will not apply in a case where more than one act of solicitation is charged. In such circumstances, use separate elemental instructions that identify each alleged act in some distinguishing manner (e.g., date, name of person solicited, etc.).
5. *See* Instruction H:39 (affirmative defense to criminal solicitation – sole victim, inevitably incident, or otherwise not liable); Instruction H:40 (affirmative defense to criminal solicitation – prevention and renunciation).
6. *See People v. Jacobs*, 91 P.3d 438, 441-42 (Colo. App. 2003) (because the general offense of solicitation does not apply to the separate substantive offense of soliciting for child prostitution, the affirmative defenses of prevention and renunciation under the general solicitation statute are also inapplicable).

## **G2:10 CRIMINAL SOLICITATION (NON-GUILT OF PERSON SOLICITED NOT A DEFENSE)**

It is no defense to the charge of criminal solicitation that the person solicited could not be guilty of the offense because of lack of culpability or legal responsibility, or other incapacity.

### COMMENT

1. *See* § 18-2-301(3), C.R.S. 2020.

## CHAPTER H

### DEFENSES

#### SECTION I: DEFENSES THAT ARE GENERALLY APPLICABLE

- [H:01](#) EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF FACT)
- [H:02](#) EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF LAW)
- [H:03](#) CONSENT OF VICTIM
- [H:04](#) CONSENT OF VICTIM (OFFENSES INVOLVING BODILY INJURY, OR THREATENED BODILY INJURY)
- [H:05.SP](#) SPECIAL INSTRUCTION: WHEN ASSENT DOES NOT CONSTITUTE CONSENT
- [H:06](#) DEFENDANT AS VICTIM OR INCIDENTAL ACTOR
- [H:07](#) COMPLICITY – TIMELY WARNING
- [H:08](#) EXECUTION OF PUBLIC DUTY
- [H:09](#) CHOICE OF EVILS
- [H:10](#) USE OF PHYSICAL FORCE (SPECIAL RELATIONSHIPS)
- [H:11](#) USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)
- [H:12](#) USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)
- [H:13](#) USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)
- [H:14](#) USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)

- [H:15](#) USE OF PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE (INTRUDER INTO A DWELLING)
- [H:16](#) USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)
- [H:17](#) USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)
- [H:18](#) USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PROPERTY)
- [H:18.5](#) RENDERING EMERGENCY ASSISTANCE TO AN AT-RISK PERSON OR AN ANIMAL IN A LOCKED VEHICLE
- [H:19](#) USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)
- [H:20](#) USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)
- [H:20.5.SP](#) + USE OF A CHOKEHOLD – SPECIAL INSTRUCTION (PEACE OFFICER)
- [H:21](#) USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)
- [H:22](#) USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)
- [H:23](#) USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)
- [H:24](#) USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)
- [H:25](#) USE OF DEADLY PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)
- [H:26](#) USE OF PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)
- [H:27.SP](#) SPECIAL INSTRUCTION: REASONABLE BELIEF THAT A PERSON HAS COMMITTED AN OFFENSE

<a href="#"><u>H:28.SP</u></a>	SPECIAL INSTRUCTION: VALIDITY OF ARREST WARRANT
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## SECTION II: DEFENSES TO INCHOATE OFFENSES AND SPECIFIC CRIMES

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JUVENILE TO POSSESS A HANDGUN OR FIREARM – PHYSICAL HARM FROM ATTEMPT TO DISARM

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TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK – PERMISSIBLE TRANSFER UNLAWFUL SALE, TRANSFER, OR POSSESSION OF A LARGE-CAPACITY MAGAZINE – LAWFUL OWNERSHIP

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ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL OR MARIJUANA BY AN UNDERAGE PERSON; ILLEGAL POSSESSION OF MARIJUANA PARAPHERNALIA BY AN UNDERAGE PERSON – REPORTING AN EMERGENCY

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CRIMINAL USURY – RATE NOT EXCESSIVE COLLECTION OF PROHIBITED FEES BY A LOAN FINDER – EXEMPT PERSON OR ORGANIZATION

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MEDICAL MARIJUANA RECREATIONAL MARIJUANA OFFENSES RELATED TO PROVIDING A PLACE FOR THE UNLAWFUL DISTRIBUTION, TRANSPORTATION, OR MANUFACTURE OF CONTROLLED SUBSTANCES (LACK OF KNOWLEDGE; REPORTED CONDUCT)

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RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR (REASONABLE RELIANCE ON IDENTIFICATION)

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DRIVING WITHOUT A VALID LICENSE (EMERGENCY OR EXEMPTION)

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SPEEDING (EMERGENCY) DRIVING UNDER A RESTRAINT FROM ANOTHER STATE (VALID LICENSE ISSUED SUBSEQUENT TO RESTRAINT)

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DRIVING WITH EXCESSIVE ALCOHOL CONTENT – SUBSEQUENT CONSUMPTION OF ALCOHOL

## CHAPTER COMMENTS

1. As reflected in the table of contents above, the chapter is divided into two sections. Within each section, the instructions are arranged sequentially according to the numbering of the underlying statutes.
2. The instructions for the affirmative defense of insanity are located in Chapter I.
3. In previous editions of COLJI-Crim., this chapter was captioned “Affirmative Defenses.” The Committee has retitled the chapter “Defenses” because it also contains instructions for element-negating traverses.

The supreme court has explained the distinction between these two types of defenses as follows:

There are, generally speaking, two types of defenses to criminal charges: (1) “affirmative” defenses that admit the defendant’s commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act; and (2) “traverses” that effectively refute the possibility that the defendant committed the charged act by negating an element of the act. *See People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989) (citations omitted) [(defense of alibi is not an affirmative defense requiring an instruction stating that the People bear the burden of refuting an alibi beyond a reasonable doubt)]; *see also People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (further explaining the distinction between affirmative defenses and traverses). In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *See* § 18-1-407, C.R.S. (2010); *Huckleberry*, 768 P.2d at 1238 (citations omitted). If, on the other hand, the presented evidence raises the issue of an elemental traverse, the jury may consider the evidence in determining whether the prosecution has proven the element

implicated by the traverse beyond a reasonable doubt, but the defendant is not entitled to an affirmative defense instruction. *See Huckleberry*, 768 P.2d at 1238.

*People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011).

4. A defendant is entitled to an instruction concerning an affirmative defense if the trial court determines, as a matter of law, that there is some credible evidence in the record to support it. *See O'Shaughnessy v. People*, 2012 CO 9, ¶ 11, 269 P.3d 1233, 1236; *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011).

5. The Committee has designed model affirmative defense instructions that are to be referenced by inclusion of the following language in an elemental instruction: "and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_."

However, when the jury is instructed concerning the affirmative defense of insanity, the following language should be included as the final element of the offense (and it should be numbered as a separate element, as shown in the example below, whether insanity is the only affirmative defense or an alternative to one of the other affirmative defenses which are to be referenced using the "was not legally authorized" language that appears within the final bracketed element of each model elemental instruction):

\_. and that the defendant was not insane, as defined in Instruction \_\_\_\_.

6. Although the Committee has drafted an affirmative defense instruction for each generally applicable defense that is identified as an "affirmative defense" by statute, in a few instances the Committee has, consistent with past practice, included comments that question the correctness of the characterization. *See, e.g.*, Instruction H:02, Comment 2 (mistaken belief of law).

7. In COLJI-Crim. (2008), the third "Note on Chapter Use" stated that "[t]here may be other, non-statutory affirmative defenses." However, in

*Oram v. People*, 255 P.3d 1032 (Colo. 2011), the supreme court explicitly rejected this proposition and held that “all affirmative defenses to crimes must be defined by the General Assembly in the Colorado Revised Statutes.” *Id.* at 1036 (the common-law bonding agent’s privilege does not exist in Colorado as an affirmative defense to burglary).

8. This chapter does not include an instruction defining an affirmative defense based on the concept of an “intervening cause.” There is no statute establishing such an affirmative defense, and when the supreme court has likened the concept of an “intervening cause” to an affirmative defense it has done so only for a narrow purpose:

The quantum of evidence that must be offered by the defendant in order to be entitled to an instruction on a theory of defense is “a scintilla of evidence”. See *People v. Lundy*, 188 Colo. 194, 197, 533 P.2d 920, 921 (1975). “Some credible evidence”, an alternative statement of the “scintilla of evidence” standard, is necessary to present an affirmative defense. See *People v. Dover*, 790 P.2d 834, 836 (Colo. 1990). It merely requires some evidence to support the defense. See *People v. Dillon*, 655 P.2d 841, 845 (Colo. 1982). We hold that the intervening cause defense is treated like an affirmative defense or a theory of defense for the purpose of determining the quantum of evidence necessary to submit the issue to the jury. Therefore, a defendant must present a scintilla of evidence, or some evidence, [of an intervening cause] in order to be entitled to submit the issue to the jury. The court, not the jury, must make threshold determinations of whether an affirmative defense can be supported by the evidence.

*People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998) (emphasis added).

Significantly, although the court has, in dicta, referred to an “intervening cause” as an “affirmative defense,” see *People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) (“[w]hile it is possible that Stewart . . . wished to deemphasize intervening cause as an affirmative defense to first and second degree assault”); *People v. Fite*, 627 P.2d 761, 765 n.6 (Colo. 1981) (acknowledging that “[t]he issue of supervening cause was submitted to the jury as an affirmative defense,” but holding, as a matter of law, that

there was no evidence of an intervening cause), it has never found error based on the absence of an instruction defining the concept of an intervening cause as an affirmative defense. Nor has it ever directed a trial court to instruct a jury in such a manner, even when it has concluded that an instruction was warranted. *See People v. Bowman*, 669 P.2d 1369, 1379 (Colo. 1983) (“We direct that, if the evidence presented on retrial warrants it, the jury should be fully instructed about the law concerning supervening causes as set forth in *People v. Calvaresi*, [534 P.2d 316 (Colo. 1975)].”). Moreover, no earlier edition of COLJI-Crim. has included an instruction defining an “intervening cause” as an affirmative defense.

Accordingly, the Committee has concluded that, when a defendant makes the threshold showing necessary to obtain an intervening cause instruction, *see People v. Stewart*, 55 P.3d 107, 119; *People v. Saavedra-Rodriguez*, 971 P.2d at 228, the element-negating traverse should be explained in a separate instruction, or by adding language to an instruction that defines the term “cause.” The latter approach is consistent with CJI-Civ. 9:20 (2014) (defining “cause” with optional language discussing the concept of an intervening cause), and there is support for it in *People v. Deadmond*, 683 P.2d 763, 768 (Colo. 1984) (trial court did not err by rejecting the defendant’s proffered instruction defining “intervening cause” because the concept was explained in the instruction defining “proximate cause,” which “fully apprised the jury of the nature of the causal connection between conduct and result which the prosecution was required to establish beyond a reasonable doubt”). *See also People v. Gentry*, 738 P.2d 1188, 1189-90 (Colo. 1987) (both the defendant’s theory of defense instruction, which the supreme court disapproved because it did not state that only negligence rising to the level of “gross negligence” can constitute an “intervening cause,” and the prosecution’s tendered instruction, which the trial court rejected, described an “intervening cause” merely as a “defense,” and not as an affirmative defense); *People v. Grassi*, 192 P.3d 496, 499 (Colo. App. 2008) (instruction defining “proximate cause” was “an amalgam of both the civil and criminal jury instructions on proximate cause [that] was done to accommodate defendant’s defense that his conduct was not the proximate cause of the accident or the victim’s resulting death, but that the victim’s actions had been the intervening cause of both”); *People v. Marquez*, 107 P.3d 993, 997 (Colo. App. 2004) (“The

instructions given by the court required the jurors to find that the prosecution had proved the causation element of vehicular homicide beyond a reasonable doubt, and they gave the jurors a correct definition of ‘proximate cause.’ The additional references to intervening cause and related concepts were superfluous. However, any error inured to defendant’s benefit, in that it suggested the existence of a defense to the causation element that was unwarranted in light of the evidence presented.”).

9. Citations to definitional instructions located in Chapter F are included in the comments that follow the defense instructions. However, citations to definitional instructions are not included for those terms that also appear in the corresponding elemental instructions (because citations to those definitional instructions are included as part of the comments for the elemental instructions). For example, the second comment for Instruction H:69 (affirmative defense of “recreational marijuana”) includes numerous citations to definitional instructions in Chapter F, but it does not include a citation to Instruction F:208 (defining “marijuana”), because a citation to that definitional instruction is included in a comment for each elemental instruction that defines a marijuana offense.

10. In COLJI-Crim. (2008), the first instruction in Chapter H, Instruction H:01, was captioned as: “Affirmative Defenses – Generally.” The instruction contained just two paragraphs which stated the prosecution’s burden of proof with respect to affirmative defenses, and a comment advised users that “[t]his language should now be included in the concluding paragraphs of affirmative defense instructions and not set forth in a separate instruction.”

In this edition of COLJI-Crim., the Committee has substantially revised the burden-of-proof language and, as in COLJI-Crim. 2008, included the burden-of-proof language in each of the model affirmative defense instructions in Chapter H. Because the Committee did not see a need to have a freestanding instruction that merely states the prosecution’s burden of proof (or, more accurately, its burden of disproof), Instruction H:01 now defines the first affirmative defense in the chapter (i.e., mistaken belief of fact).

When drafting an instruction to define a statutory affirmative defense for which there is no model instruction, use as a template one of the model instructions that includes the burden-of-proof language.

## **CHAPTER H: SECTION I (DEFENSES THAT ARE GENERALLY APPLICABLE)**

### **H:01 EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF FACT)**

The evidence presented in this case has raised the affirmative defense of “mistaken belief of fact,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. the defendant engaged in the prohibited conduct under a mistaken belief, and
2. due to this mistaken belief he [she] did not form the particular mental state required in order to commit the offense.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-504(1)(a), (3), C.R.S. 2020.
2. A division of the Court of Appeals has held that a mistake of fact instruction need not be given if proof of the mens rea necessarily requires proof that the defendant was not operating under the asserted mistaken belief of fact. See *People v. Walden*, 224 P.3d 369, 378-79 (Colo. App. 2009) (defendant's proposed mistake of fact instruction, relating to his alleged belief that he had permission to enter and stay at victim's apartment, duplicated elements of instruction defining first-degree criminal trespass; the effect of defendant's instruction, if the jury were to believe his contention, would merely have been to negate requisite "knowing" element of trespass; therefore, the trial court did not err by refusing defendant's proposed instruction); see also *People v. Andrews*, 632 P.2d 1012, 1016 (Colo. 1981) ("the culpability element of 'knowingly' belies the notion that the [aggravated motor vehicle theft] statute somehow authorizes a conviction based on a mistaken belief in one's authorization to obtain or exercise control over another's vehicle").

## **H:02 EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF LAW)**

The evidence presented in this case has raised the affirmative defense of “mistaken belief of law,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. the defendant engaged in the prohibited conduct under a mistaken belief that his [her] conduct did not, as a matter of law, constitute an offense, and
2. the conduct was permitted by: [a statute or ordinance binding in this state] [an administrative regulation, order, or grant of permission by a body or official authorized and empowered to make such order or grant the permission under the laws of the state of Colorado] [an official written interpretation of the statute or law relating to the offense, made or issued by a public servant, agency, or body legally charged or empowered with the responsibility of administering, enforcing, or interpreting a statute, ordinance, regulation, order, or law [, which, if by judicial decision, was binding in the state of Colorado]].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your

verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-504(2), C.R.S. 2020.

2. The Committee included this instruction because the General Assembly has labeled this type of “mistake” as an “an affirmative defense.” § 18-1-504(3), C.R.S. 2020. However, no published decision has analyzed a jury instruction embodying this affirmative defense, and it is difficult to conceive of a scenario that would implicate this defense without giving rise to grounds for a judgment of acquittal under Crim. P. 29(a). Moreover, “it is a well-known maxim that ‘ignorance of the law constitutes no excuse for its violation,’” *Kent v. People*, 9 P. 852, 854 (Colo. 1886), and a “mistake of law” defense cannot be based on a misunderstanding of the law. See *People v. Lesslie*, 24 P.3d 22 (Colo. App. 2000) (deputy sheriff convicted of conspiracy to commit criminal eavesdropping for installing an electronic listening device in the restroom of a bar was not entitled to mistake of law instruction where (1) the sheriff, whom the deputy alleged had ordered him to place the electronic listening device, was not an official authorized or empowered to permit the interception and recording of communications by such a device; and (2) the appellate decision on which the deputy allegedly relied was inapposite, as it involved police interception of conversations without the aid of an electronic listening device).

### H:03 CONSENT OF VICTIM

The evidence presented in this case has raised the affirmative defense of “consent,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. the alleged victim consented to the conduct charged to constitute the offense, [or to the result thereof,] and
2. [the consent negates an element of the offense.]

[the consent precluded the infliction of [insert a short statement identifying the harm or evil sought to be prevented by the law defining the offense].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-505(1), C.R.S. 2020.
2. Section 18-1-505(4), C.R.S. 2020, states that “[a]ny defense authorized by this section is an affirmative defense,” and section 18-1-505(1), C.R.S. 2020, states that consent is a defense if it “negates an element of the offense.”

The Committee notes that divisions of the Court of Appeals have held that an affirmative defense instruction is not required in cases where proof of the elements of the offense necessarily requires the prosecution to prove the absence of consent. See *People v. Bush*, 948 P.2d 16, 18 (Colo. App. 1997) (the trial court did not err in rejecting defendant’s instructions defining consent as an affirmative defense to the charges of theft and unauthorized use of a financial transaction device because “a trial court is not required to give the jury an instruction defining an affirmative defense if proof of the elements of the charged offense necessarily requires disproof of the issue raised by the affirmative defense”); *People v. Cruz*, 923 P.2d 311, 312 (Colo. App. 1996) (“§ 18-1-505(1) does not impose a requirement that the jury be instructed on an affirmative defense of consent in a case under . . . [a] statute which itself requires, in effect, that the prosecution prove a lack of consent”). Nevertheless, because the General Assembly has specified that consent which negates an element of an offense is an “affirmative defense,” the Committee has included bracketed language reflecting that legislative directive.

However, in 2002 the General Assembly enacted a provision directing that, in cases where the defendant is charged with a sexual offense or an invasion of privacy (or an attempt or a conspiracy with one of these enumerated offenses as the object): “[n]otwithstanding the provisions of section 18-1-505(4), an instruction on the definition of consent given pursuant to [the special definition of consent set forth in section 18-3-401(1.5)] shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense.” § 18-3-408.5(1), C.R.S. 2020 (emphasis added); see also § 18-3-408.5(2), C.R.S. 2020 (listing the offenses to

which this provision applies); Instruction F:68 (defining “consent” pursuant to section 18-3-401(1.5)).

## **H:04 CONSENT OF VICTIM (OFFENSES INVOLVING BODILY INJURY, OR THREATENED BODILY INJURY)**

The evidence presented in this case has raised the affirmative defense of “consent,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. the alleged victim consented to the conduct that caused or threatened bodily injury, or to the infliction of that injury, and
2. [the bodily injury consented to, or threatened by the conduct consented to, was not serious.]

[the conduct and the injury were reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-505(2), (4), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); Instruction F:332 (defining “serious bodily injury”).
3. The final clause of section 18-1-505(2) states that consent to bodily injury is a defense where “the consent establishes a justification under sections 18-1-701 to 18-1-707.” See, e.g., § 18-1-703(1)(e)(I), C.R.S. 2020 (establishing an affirmative defense where a patient consents to reasonable and appropriate physical force that is administered for a recognized physical or mental health treatment).
4. If there is evidence of consent based on “joint participation in a lawful athletic contest or competitive sport,” draft a supplemental instruction in accordance with the statutes or regulations that govern the relevant activity. See, e.g., § 12-10-106(1), C.R.S. 2020 (authorizing the Colorado state boxing commission to promulgate necessary rules and regulations).
5. See Instruction H:03, Comment 2 (explaining that, pursuant to section 18-3-408.5(1), consent is not an affirmative defense to certain sexual offenses).

## H:05.SP SPECIAL INSTRUCTION: WHEN ASSENT DOES NOT CONSTITUTE CONSENT

Assent does not constitute consent if:

[it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense.]

[it is given by a person who, by reason of immaturity, behavioral or mental health disorder, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of conduct charged to constitute the offense.]

[it is given by a person whose conduct is sought to be prevented by the law defining the offense.]

[it is induced by force, duress, or deception].

### COMMENT

1. See § 18-1-505(3), C.R.S. 2020 (stating that these limitations apply, “[u]nless otherwise provided by this code or by the law defining the offense”).
2. See Instruction F:226.5 (defining “mental health disorder”).
3. If the facts of the case implicate one of the above provisions, use of a separate instruction may not be the simplest way to explain the concept. Consider incorporating the relevant limiting language into the instruction defining the term “consent.” See *People v. Holwuttle*, 155 P.3d 447, 450 (Colo. App. 2006) (trial court did not err by including language from section 18-1-505(3) as part of instruction defining the term “consent”).
4. In 2017, pursuant to a legislative amendment, the Committee modified the language in the second bracketed alternative pursuant to a

legislative amendment, and it added Comment 2. *See* Ch. 263, sec. 138, § 18-1-505(3)(b), 2017 Colo. Sess. Laws 1249, 1305.

## H:06 DEFENDANT AS VICTIM OR INCIDENTAL ACTOR

The evidence presented in this case has raised the affirmative defense of “defendant as [victim] [incidental actor]” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. [he [she] was a victim of the offense] [his [her] conduct was inevitably incidental to the commission of the offense], and
2. the offense was committed by another person.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. *See* § 18-1-604(1), C.R.S. 2020 (stating that these provisions apply “[u]nless otherwise provided by the statute defining the offense”).

2. Although the Committee has drafted a model instruction based on section 18-1-604(1), it is debatable whether this section establishes: (1) a defense that is subject to determination by the jury; or (2) a principle of statutory construction that the court is to determine as a matter of law. Compare *People v. Grace*, 55 P.3d 165, 171 (Colo. App. 2001) (concluding, as part of a determination that the evidence was sufficient to support the defendant's conviction for distribution and attempted possession of cocaine, that his actions as a middleman to a drug transaction were not inevitably incidental to the commission of that offense), with *People v. Hart*, 787 P.2d 186, 189 (Colo. App. 1989) (reversing defendant's conviction for distribution of a controlled substance which entered under a theory of complicity; "as framed by the definition of the crime of distribution, the conduct of one who takes delivery of the controlled substance is 'inevitably incidental' to the criminal conduct of one who delivers the controlled substance"; therefore, "a person who takes delivery of a controlled substance by purchase is exempt from liability as a complicitor for the crime of distribution committed by a person delivering the controlled substance to him").

3. Because section 18-1-604(1) speaks in terms of criminal liability "for behavior of another," it appears this provision applies only where the defendant is charged as a complicitor, or pursuant to one of the provisions of section 18-1-602, C.R.S. 2020 ("behavior of another").

## H:07 COMPLICITY – TIMELY WARNING

The evidence presented in this case has raised the affirmative defense of “timely warning,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. prior to the commission of the offense, he [she] terminated his [her] effort, as a complicitor, to promote or facilitate its commission, and
2. he [she] gave timely warning to law enforcement authorities or the intended victim.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. See § 18-1-604(2), C.R.S. 2020.

2. Complicity is a theory of criminal liability; it is not an offense. *See Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005); Instruction J:03 (defining liability as a complicitor).

## H:08 EXECUTION OF PUBLIC DUTY

The evidence presented in this case has raised the affirmative defense of “execution of public duty,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] was [insert disputed predicate fact(s) that will determine whether the defendant was acting pursuant to a provision of law or judicial decree].] [, and]
- [2. insert disputed predicate fact(s) that will determine whether the provision of law or judicial decree was binding in Colorado.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. See § 18-1-701, C.R.S. 2020.

2. Both COLJI-Crim. 7:07 (1983) and COLJI-Crim. H:08 (2008) indicated that “execution of public duty” was an “affirmative defense,” though neither instruction specified how the jury was to determine the issue.

Because the applicability of section 18-1-701 will, in every case, turn on an interpretation of a judicial decree or provision of law as defined by section 18-1-701(2), the Committee has concluded that the inquiry is, at least in part, a question of law. *See People v. Lesslie*, 24 P.3d 22, 25 (Colo. App. 2000) (concluding, as a matter of law, that deputy sheriff convicted of conspiracy to commit eavesdropping for placing an electronic listening device in a restroom was not entitled to raise the defense of execution of a public duty because the sheriff who allegedly directed the action did not have the authority to do so without a court order); *People v. Roberts*, 601 P.2d 654, 656 (Colo. App. 1979) (trial court did not err in refusing an instruction on execution of a public duty; “[t]he propriety of this refusal depends upon the legal question of whether defendant, as a penitentiary guard, had a public duty to apprehend an escaped convict by using undercover techniques”).

Significantly, the statute does not contain any requirement that the defendant actually have had knowledge of the statutory provision or judicial decree (unlike the affirmative defense of mistake of law, which is discussed in Comment 2 to Instruction H:02). Therefore, the only possibility for a factual dispute is with respect to the predicate facts that establish whether a defendant’s conduct was within the scope of a binding provision of law or judicial decree that makes the conduct non-criminal.

For example, in a case where a defendant asserts the defense based on a judicial decree from another state there could be factual disputes concerning (1) whether the defendant was acting pursuant to the judicial decree; and (2) if so, whether the out-of-state judgment was binding in Colorado.

3. Section 18-1-701(1) states that the exemption from criminal liability applies: “[u]nless inconsistent with other provisions of sections 18-1-702 to 18-1-710, defining justifiable use of physical force.”

4. *See People v. Neckel*, 2019 COA 69, ¶ 21-23, \_\_ P.3d \_\_ (holding that a “No Trespassing” sign alone did not revoke the public’s implicit license to approach the defendant’s property, meaning that a process server who so approached was effecting legal process and was thus protected from trespass laws under section 18-1-701).

5. In 2019, the Committee added Comment 4.

## H:09 CHOICE OF EVILS

The evidence presented in this case has raised the affirmative defense of “choice of evils,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. it was necessary as an emergency measure to avoid an imminent public or private injury, which was about to occur because of a situation occasioned or developed through no conduct of the defendant, and
2. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute defining [insert name(s) of offense(s)].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-702, C.R.S. 2020 (stating that this affirmative defense is available unless inconsistent with other provisions of sections 18-1-703 to 707, defining the justifiable use of physical force, or with some other provision of law).
2. “When evidence relating to the defense of justification under this section is offered by the defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.” § 18-1-702(2), C.R.S. 2020.
3. The statute defining the defense of duress, section 18-1-708, C.R.S. 2020, states: “The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application.”
4. In *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1990), a division of the Court of Appeals relied on dictionary definitions of three terms that appear in the statutory definition of the choice of evils defense: “emergency,” “imminent,” and “urgency.” However, the division cited these definitions for the limited purpose of disapproving a trial court’s decision to instruct the jury concerning the choice of evils defense (specifically, the division held that a kidnapping victim’s mere affiliation with the Unification Church was insufficient to warrant an instruction in a case where the defendant asserted a need to “deprogram” the victim). Accordingly, because the Committee has concluded that all three terms are commonly understood, the dictionary definitions referenced in *Brandyberry* are not included in Chapter F.
5. A defendant is not entitled to a choice of evils instruction based on mere speculation. See *People v. Brante*, 232 P.3d 204, 210 (Colo. App. 2009) (defendant’s speculative fears did not rise to the level of an impending injury demanding immediate action).

6. A division of the Court of Appeals has questioned whether the choice of evils defense applies to nonintentional conduct, and has suggested that an instruction may not be necessary where the concept is sufficiently embodied in a self-defense instruction. *See People v. Roberts*, 983 P.2d 11, 15 (Colo. App. 1998).

7. The choice of evils defense is not available as a justification for behavior that attempts to bring about social and political change outside the democratic governmental process. *See Andrews v. People*, 800 P.2d 607, 609 (Colo. 1990) (choice of evils defense unavailable to protesters charged with public order offenses committed during a protest at nuclear weapons plant).

8. *See also People v. Dover*, 790 P.2d 834, 834-35 (Colo. 1990) (attorney charged with driving eighty miles per hour in a fifty-five mile per hour zone who claimed he was late for a court hearing was not entitled to assert an emergency defense under a provision of the traffic code, now codified as section 42-4-1101(9), C.R.S. 2020, that is a corollary to the choice of evils defense); *People v. McKnight*, 626 P.2d 678, 681 (Colo. 1981) (defendant charged with escape from prison not entitled to assert choice of evils defense based on normal conditions of confinement).

9. *See also* Instruction H:64 (affirmative defense of “possession of a weapon by a previous offender – choice of evils”).

## H:10 USE OF PHYSICAL FORCE (SPECIAL RELATIONSHIPS)

The evidence presented in this case has raised the affirmative defense of “physical force pursuant to a special relationship,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was [a parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person] [a teacher or other person entrusted with the care and supervision of a minor], and
  2. he [she] used reasonable and appropriate physical force upon the [minor] [incompetent person], when and to the extent it was reasonably necessary and appropriate, to maintain discipline or promote the welfare of the minor [incompetent person].]
1. he [she] was a superintendent [or other authorized official] of a [jail] [prison] [correctional institution], and
  2. he [she] used + objectively reasonable and appropriate physical force, when and to the extent that he [she] reasonably believed it was necessary to maintain order and discipline. [, and]
  3. + he [she] used deadly physical force when he [she] objectively reasonably believed that the inmate posed an immediate threat to himself [herself] or another person.]]
1. he [she] was a person responsible for the maintenance of order in a common carrier of passengers, [or was acting under the direction of a person with that responsibility,] and
  2. he [she] used reasonable and appropriate physical force, when and to the extent that it was necessary, to maintain order and discipline. [, and]
  3. the use of deadly physical force was reasonably necessary to

prevent death or serious bodily injury.]]

1. he [she] was a person acting under a reasonable belief that another person was about to [commit suicide] [inflict serious bodily injury upon himself [herself]], and
  2. he [she] used reasonable and appropriate physical force upon that person to the extent that it was reasonably necessary to thwart the result.]]
- 
1. he [she] was a duly licensed [physician] [advanced practice nurse] [person acting under the direction of a duly licensed [physician] [advanced practice nurse]], and
  2. he [she] used reasonable and appropriate physical force for the purpose of administering a recognized form of treatment that he [she] reasonably believed to be adapted to promoting the physical or mental health of the patient, and
  3. [the treatment was administered with the consent of the patient.] [the patient was a minor or an incompetent person, and the treatment was administered with the consent of his [her] parent, guardian, or other person entrusted with his [her] care and supervision.] [the treatment was administered in an emergency when the physician or advanced practice nurse reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you

must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-703(1)(a)-(e), C.R.S. 2020.
2. See Instruction F:58 (defining “common carrier”); Instruction F:87 (defining “deadly physical force”); Instruction F:332 (defining “serious bodily injury”).
3. Previously, the statute defining child abuse included “without justifiable excuse” as an element. Although the supreme court construed that language as incorporating the affirmative defense of reasonable discipline, the General Assembly has since amended the child abuse statute and removed the language. See § 18-6-401, C.R.S. 2020; *People v. Lybarger*, 700 P.2d 910, 916 (Colo. 1985); *People v. Hoehl*, 568 P.2d 484, 487 (Colo. 1977).
4. + In 2020, pursuant to a legislative amendment, the Committee updated the conditions regarding the use of force by a superintendent or authorized official of a jail, prison, or correctional institution. See Ch. 110, sec. 4, § 18-1-703(1)(b), 2020 Colo. Sess. Laws 445, 453-54.

## H:11 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

The evidence presented in this case has raised the affirmative defense of “defense of person,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person without first retreating if:

1. he [she] used that physical force in order to defend himself [herself] or a third person from what he [she] reasonably believed to be the use or imminent use of unlawful physical force by that other person, and
2. he [she] used a degree of force which he [she] reasonably believed to be necessary for that purpose. [, and]
- [3. he [she] did not, with intent to cause bodily injury or death to another person, provoke the use of unlawful physical force by that other person.]
- [4. he [she] was not the initial aggressor, or, if he [she] was the initial aggressor, he [she] had withdrawn from the encounter and effectively communicated to the other person his [her] intent to do so, and the other person nevertheless continued or threatened the use of unlawful physical force.]
- [5. the physical force involved was not the product of an unauthorized combat by agreement.]
- + [6. the use of physical force against another was not based on the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.]

The prosecution has the burden to prove, beyond a reasonable doubt,

that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-704(1)–(3), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); + Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. See *People v. Garcia*, 28 P.3d 340, 347 (Colo. 2001) (“the no-duty to retreat rule does not apply when a non-aggressor pursues an initial aggressor who has withdrawn because in that situation, the non-aggressor in fact becomes the aggressor”; however, the trial court erred in refusing to give a no-duty to retreat instruction in this case because the victim had not withdrawn, the defendant was not out of danger at the time that she killed him, and the jury could have mistakenly concluded that the defendant had a duty to retreat before using deadly force); *Idrogo v. People*, 818 P.2d 752, 757 (Colo. 1991) (because the question of whether the defendant did in fact retreat was vigorously disputed, the defendant was entitled to have the jury properly instructed on applicable law of nonretreat; trial court erred

by not instructing the jury that an innocent victim of assault need not retreat before using deadly force if the victim believes the use of such force is necessary for self-protection and the belief is based on reasonable grounds); + *see also* *People v. Monroe*, 2020 CO 67, ¶¶ 5, 30, 468 P.3d 1273, 1274, 1278 (“[T]he prosecution may not argue that a defendant acted unreasonably in self-defense because she failed to retreat from an encounter. . . . To allow the prosecution to argue that a defendant’s failure to retreat undermines the reasonableness of that defendant’s self-defense claim would cripple the no-duty-to-retreat rule. . . . The line between argument that imposes a duty to retreat (a threatened person *should* retreat instead of using force) and argument that undermines the reasonableness of a defendant’s use of force (a threatened person *would* retreat instead of using force) is too thin to allow the latter.”).

4. If the jury is given an instruction that utilizes the language of section 18-1-704, it is unnecessary to give a separate instruction concerning the concept of “apparent necessity.” *See Beckett v. People*, 800 P.2d 74, 78 (Colo. 1990) (a separate “apparent necessity” instruction is not necessary where jury instructions adequately informed the jury that it was required to consider the defendant’s reasonable belief in the necessity of defensive action).

5. The above instruction does not include multiple assailant language from *People v. Jones*, 675 P.2d 9, 14 (Colo. 1984). More recently, the supreme court has explained “that *Jones* does not require a trial court to give a specific multiple assailants instruction in *every* case involving both multiple assailants and self-defense.” *Riley v. People*, 266 P.3d 1089, 1094 (Colo. 2011).

Instead, *Jones* stands for the principle that a jury must consider the totality of the circumstances, including the number of persons reasonably appearing to be threatening the defendant, (1) when evaluating the reasonableness of the defendant’s belief that he needed to use self-defense in the given situation, and (2) when evaluating the reasonableness of the actual force used by the defendant to repel the apparent danger. *See Jones*, 675 P.2d at 14. The purpose of this rule is to ensure that the jury understands that it may

consider all relevant evidence when assessing the reasonableness of the defendant's actions. Thus, so long as the given instructions properly direct the jury to consider the totality of the circumstances during its deliberations on reasonableness, those instructions will satisfy *Jones*.

*Riley*, 266 P.3d at 1094 (the instructions given, when read together, accurately described the law of self-defense in the multiple assailants situation, in that they described the law of self-defense and broadly provided that the jury should consider the totality of the circumstances when evaluating the reasonableness of the defendant's actions); *cf. id.* at 1097 (Coats, J., concurring in the judgment) (arguing that the defendant's tendered instruction was improper because it simply "amplif[ied] the statutory definition of self-defense itself" rather than "explain[ing] the defendant's theory of the case by relating the circumstances as he perceived them to be to the law of self-defense").

6. Participation in an unauthorized "combat by agreement" is a disqualifying condition that, like initial aggression and provocation, establishes an exception to the affirmative defense of self-defense. Although section 18-1-704(3)(c) requires proof that the agreement was "not specifically authorized by law," this language does not establish a separate defense. *See also* Instruction H:04 (defining the affirmative defense of consent, under section 18-1-505(2), where "the conduct and the injury were reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport").

"Colorado case law makes clear that there must be a definite agreement before a court can instruct a jury on the mutual combat limitation on self-defense." *Kaufman v. People*, 202 P.3d 542, 561-62 (Colo. 2009) ("Nowhere in the [self-defense] statute does the General Assembly define 'combat by agreement.' Rather, the elements of this self-defense exception have been developed through case law."). Accordingly, in a case where there is an evidentiary basis for including language defining the combat by agreement exception, draft a supplemental instruction specifying the relevant principles of law that the jury should apply to decide whether the combat by agreement was "unauthorized." *See, e.g.*, §

12-10-103(15), C.R.S. 2020 (defining “toughperson fighting” as including nearly all types of combat by agreement, other than sanctioned boxing and martial arts training that is conducted in specified circumstances); § 12-10-107.5, C.R.S. 2020 (“toughperson fighting” is a class one misdemeanor); § 18-9-106(1)(d), C.R.S. 2020 (making it a class three misdemeanor to engage in public fighting, other than in an amateur or professional contest of athletic skill); § 18-13-104, C.R.S. 2020 (dueling statute, prohibiting (1) agreements to fight in a public place, except in sporting events authorized by law; and (2) agreements to engage in a fight with deadly weapons, whether in a public or private place).

7. When submitting an offense that is defined with the alternative mens reas of “knowingly” and “recklessly,” *see, e.g.*, § 18-3-204(1)(a), C.R.S. 2020 (third degree assault), use separate instructions to define self-defense (1) as an affirmative defense to an elemental instruction that defines the offense with only the mens rea of “knowingly”; and (2) pursuant to section 18-1-704(4), with respect to a separate elemental instruction that defines the offense with only the mens rea of “recklessly.” *See* Instruction H:13 (affirmative defense of “use of non-deadly physical force (defense of person – offense with a mens rea of recklessness, extreme indifference, or criminal negligence)).

8. In a case where more than one exception is submitted (e.g., initial aggression and provocation), include a conjunction.

9. In determining what exception(s) to instruct the jury on, the Committee notes that, to warrant an instruction, the exception must be supported by the evidence. *See Castillo v. People*, 2018 CO 62, ¶ 4, 421 P.3d 1141, 1142 (concluding that the trial court reversibly erred in instructing the jury on the initial aggressor exception because it was unsupported by the evidence); + *see also People v. Galvan*, 2020 CO 82, ¶¶ 1-2, 4, 476 P.3d 746, 750 (holding that a trial court should instruct the jury on an exception to self-defense “if there is *some evidence* to support the exception”; further holding that, where the trial court’s instruction on provocation tracked the model instruction, it made clear that for the defendant to forfeit his defense of self-defense, “he had to have provoked the same person as to whom he

was asserting self-defense”; declining to consider whether the First Amendment bars a provocation instruction in a case of “mere words”).

10. See *People v. Tardif*, 2017 COA 136, ¶¶ 38, 433 P.3d 60, 68 (holding that, because “none of the elements of conspiracy require the use of physical force,” self-defense is not an affirmative defense to conspiracy).

11. See *People v. Koper*, 2018 COA 137, ¶ 18, \_\_\_ P.3d \_\_\_ (holding that, where the evidence showed that the defendant acted in self-defense against a third party, he was entitled to a “transferred intent” self-defense instruction as to the victim because the victim “was a bystander incidentally affected by [the] defendant’s asserted attempt to defend himself against what he perceived as a threat posed by” the third party).

12. See *People v. Coahran*, 2019 COA 6, ¶ 27, 436 P.3d 617, 623 (holding that the defendant was entitled to a self-defense instruction “[b]ecause the charged criminal mischief arose out of her use of force upon the [victim] (albeit indirectly)”).

13. + See *People v. Luna*, 2020 COA 123M, ¶¶ 27, 33–35, 474 P.3d 230, 235–36 (holding that the trial court properly rejected a juvenile’s tendered “reasonable child” instruction – specifically, that children “are generally less mature and responsible than adults, and often lack the experience, intelligence, perspective, and judgment necessary to evaluate consequences and risks” – because, while the juvenile was permitted to argue “that his age was a factor in determining whether he reasonably believed he was entitled to act in self-defense,” the standard self-defense instruction “properly instructed the jury to consider [the juvenile’s] subjective state of mind and the totality of the circumstances”).

14. In 2018, the Committee added Comment 9.

15. In 2019, the Committee added a supplemental citation to *Riley* in Comment 5, and it also added Comments 10, 11, and 12.

16. + In 2020, pursuant to new legislation, the Committee added the bracketed exception regarding gender identity/expression or sexual orientation. See Ch. 279, sec. 3, § 18-1-704(3)(d), 2020 Colo. Sess. Laws 1364,

1365. The Committee also added the relevant cross-references in Comment 2. Finally, the Committee added citations to Comment 3 (*Monroe*) and Comment 9 (*Galvan*), and it added Comment 13.

## H:12 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

The evidence presented in this case has raised the affirmative defense of “deadly physical force in defense of person,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person without first retreating if:

1. he [she] used that deadly physical force in order to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of unlawful physical force by that other person, and
2. he [she] reasonably believed a lesser degree of force was inadequate, and
3. [he [she] had a reasonable ground to believe, and did believe, that he [she] or another person was in imminent danger of being killed or of receiving great bodily injury.]

[the other person was using or reasonably appeared about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary.]

[the other person was committing or reasonably appeared about to commit kidnapping, robbery, sexual assault, or assault in the first or second degree.]

[, and]

4. he [she] did not, with intent to cause bodily injury or death to another person, provoke the use of unlawful physical force by that other person.]
5. he [she] was not the initial aggressor, or, if he [she] was the

initial aggressor, he [she] had withdrawn from the encounter and effectively communicated to the other person his [her] intent to do so, and the other person nevertheless continued or threatened the use of unlawful physical force.]

- [6. the physical force involved was not the product of an unauthorized combat by agreement.]
- + [7. the use of physical force against another was not based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-704(1)-(3), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:87 (defining “deadly physical force”); Instruction F:114 (defining “dwelling”); + Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. Although the term “great bodily injury” appears in section 18-1-704(2)(a), it is not defined by statute. In *People v. Reed*, 695 P.2d 806, 808 (Colo. App. 1984), a division of the Court of Appeals held that the term “great bodily injury,” as used in section 18-1-704(2)(a), is synonymous with the term “serious bodily injury,” as defined in section 18-1-901(3)(p). See Instruction F:332 (defining “serious bodily injury”).

4. In a case where the victim dies and there is a factual dispute concerning whether the defendant used ordinary physical force or deadly physical force (which includes an intent to cause death as a necessary ingredient), the jury should also be allowed to consider the applicability of self-defense principles relating to the use of ordinary physical force. See *People v. Vasquez*, 148 P.3d 326, 328 (Colo. App. 2006) (trial court erroneously limited the jury’s consideration of self-defense principles to only those involving the use of deadly physical force).

5. See Instruction H:11, Comments 3–6, 9–12 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement; exceptions must be supported by evidence; self-defense not a defense to conspiracy; transferred intent; criminal mischief).

6. In a case where more than one exception is submitted (e.g., initial aggression and provocation), include a conjunction.

7. In 2019, the Committee updated Comment 5 to cross-reference additional Comments in Instruction H:11.

8. + In 2020, pursuant to new legislation, the Committee added the bracketed exception regarding gender identity/expression or sexual

orientation. *See* Ch. 279, sec. 3, § 18-1-704(3)(d), 2020 Colo. Sess. Laws 1364, 1365. The Committee also added the relevant cross-references in Comment 2.

## **H:13 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)**

The evidence presented in this case has raised the question of self-defense with respect to [insert name(s) of offense(s)].

A person is justified in using physical force upon another person without first retreating in order to defend himself [herself] [a third person] from what he [she] reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he [she] may use a degree of force which he [she] reasonably believes to be necessary for that purpose.

However, a person is not justified in using physical force if:

[with intent to cause bodily injury or death to another person, he [she] provokes the use of unlawful physical force by that other person.]

[he [she] is the initial aggressor; except that his [her] use of physical force upon another person under the circumstances is justifiable if he [she] withdraws from the encounter and effectively communicates to the other person his [her] intent to do so, but the other person nevertheless continues or threatens the use of unlawful physical force.]

[the physical force involved is the product of an unauthorized combat by agreement.]

+ [the use of physical force against another is based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim makes an unwanted nonforcible romantic or sexual advance toward the person.]

You have been instructed that the prosecution has the burden of proving beyond a reasonable doubt all of the elements of [insert name(s) of offense(s)], including that the defendant acted [recklessly] [with extreme indifference] [in a criminally negligent manner].

You are further instructed that, with respect to [insert name(s) of offense(s)], the prosecution does not have an additional burden to disprove self-defense. You are instructed, though, that a person does not act [recklessly] [with extreme indifference] [in a criminally negligent manner] if his [her] conduct is legally justified as set forth above.

#### COMMENT

1. See § 18-1-704(4), C.R.S. 2020 (“In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction.”; section inapplicable to strict liability crimes); see also *People v. Duran*, 272 P.3d 1084, 1099 (Colo. App. 2011) (“the statute mandates provocation and initial aggressor instructions in cases where self-defense is asserted as an element-negating [de]fense under subsection (4), if such instructions are otherwise warranted by the evidence in the case”).

2. See Instruction F:36 (defining “bodily injury”); + Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).

3. It is permissible to inform the jury when self-defense is *not* an affirmative defense. See *People v. Pickering*, 276 P.3d 553, 557 (Colo. 2011) (“[I]nstructing the jury, pursuant to the fourth clause of section 18-1-704(4), that the prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an affirmative defense is an accurate statement of Colorado law and does not improperly shift the prosecution’s burden to prove recklessness, extreme indifference, or criminal negligence. So long as the trial court properly instructs the jury

regarding the elements of the charged crime, a carrying instruction using the language of section 18-1-704(4) is not constitutionally erroneous.”); *see also Montoya v. People*, 2017 CO 40, ¶¶ 22–27, 394 P.3d 676, 685–87 (explaining that *Pickering* was not overruled by *Smith v. United States*, 568 U.S. 106 (2013)).

4. The first sentence of the model instruction refers only to “self-defense” because that is the language that appears in section 18-1-704(4), C.R.S. 2020. Although the Committee is not aware of any authority addressing the question of whether the General Assembly intended for the term “self-defense” to encompass the defense of “a third person,” as used in section 18-1-704(1), it is the Committee’s best judgment that this was the legislative objective. Accordingly, this understanding of the statute is reflected in the second paragraph of the above instruction.

5. *See* Instruction H:11, Comment 7 (separate instructions are required when explaining self-defense with respect to an offense, such as third degree assault in violation of § 18-3-204(1)(a), C.R.S. 2020, that has alternative mens reas of “knowingly” and “recklessly”).

6. *See* Instruction H:14 (affirmative defense of “use of deadly physical force (defense of person – offense with a mens rea of recklessness, extreme indifference, or criminal negligence), Comment 5 (section 18-1-704(4) applies to “extreme indifference” offenses).

7. + *See People v. Luna*, 2020 COA 123, ¶¶ 14–16, 474 P.3d 230, 233–34 (considering a case where the defendant was charged with both attempted first-degree murder and lesser crimes with a mens rea of recklessness, and where the court instructed the jury that (1) the affirmative defense of self-defense did “not apply” to the reckless crimes, and (2) “[i]f the defendant acted in self-defense, then he cannot be found guilty of ‘Reckless’ conduct”; holding that the instruction was contradictory – and thus plainly erroneous – because, although it correctly explained that the defendant could not be guilty of “reckless” conduct if he acted in self-defense, it also “told jurors that the affirmative defense of self-defense does not apply to” reckless crimes without explaining “the fine, but significant, distinction between an ‘affirmative defense’ and a traverse”; clarifying that, “by instructing the jury that the affirmative defense of self-defense ‘did not

apply' to crimes of recklessness, the instruction conflicted with section 18-1-704(4)'s requirement that the trial court give the jury a self-defense instruction that outlines the elements of self-defense law" (citing *People v. McClelland*, 2015 COA 1, ¶ 24, 350 P.3d 976, 981-82)).

8. In 2017, the Committee modified the final paragraph of this instruction for clarity, and it added the citation to *Montoya v. People* in Comment 3.

9. + In 2020, pursuant to new legislation, the Committee added the bracketed exception regarding gender identity/expression or sexual orientation. See Ch. 279, sec. 3, § 18-1-704(3)(d), 2020 Colo. Sess. Laws 1364, 1365. The Committee also added the relevant cross-references in Comment 2. Finally, the Committee added Comment 7.

## **H:14 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON – OFFENSE WITH A MENS REA OF RECKLESSNESS, EXTREME INDIFFERENCE, OR CRIMINAL NEGLIGENCE)**

The evidence presented in this case has raised the question of self-defense with respect to [insert name(s) of offense(s)].

A person is justified in using deadly physical force upon another person without first retreating in order to defend himself [herself] or a third person from what he [she] reasonably believes to be the use or imminent use of unlawful physical force by that other person if he [she] reasonably believes a lesser degree of force is inadequate, and:

[he [she] has a reasonable ground to believe, and does believe, that he [she] or another person is in imminent danger of being killed or of receiving great bodily injury.]

[the other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary.]

[the other person is committing or reasonably appears about to commit kidnapping, robbery, sexual assault, or assault in the first or second degree.]

However, a person is not justified in using deadly physical force if:

[with intent to cause bodily injury or death to another person, he [she] provokes the use of unlawful physical force by that other person.]

[he [she] is the initial aggressor; except that his [her] use of deadly physical force upon another person under the circumstances is justifiable if he [she] withdraws from the encounter and effectively communicates to the other person his [her] intent to do so, but the other person nevertheless continues or threatens the use of unlawful physical force.]

[the physical force involved is the product of an unauthorized combat by agreement.]

+ [the use of physical force against another is based on the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim makes an unwanted nonforcible romantic or sexual advance toward the person.]

You have been instructed that the prosecution has the burden of proving beyond a reasonable doubt all of the elements of [insert name(s) of offense(s)], including that the defendant acted [recklessly] [with extreme indifference] [in a criminally negligent manner].

You are further instructed that, with respect to [insert name(s) of offense(s)], the prosecution does not have an additional burden to disprove self-defense. You are instructed, though, that a person does not act [recklessly] [with extreme indifference] [in a criminally negligent manner] if his [her] conduct is legally justified as set forth above.

#### COMMENT

1. *See* § 18-1-704(4), C.R.S. 2020 (“In a case in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction.”; section inapplicable to strict liability crimes); *see also People v. Duran*, 272 P.3d 1084, 1099 (Colo. App. 2011) (“the statute mandates provocation and initial aggressor instructions in cases where self-defense is asserted as an element-negating [de]fense under subsection (4), if such instructions are otherwise warranted by the evidence in the case”).

2. *See* Instruction F:36 (defining “bodily injury”); Instruction F:87 (defining “deadly physical force”); Instruction F:114 (defining “dwelling”);

+ Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”); *see also People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. A division of the court of appeals has held that in a case where the victim dies and there is a factual dispute concerning whether the defendant used ordinary physical force or deadly physical force (which is defined as including an intent to cause death), the jury should also be allowed to consider the applicability of self-defense principles relating to the use of ordinary physical force. *See People v. Vasquez*, 148 P.3d 326, 328 (Colo. App. 2006) (trial court erroneously limited the jury’s consideration of self-defense principles to only those involving the use of deadly physical force). Although *Vasquez* was decided in the context of affirmative defense instructions, this same method should be used when a similar dispute arises and the court instructs the jury about principles of self-defense pursuant to section 18-1-704(4).

4. *See* Instruction H:11, Comments 3–6, 9–12 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement; exceptions must be supported by evidence; self-defense not a defense to conspiracy; transferred intent; criminal mischief); Instruction H:13 (affirmative defense of “use of non-deadly physical force (defense of person – offense with a mens rea of recklessness, extreme indifference, or criminal negligence)), Comment 3 (explaining that, pursuant to *People v. Pickering*, 276 P.3d 553, 557 (Colo. 2011), it is permissible to inform the jury when self-defense is *not* an affirmative defense), Comment 4 (explaining why the model instruction refers only to “self-defense”).

5. The plain language of section 18-1-704(4) states that: “The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted . . . with extreme indifference.” And the supreme court has indicated that, in this context, self-defense operates as an “element-negating traverse” in the same manner that it does with respect to criminal recklessness and criminal negligence. *See People v.*

*Pickering*, 276 P.3d 553, 556 (Colo. 2011); *Riley v. People*, 266 P.3d 1089, 1093 (Colo. 2011). Accordingly, notwithstanding the fact that there is a “knowingly” requirement within the statutory definition of the *actus reus* for first degree extreme indifference murder, *see* § 18-3-102(1)(d), C.R.S. 2020; *Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006); *People v. Jefferson*, 748 P.2d 1223, 1233 (Colo. 1988), a defendant so charged is not statutorily entitled to an instruction defining self-defense as an affirmative defense under section 18-1-704(1), (2), C.R.S. 2020. *See also* § 18-3-202(1)(c), C.R.S. 2020 (defining first degree extreme indifference assault).

6. In 2017, the Committee modified the final paragraph of this instruction for clarity.

7. In 2019, the Committee updated Comment 4 to cross-reference additional Comments in Instruction H:11.

8. + In 2020, pursuant to new legislation, the Committee added the bracketed exception regarding gender identity/expression or sexual orientation. *See* Ch. 279, sec. 3, § 18-1-704(3)(d), 2020 Colo. Sess. Laws 1364, 1365. The Committee also added the relevant cross-references in Comment 2.

## **H:15 USE OF PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE (INTRUDER INTO A DWELLING)**

The evidence presented in this case has raised the affirmative defense of “[deadly] physical force against an intruder,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use any degree of physical force [, including deadly physical force,] against another person without first retreating if:

1. he [she] was an occupant of a dwelling, and
2. the other person had made a knowingly unlawful entry into that dwelling, and
3. he [she] had a reasonable belief that, in addition to the uninvited entry, the other person had committed, was committing, or intended to commit a crime in the dwelling, and
4. he [she] reasonably believed the other person might use any physical force, no matter how slight, against any occupant of the dwelling.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your

verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-704.5, C.R.S. 2020.
2. See Instruction F:87 (defining “deadly physical force”); Instruction F:114 (defining “dwelling”); Instruction F:195 (defining “knowingly”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. See *People v. Guenther*, 740 P.2d 971, 981 (Colo. 1987) (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2). In such an instance, the burden of proof generally applicable to affirmative defenses would apply to the defense created by section 18-1-704.5(2). The defendant would be required to present some credible evidence supporting the applicability of section 18-1-704.5(2); and, if such evidence is presented, the prosecution would then bear the burden of proving beyond a reasonable doubt the guilt of the defendant as to the issue raised by the affirmative defense as well as all other elements of the offense charged.”).
4. For purposes of section 18-1-704.5, the common areas of an apartment building, such as a stairwell, do not constitute a “dwelling.” See *People v. Cushinberry*, 855 P.2d 18, 19 (Colo. App. 1992).
5. Section 18-1-704.5 requires an “unlawful entry”; it does not apply when an invitee remains unlawfully. See *People v. Drennon*, 860 P.2d 589, 591 (Colo. App. 1993).

6. In *People v. McNeese*, 892 P.2d 304, 310–11 (Colo. 1995), the supreme court held that the “unlawful entry” component of section 18-1-704.5 requires a culpable mental state of “knowingly” on the part of the intruder. See *People v. Janes*, 982 P.2d 300, 303 (Colo. 1999) (observing that a jury instruction with a requirement that the victim have made a “knowingly unlawful entry” “accurately tracks the language of *People v. McNeese* in an attempt to define the term ‘unlawful entry,’” but reversing because the instruction failed to make clear that it was the prosecution’s burden to disprove the affirmative defense beyond a reasonable doubt); see also *People v. Jones*, 2018 COA 112, ¶¶ 34, 39, 434 P.3d 760, 766 (holding that, when the court instructed the jury that the make-my-day defense applies when a person has “made an unlawful entry into the dwelling,” it erred in refusing to modify the phrase “unlawful entry” with the word “knowingly” because “the purpose of the ‘knowing’ element is to protect the accidental trespasser”); *People v. Phillips*, 91 P.3d 476, 482 (Colo. App. 2004) (while every unlawful entry is necessarily uninvited, an uninvited entry is not necessarily unlawful; for example, a police officer’s entry into a house can be lawful though uninvited); *People v. Zukowski*, 260 P.3d 339, 344 (Colo. App. 2010) (“Although the *McNeese* court used the phrase ‘in knowing violation of the criminal law,’ [*McNeese*, 892 P.2d at 310], it appears that the phrase was intended to express a requirement that an intruder must knowingly engage in criminal conduct, not that an intruder knows he or she is violating a criminal statute.”).

7. This instruction does not include bracketed language describing the concepts of “provocation,” acting as an “initial aggressor,” or “combat by agreement.” Where a defendant who raises the affirmative defense of section 18-1-704.5 also raises the affirmative defense of person on grounds unrelated to the victim’s status as an intruding criminal, the court should explain one or more of these concepts (if applicable under the facts of the case) within the context of Instruction H:11 or H:12. See, e.g., *People v. Zukowski*, 260 P.3d 339, 344 (Colo. App. 2010) (jury instructed pursuant to section 18-1-704.5, and also as to self-defense with an explanation of the initial aggressor exception).

8. See Instruction H:11, Comments 3–6, 9–12 (no-duty to retreat; apparent necessity; multiple assailants; combat by agreement; exceptions

must be supported by evidence; self-defense not a defense to conspiracy; transferred intent; criminal mischief).

9. See *People v. Lane*, 2014 COA 48 ¶ 19, 343 P.3d 1019, 1024 (“[W]e conclude that [*Smith v. United States*, 133 S. Ct. 714 (2013) (when a defense excuses conduct that would otherwise be punishable but does not controvert any of the elements of the offense itself, the prosecution has no constitutional duty to overcome the defense by proof beyond a reasonable doubt)] did not overrule [*People v. Pickering*, 276 P.3d 553 (Colo. 2011) (When a defendant presents evidence that raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable; when a defendant presents evidence that raises the issue of an elemental traverse, however, no such instruction is required; self-defense is an affirmative defense to second degree murder, but it is a traverse to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter)], and, thus, the trial court did not err in relying on *Pickering* to instruct the jury that self-defense was not an affirmative defense to the lesser-included charges of manslaughter and criminally negligent homicide.”).

10. In 2015, the Committee added Comment 9, citing to *People v. Lane*, *supra*.

11. In 2019, the Committee added the citation to *Jones* in Comment 6, and it updated Comment 8 to cross-reference additional Comments in Instruction H:11.

## **H:16 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)**

The evidence presented in this case has raised the affirmative defense of “physical force in defense of premises,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was in possession or control of any building, realty, or other premises, [or was a person licensed or privileged to be there,] and
2. he [she] used reasonable and appropriate physical force, when and to the extent it was reasonably necessary to prevent or terminate what he [she] reasonably believed was the commission or attempted commission of an unlawful trespass by the other person in or upon the building, realty, or premises.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-705, C.R.S. 2020.
2. See Instruction F:284 (defining “premises”); Instruction G2:01 (criminal attempt); Instructions 4-5:03, 4-5:04, 4-5:05, 4-5:09 (criminal trespass); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. “Section 18-1-705 is not, by its terms, inapplicable to unlawful entries where the trespassers happen to be police officers.” *People v. Lutz*, 762 P.2d 715, 717 (Colo. App. 1988).
4. See Instruction H:11, Comment 3 (no-duty to retreat), Comment 5 (multiple assailants); see also *People v. Neckel*, 2019 COA 69, ¶ 31, \_\_ P.3d \_\_ (holding that the trial court properly rejected the defendant’s tendered “no duty to retreat” instruction because “[t]he concept of defense of premises is at odds with the duty to retreat”).
5. In 2019, the Committee added the citation to *Neckel* in Comment 4.

## **H:17 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)**

The evidence presented in this case has raised the affirmative defense of “deadly physical force in defense of premises,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] she was in possession or control of any building, realty, or other premises, [or was a person licensed or privileged to be there,] and
2. he [she] reasonably believed the use of deadly physical force was necessary to prevent what he [she] reasonably believed to be an attempt by the trespasser to commit first degree arson.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-705, C.R.S. 2020.
2. See Instruction F:87 (defining “deadly physical force”); Instruction F:284 (defining “premises”); Instruction 4-1:01 (first degree arson); Instruction G2:01 (criminal attempt); Instructions 4-5:03, 4-5:04, 4-5:05, 4-5:09 (criminal trespass); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. See Instruction H:11, Comment 3 (no-duty to retreat), Comment 5 (multiple assailants); Instruction H:16 (use of non-deadly physical force in defense of premises), Comment 3 (police officers as trespassers).

## **H:18 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PROPERTY)**

The evidence presented in this case has raised the affirmative defense of “physical force in defense of property,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] used reasonable and appropriate physical force when and to the extent that he [she] reasonably believed it was necessary to prevent what he [she] reasonably believed to be an attempt by the other person to commit the offense of [theft] [criminal mischief] [criminal tampering involving property].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-706, C.R.S. 2020.
2. See Instruction G2:01 (criminal attempt); Chapter 4-4 (theft); Instruction 4-5:01 (criminal mischief); Instructions 4-5:12, 4-5:13 (tampering).
3. See Instruction H:11, Comment 5 (multiple assailants).
4. Because prevention of a crime is an essential condition of the defense, an instruction should not be given where a defendant uses force *after* the crime has been completed. See *People v. Oslund*, 2012 COA 62, ¶¶ 23–26, 292 P.3d 1025, 1029 (defense of property instruction not warranted where defendant used force while trying to apprehend the thief and recover the property; because theft was completed, use of force could not prevent it from occurring); *People v. Goedecke*, 730 P.2d 900, 901 (Colo. App. 1986) (defense of property instruction not warranted where defendant used physical force on the victim some time after the victim had completed the alleged theft).
5. If the defendant used deadly physical force, this affirmative defense is not applicable. See § 18-1-706, C.R.S. 2020 (a defendant may “use deadly physical force under these circumstances only in defense of himself or another as described in section 18-1-704”).

## **H:18.5 RENDERING EMERGENCY ASSISTANCE TO AN AT-RISK PERSON OR AN ANIMAL IN A LOCKED VEHICLE**

The evidence presented in this case has raised the affirmative defense of “rendering emergency assistance to an at-risk person or an animal in a locked vehicle,” as a defense to [criminal mischief] [criminal trespass] [criminal tampering involving property].

The defendant’s conduct was legally authorized if:

1. he [she] forcibly entered a locked vehicle, and
2. the vehicle was not a law enforcement vehicle, and
3. an at-risk person or an animal was present in the vehicle and the defendant had a reasonable belief that the at-risk person or the animal was in imminent danger of death or suffering serious bodily injury, and
4. the defendant determined that the vehicle was locked and that forcible entry was necessary, and
5. the defendant made a reasonable effort to locate the owner or operator of the vehicle and documented the color, make, model, license plate number, and location of the vehicle, and
6. the defendant contacted a local law enforcement agency, the fire department, animal control, or a 911 operator prior to forcibly entering the vehicle, and did not interfere with, hinder, or fail to obey a lawful order of any person duly empowered with police authority or other first responder duties who was discharging or apparently discharging his or her duties, and
7. the defendant used no more force than he [she] believed was reasonably necessary, and
- [8. the defendant remained with the at-risk person or the animal, reasonably close to the vehicle, until a law enforcement officer,

emergency medical service provider, animal control officer, or other first responder arrived at the scene.]

- [8. the defendant left the scene before a law enforcement officer, emergency medical service provider, animal control officer, or other first responder arrived at the scene, and
9. it was necessary for the defendant to leave, and
10. before leaving, the defendant placed a notice on the windshield of the vehicle that included his [her] name and contact information and the name and contact information of the location, if any, to which the defendant took the at-risk person or the animal when he [she] left the scene, and
11. contacted law enforcement, animal control, or other first responder to advise them of his [her] name and contact information, that he [she] was leaving the scene, and the name and contact information of the location, if any, to which the defendant was taking the at-risk person or the animal.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [criminal mischief] [criminal trespass] [criminal tampering involving property]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [criminal mischief] [criminal trespass] [criminal tampering involving property] must depend upon your

determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. *See* §§ 18-1-706.5, 13-21-108.4(2), C.R.S. 2020.
2. *See* Chapter 4-5 (trespass, tampering, and criminal mischief); Instruction F:17.5 (defining “animal” (emergency assistance); Instruction F:26.5 (defining “at-risk person”) Instruction F:332 (defining “serious bodily injury”).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 127, sec. 2, § 18-1-706.5, 2017 Colo. Sess. Laws 435, 435-37.

## **H:19 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)**

The evidence presented in this case has raised the affirmative defense of “peace officer’s use of physical force,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was a peace officer, and
- + 2. nonviolent means would have been ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of serious bodily injury or death to himself [herself] or another person, and
3. he [she] used only a degree of force consistent with the minimization of injury to others.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-707(1), + (2)(b), C.R.S. 2020.
2. See Instruction F:263 (defining “peace officer”); + Instruction F:332 (defining “serious bodily injury”).
3. See Instruction H:20.5.SP (use of chokehold prohibited); Instruction H:29.SP (special instruction: unauthorized arrest).
4. + The statute further provides that, “when physical force is used, a peace officer shall . . . [e]nsure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and . . . [e]nsure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.” § 18-1-707(2)(c)–(d). Because this language instructs peace officers to act *after* the use of force, rather than circumscribing justifications *for* the use of force, the Committee has not included these subsections as conditions of the affirmative defense.
5. See also § 18-8-803(2), C.R.S. 2020 (“As used in this section, ‘excessive force’ means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.”).
6. + In 2020, after the legislature repealed and reenacted section 18-1-707, the Committee heavily modified this instruction and its comments. See Ch. 110, sec. 5, § 18-1-707(1), (2)(b), 2020 Colo. Sess. Laws 445, 454. Furthermore, the Committee notes that this legislation became effective on September 1, 2020. See Ch. 110, sec. 18(3), 2020 Colo. Sess. Laws 445, 461. Therefore, if the charges involve conduct allegedly committed before that date, the court should use the 2019 version of this instruction.

## **H:20 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PEACE OFFICER)**

The evidence presented in this case has raised the affirmative defense of “peace officer’s use of deadly physical force,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was a peace officer, and
- + [2. nonviolent means would have been ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of serious bodily injury or death to himself [herself] or another person, and
3. he [she] did not use deadly physical force to apprehend a person who was suspected of only a minor or nonviolent offense, and
4. he [she] used only a degree of force consistent with the minimization of injury to others, and
- [5. he [she] used deadly physical force to make an arrest only when all other means of apprehension were unreasonable given the circumstances, and
6. the arrest was for a felony involving conduct including the use or threatened use of deadly physical force, and
7. the suspect posed an immediate threat to the peace officer or another person, and
8. the force employed did not create a substantial risk of injury to other persons, and]
9. he [she] identified himself [herself] as a peace officer and gave a

clear verbal warning of his [her] intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would have unduly placed peace officers at risk of injury or would have created a risk of death or injury to other persons.]

- [2. he [she] had an objectively reasonable belief that a lesser degree of force was inadequate, and
3. he [she] had objectively reasonable grounds to believe, and did believe, that he [she] or another person was in imminent danger of being killed or of receiving serious bodily injury.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See + § 18-1-707(1), (2)(a)-(b), (3), (4), (4.5), C.R.S. 2020.

2. See Instruction F:87 (defining “deadly physical force”); Instruction F:263 (defining “peace officer”); Instruction F:332 (defining “serious bodily injury”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).

3. + This instruction creates two main sets of brackets. The first, with conditions numbered 2 through 9, stems from subsections (1) through (4) of section 18-1-707. Within that bracketing is an additional set of brackets for conditions 5 through 8, which apply only where a peace officer used deadly physical force *to make an arrest*. See § 18-1-707(3). (The Committee notes that paragraphs (3)(a) through (3)(c) – resulting in numbered conditions 6 through 8 – are not connected by a conjunction (neither “and” nor “or”), but it has interpreted the statute to require all three paragraphs to be satisfied for purposes of this defense.) If an arrest is not in issue, the court should omit conditions 5 through 8.

The second main alternative, with conditions numbered 2 and 3, derives from subsection (4.5), which discusses a peace officer’s “objectively reasonably belief” and which applies “[n]otwithstanding any other provision in this section.”

If the evidence supports instructions as to both main sets of bracketed conditions, the court should prepare separate instructions.

4. See Instruction H:20.5.SP (use of chokehold prohibited); Instruction H:29.SP (special instruction: unauthorized arrest).

5. + Regarding the ninth condition, section 18-1-707(4) concludes with the phrase, “unless to do so would unduly place peace officers at risk of injury, would create a risk of death or injury to other persons.” Because the comma after “injury” without a follow-up conjunction appears to create a sentence fragment, the Committee has inserted the conjunction “or” into its phrasing of the condition.

6. + The statute further provides that, “when physical force is used, a peace officer shall . . . [e]nsure that assistance and medical aid are rendered

to any injured or affected persons as soon as practicable; and . . . [e]nsure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.” § 18-1-707(2)(c)–(d). Because this language instructs peace officers to act *after* the use of force, rather than circumscribing justifications *for* the use of force, the Committee has not included these subsections as conditions of the affirmative defense.

7. *See also* § 18-8-803(2), C.R.S. 2020 (“As used in this section, ‘excessive force’ means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.”).

8. + In 2020, after the legislature repealed and reenacted section 18-1-707, the Committee heavily modified this instruction and its comments. *See* Ch. 110, sec. 5, § 18-1-707(1), (2)(a)–(b), (3), (4), (4.5), 2020 Colo. Sess. Laws 445, 454–55. Furthermore, the Committee notes that this legislation became effective on September 1, 2020. *See* Ch. 110, sec. 18(3), 2020 Colo. Sess. Laws 445, 461. Therefore, if the charges involve conduct allegedly committed before that date, the court should use the 2019 version of this instruction. Finally, note that the legislation regarding deadly physical force while making an arrest (i.e., numbered conditions 5 through 8) became effective on June 19, 2020. *See id.*

## H:20.5.SP + USE OF A CHOKEHOLD – SPECIAL INSTRUCTION (PEACE OFFICER)

+ A peace officer is prohibited from using a chokehold upon another person.

### COMMENT

1. *See* § 18-1-707(2.5)(a), C.R.S. 2020.
2. *See* Instruction F:52.5 (defining “chokehold”); Instruction F:263 (defining “peace officer”).
3. + In 2016, pursuant to new legislation, the Committee added this instruction as an affirmative defense instruction titled, “Use of chokehold in making an arrest or in preventing an escape (peace officer).” *See* Ch. 341, sec. 1, § 18-1-707(2.5), 2016 Colo. Sess. Laws 1390, 1390–91. But in 2020, the legislature repealed and reenacted this subsection, which now simply reads, “A peace officer is prohibited from using a chokehold upon another person.” *See* Ch. 110, sec. 5, § 18-1-707(2.5)(a), 2020 Colo. Sess. Laws 445, 454. Accordingly, in 2020, the Committee changed this instruction from an affirmative defense instruction to a special instruction.

Furthermore, the Committee notes that this legislation became effective upon passage on June 19, 2020. *See* Ch. 110, sec. 18(3), 2020 Colo. Sess. Laws 445, 461. Therefore, if the charges involve conduct allegedly committed before that date, the 2019 version of this instruction applies.

## **H:21 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)**

The evidence presented in this case has raised the affirmative defense of “physical force at the direction of a peace officer,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was directed by a peace officer to assist him [her] in making an arrest, [in preventing an escape from custody,] and
2. he [she] used reasonable and appropriate physical force when and to the extent that he [she] reasonably believed the force was necessary to carry out the peace officer’s direction. [, and]
- [3. he [she] did not know that the [arrest] [prospective arrest] was unauthorized.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those]

offense[s].

## COMMENT

1. See § 18-1-707(5), C.R.S. 2020.
2. See Instruction F:87 (defining “deadly physical force”); Instruction F:263 (defining “peace officer”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. See Instruction H:29.SP (special instruction: unauthorized arrest).
4. + In 2020, the Committee deleted the prior Comment 4 – which had discussed an older statutory definition of “reasonable belief” – because new legislation rendered it irrelevant. See Ch. 110, sec. 5, 2020 Colo. Sess. Laws 445, 454–55 (repealing and reenacting section 18-1-707(4)).

## **H:22 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON DIRECTED BY A PEACE OFFICER)**

The evidence presented in this case has raised the affirmative defense of “deadly physical force at the direction of a peace officer,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was directed by a peace officer to assist him [her] in [making an arrest,] [preventing an escape from custody,] and
2. he [she] used deadly physical force when he [she] reasonably believed that deadly physical force was necessary to carry out the peace officer’s direction, and
3. [he [she] reasonably believed that deadly physical force was necessary to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of deadly physical force.]

[he [she] was directed or authorized by the peace officer to use deadly physical force.] [, and he [she] did not know, if that was in fact the case, that the peace officer was not authorized to use deadly physical force under the circumstances.]

[, and]

- [4. he [she] did not know that the [arrest] [prospective arrest] was unauthorized.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-707(6), C.R.S. 2020.
2. See Instruction F:87 (defining "deadly physical force"); Instruction F:263 (defining "peace officer"); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that "deadly physical force" is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. Section 18-1-707(6)(b) authorizes a citizen, in circumstances specified by section 18-1-707(5), to follow an officer's direction to use deadly physical force provided that the citizen "does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances." Clearly, whether the defendant actually knew that the officer was not authorized to use deadly physical force is a factual matter. And it appears that the subsidiary question of whether the directing peace officer was authorized to use deadly physical force may also give rise to a factual issue. Should this occur, draft an instruction that explains the principles of Instruction H:20 (use of deadly physical force in making an arrest or in preventing an escape (peace officer)).

4. *See* Instruction H:29.SP (special instruction: unauthorized arrest).
5. + In 2020, the Committee deleted the prior Comment 5 – which had discussed an older statutory definition of “reasonable belief” – because new legislation rendered it irrelevant. *See* Ch. 110, sec. 5, 2020 Colo. Sess. Laws 445, 454–55 (repealing and reenacting section 18-1-707(4)).

## **H:23 USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)**

The evidence presented in this case has raised the affirmative defense of “physical force in [making an arrest] [preventing an escape],” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] used reasonable and appropriate physical force upon another person when and to the extent that he [she] reasonably believed it was necessary:

[to make an arrest, for an offense that [had been] [was being] committed by the other person in the defendant’s presence.]

[to prevent the escape from custody of an arrested person whom the defendant had arrested for committing an offense in his [her] presence.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its

burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-707(7), C.R.S. 2020.
2. Section 16-3-201, C.R.S. 2020, provides that: “A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.” A division of the Court of Appeals has held that this language limits the availability of the defense set forth in section 18-1-707(7):

[A]n arrest must first be authorized under § 16-3-201, before a private person can use physical force to effect it under § 18-1-707(7).

Furthermore, when a person already under arrest has attempted an escape, the second clause of § 18-1-707(7) similarly permits a private person to use physical force but, again, only when the attempted escape is committed in his or her presence.

*People v. Joyce*, 68 P.3d 521, 524 (Colo. App. 2002).

3. + In 2020, the Committee deleted the prior Comment 3, which had cited to Instruction H:27.SP, because new legislation eliminated the need for that instruction. See Ch. 110, sec. 5, 2020 Colo. Sess. Laws 445, 454–55; Instruction H:27.SP, Comment 1.

## **H:24 USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE (PRIVATE PERSON, ACTING ON HIS OR HER OWN)**

The evidence presented in this case has raised the affirmative defense of “deadly physical force in [making an arrest] [preventing an escape],” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] reasonably believed it was necessary [to make an arrest, for an offense that the other person [had committed][was committing] in his [her] presence,] [to prevent the escape from custody of an arrested person whom he [she] had arrested for committing an offense in his [her] presence,] and
2. he [she] reasonably believed that it was necessary to defend himself [herself] [or a third person] from what he [she] reasonably believed to be the use or imminent use of deadly physical force.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its

burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-707(7), C.R.S. 2020.
2. See Instruction F:87 (defining “deadly physical force”); Instruction F:263 (defining “peace officer”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. + In 2020, the Committee deleted the prior Comment 3, which had cited to Instruction H:27.SP, because new legislation eliminated the need for that instruction. See Ch. 110, sec. 5, 2020 Colo. Sess. Laws 445, 454–55; Instruction H:27.SP, Comment 1.

## **H:25 USE OF DEADLY PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)**

The evidence presented in this case has raised the affirmative defense of “deadly physical force to prevent an escape from a detention facility,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use deadly physical force upon another person if:

1. he [she] was a [peace officer] [guard] employed in a detention facility, and
2. he [she] reasonably believed the use of deadly physical force was necessary to prevent the escape of a prisoner [[convicted of] [charged with] [held for] a felony.] [confined under the maximum security rules of any detention facility.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-707(8)(a), C.R.S. 2020.
2. See Instruction F:87 (defining “deadly physical force”); Instruction F:95 (defining “detention facility”); Instruction F:263 (defining “peace officer”); see also *People v. Ferguson*, 43 P.3d 705, 707 (Colo. App. 2001) (in light of the way that “deadly physical force” is defined by statute, it is error to instruct the jury concerning the concept in a case in which the victim did not die); *People v. Silva*, 987 P.2d 909, 917 (Colo. App. 1999) (same).
3. The term “guard” is not defined by statute.
4. See also § 18-8-803(2), C.R.S. 2020 (“As used in this section, ‘excessive force’ means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.”).

## **H:26 USE OF PHYSICAL FORCE TO PREVENT AN ESCAPE (DETENTION FACILITY)**

The evidence presented in this case has raised the affirmative defense of “physical force to prevent an escape from a detention facility,” as a defense to [insert name(s) of offense(s)].

The defendant was legally authorized to use physical force upon another person if:

1. he [she] was a [peace officer] [guard] employed in a detention facility, and
2. he [she] used reasonable and appropriate physical force, when and to the extent that he [she] reasonably believed it was necessary to prevent what he [she] reasonably believed to be the escape of a prisoner from a detention facility.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. *See* § 18-1-707(8)(b), C.R.S. 2020.
2. *See* Instruction F:95 (defining “detention facility”); Instruction F:263 (defining “peace officer”).
3. The term “guard” is not defined by statute.
4. *See also* § 18-8-803(2), C.R.S. 2020 (“As used in this section, ‘excessive force’ means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.”).

## **H:27.SP SPECIAL INSTRUCTION: REASONABLE BELIEF THAT A PERSON HAS COMMITTED AN OFFENSE**

### COMMENT

1. + Previously, this instruction explained to the jury the definition of a “reasonable belief” pursuant to section 18-1-707(4), C.R.S. But in 2020, the legislature repealed and reenacted this subsection, which no longer defines “reasonable belief.” *See* Ch. 110, sec. 5, § 18-1-707(4), 2020 Colo. Sess. Laws 445, 455. Accordingly, in 2020, the Committee deleted this instruction.

Furthermore, the Committee notes that this legislation became effective on September 1, 2020. *See* Ch. 110, sec. 18(3), 2020 Colo. Sess. Laws 445, 461. Therefore, if the charges involve conduct allegedly committed before that date, the 2019 version of this instruction applies.

## H:28.SP SPECIAL INSTRUCTION: VALIDITY OF ARREST WARRANT

### COMMENT

1. + Previously, this instruction explained, pursuant to section 18-1-707(4), C.R.S., that a peace officer could use force when effecting an arrest based on an arrest warrant unless he or she knew the warrant to be invalid. But in 2020, the legislature repealed and reenacted this subsection, which no longer discusses arrest warrants. *See* Ch. 110, sec. 5, § 18-1-707(4), 2020 Colo. Sess. Laws 445, 455. Accordingly, in 2020, the Committee deleted this instruction.

Furthermore, the Committee notes that this legislation became effective on September 1, 2020. *See* Ch. 110, sec. 18(3), 2020 Colo. Sess. Laws 445, 461. Therefore, if the charges involve conduct allegedly committed before that date, the 2019 version of this instruction applies.

## **H:29.SP SPECIAL INSTRUCTION: UNAUTHORIZED ARREST**

For purposes of Instruction \_\_\_\_, defining the affirmative defense of [insert name of affirmative defense, from Instructions H:19-22], the [court has determined] [parties have stipulated] that the arrest of [insert alleged victim's name] was unauthorized.

### **COMMENT**

1. *See* § 18-1-707(1)(a), (2), (5)-(6), C.R.S. 2020.

## H:30 DURESS

The evidence presented in this case has raised the affirmative defense of “duress,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] engaged in the prohibited conduct at the direction of another person, because of the use or threatened use of unlawful force upon him [her] [, or upon another person], and
2. a reasonable person in his [her] situation would have been unable to resist the use or threatened use of unlawful force, and
3. he [she] did not intentionally or recklessly place himself [herself] in a situation where it was foreseeable that he [she] would be subjected to the use or threatened use of unlawful force.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-708, C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:308 (defining “recklessly”).
3. The affirmative defense of duress is not available in a prosecution for a class one felony. § 18-1-708, C.R.S. 2020. Although felony murder is a class one felony, in certain cases it may be appropriate to give a duress instruction with respect to the predicate felony. See, e.g., *People v. Al-Yousif*, 206 P.3d 824, 831 (Colo. App. 2006).
4. The statute defining the defense of duress states: “The choice of evils defense, provided in section 18-1-702, shall not be available to a defendant in addition to the defense of duress provided under this section unless separate facts exist which warrant its application.” § 18-1-708, C.R.S. 2020.
5. In *People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011), the supreme court analyzed the statutory provision that is embodied in the second element above and explained:

We have consistently construed our own statute, with its requirement that the threatened force exceed any objectively reasonable ability to resist, as making the defense of duress, like the closely related defense of necessity or choice of evils, unavailable in the absence of a specific and imminent threat of injury under circumstances leaving the defendant no reasonable alternative other than to violate the law for which he stands charged.

*Id.* (defendant charged with robbery and other offenses was not entitled to duress instruction because he had opportunities to seek police protection and foil the robbery plot, and the allegedly coercive threats to harm his brother did not put the brother at risk of imminent injury).

6. See *People v. Nunn*, 148 P.3d 222 (Colo. App. 2006) (the term “prohibited conduct” in the model instruction for duress is not prejudicial

because it refers to charged conduct that would be “prohibited” absent the existence of the affirmative defense); *People v. Yaklich*, 833 P.2d 758 (Colo. App. 1991) (trial court erred by submitting a duress instruction because defendant who hired another person to kill her husband did not act “at the direction of another person”).

## H:31 ENTRAPMENT

The evidence presented in this case has raised the affirmative defense of “entrapment,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] is a person who, but for the inducement offered, would not have conceived of or engaged in conduct of the sort induced, and
2. he [she] engaged in the proscribed conduct because he [she] was induced to do so by a law enforcement official [or other person acting under the official’s direction,] seeking to obtain evidence for the purpose of prosecution, and not as a result of his [her] own predisposition, and
3. the methods used to obtain such evidence were such as to create a substantial risk that this particular defendant would engage in the sort of conduct induced, and
4. the methods used were more persuasive than merely affording him [her] an opportunity to commit an offense, even if such an opportunity was coupled with representations or inducements calculated to overcome his [her] fear of detection.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has

met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-709, C.R.S. 2020; *Evans v. People*, 706 P.2d 795, 801 n.6 (Colo. 1985).
2. Do not augment an entrapment instruction with language from appellate opinions analyzing the legality of police conduct. The supreme court has explained that:

It is important to distinguish between the statutory defense of entrapment and the constitutional defense of outrageous governmental conduct. The latter provides a mechanism by which this court may curtail overzealous police activity that we find shocking to the conscience. See *People v. Vandiver*, 191 Colo. 263, 268, 552 P.2d 6, 9 (1976) (recognizing that a defense of outrageous governmental conduct exists when conduct by officers violates fundamental standards of due process). In contrast, judicial pronouncements of law regarding the propriety of police conduct are not appropriate in the context of the entrapment defense, as this defense rests upon a determination of the defendant's state of mind, which is a factual issue for the jury. See, e.g., *Bailey [v. People]*, 630 P.2d [1062, 1066 (Colo. 1981)](noting that Colorado's subjective approach to entrapment sanctions police conduct without question so long as the police actions are directed at persons predisposed to commit the offense charged).

*People v. Sprouse*, 983 P.2d 771, 775 n.3 (Colo. 1999); see also *Evans v. People*, 706 P.2d 795, 800 (Colo. 1985) ("a trial court's use of an excerpt from an opinion in an instruction is generally an unwise practice"; "statements taken from opinions do not necessarily translate with clarity into jury

instructions because opinions and instructions have very different purposes”).

3. See *People v. Taylor*, 2012 COA 91, ¶¶ 31-35, 296 P.3d 317, 327 (“we reject defendant’s contention that [*Brown v. People*, 239 P.3d 764, 769-70 (Colo. 2010)] holds that failing to admit the underlying crime no longer precludes the assertion of an affirmative defense like entrapment. Rather, we agree with those divisions holding the affirmative defense of entrapment is not available to a defendant who denies commission of the crime.”).

## H:32 REPORTING AN EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT

The evidence presented in this case has raised the affirmative defense of “reporting an emergency drug or alcohol overdose event,” as a defense to [insert name(s) of offense(s) enumerated in section 18-1-711(3)].

The defendant’s conduct was legally authorized if:

1. + [the defendant] [a person] reported in good faith an emergency drug or alcohol overdose event to a law enforcement officer, to the 911 system, or to a medical provider, and
2. + [the defendant] [the person] remained at the scene of the event until a law enforcement officer or an emergency medical responder arrived or he [she] remained at the facilities of the medical provider until a law enforcement officer arrived, and
3. + [the defendant] [the person] identified himself [herself] to, and cooperated with, the law enforcement officer, emergency medical responder, or medical provider, and
4. the offense for which the defendant is charged arose from the same course of events from which the emergency drug or alcohol overdose event arose.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name of offense(s) enumerated in section 18-1-711(3)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name of offense(s) enumerated in section 18-1-711(3)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See § 18-1-711(1)–(3), C.R.S. 2020 (immunity applicable to: unlawful possession of a controlled substance, as described in section 18-18-403.5(2); unlawful use of a controlled substance, as described in section 18-18-404; if committed on or after March 1, 2020, unlawful possession of two ounces or less of marijuana, as described in section 18-18-406(5)(a)(I), or more than two ounces of marijuana but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate, as described in section 18-18-406(4)(c), or more than six ounces of marijuana or more than three ounces of marijuana concentrate as described in section 18-18-406(4)(b); open and public display, consumption, or use of less than two ounces of marijuana as described in section 18-18-406(5)(b)(I); transferring or dispensing two ounces or less of marijuana from one person to another for no consideration, as described in section 18-18-406(5)(c); use or possession of synthetic cannabinoids or salvia divinorum, as described in section 18-18-406.1; possession of drug paraphernalia, as described in section 18-18-428; and illegal possession or consumption of ethyl alcohol by an underage person, as described in section 18-13-122).

2. See Instruction F:117 (defining “emergency drug or alcohol overdose event”).

3. + Section 18-1-711 speaks in terms of immunity rather than an affirmative defense. The Committee expresses no opinion on whether, where a court denies a defendant's pretrial immunity motion, the defendant may nevertheless raise the conditions of the statute as an affirmative defense. Cf. *People v. Guenther*, 740 P.2d 971, 975, 981 (Colo.

1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5. . . . [I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *People v. Harrison*, 2020 CO 57, ¶¶ 11, 19, 465 P.3d 16, 23 (considering a case where the trial court denied the defendant’s pretrial immunity motion under section 18-1-711 but subsequently allowed the defendant to raise the statute as an affirmative defense; assuming without deciding that the defendant “was entitled to invoke the statute as an affirmative defense”).

4. + Section 18-1-711(2) provides that “[t]he immunity described in subsection (1) of this section also extends to the person who suffered the emergency drug or alcohol overdose event if all of the conditions of subsection (1) of this section are satisfied.” That is, the statute applies where either (1) the defendant reported his or her *own* overdose, or (2) another person reported *the defendant’s* overdose (provided that the other person’s conduct satisfied all of the provisions of the statute). For this reason, the Committee has created bracketed alternatives of “the defendant” and “a/the person” for each of the first three conditions; depending on the facts of the case, the court should select the appropriate option. *See, e.g., Harrison*, ¶¶ 4–6 (discussing whether there was sufficient evidence that the prosecution disproved the affirmative defense where a restaurant manager called 911 after being unable to rouse the defendant).

5. + In *Harrison*, the court held that the statute’s first condition “requires both that a person report in good faith *what she subjectively perceives* is an acute condition caused by the consumption or use of drugs or alcohol and that a layperson would reasonably believe that the reported condition is a drug or alcohol overdose needing medical assistance.” ¶ 29 (emphasis added). This language essentially derives from combining subsection

(1)(a) – which provides that a person must “report[] in good faith an emergency drug or alcohol overdose event” – with subsection (5) – which defines “emergency drug or alcohol overdose event” in part as “an acute condition . . . resulting from the consumption or use of a controlled substance, or of alcohol . . . that a layperson would reasonably believe to be a drug or alcohol overdose that requires medical assistance.” Because the jury will already receive a separate definition of “emergency drug or alcohol overdose event,” see Instruction F:117, the Committee has not included the “layperson” language within this instruction. Furthermore, while *Harrison* recognizes that “the good-faith requirement renders the subjective perception of the person making the report relevant,” ¶ 24, the Committee has not added any “subjective perception” language to the instruction itself; instead it has simply retained the statutory language of “good faith.”

6. In 2015, the Committee added Comment 3.

7. In 2017, the Committee modified a statutory citation in Comment 1 pursuant to a legislative amendment. See Ch. 264, sec. 37, § 18-1-711(3)(a), 2017 Colo. Sess. Laws 1382, 1393.

8. In 2019, the Committee modified the first parenthetical in Comment 1 pursuant to a legislative amendment. See Ch. 291, sec. 5, § 18-1-711(3)(c), 2019 Colo. Sess. Laws 2676, 2679. The Committee also added Comment 4.

9. + In 2020, in light of *Harrison*, the Committee modified the first three conditions of the instruction, as described in Comment 4; it also updated Comment 3 and added Comment 5.

## **H:32.3 ADMINISTERING OPIATE ANTAGONIST DURING OVERDOSE**

The evidence presented in this case has raised the affirmative defense of “administering opiate antagonist during overdose,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] acted in good faith to furnish or administer an opiate antagonist, + including an expired opiate antagonist,
2. to an individual the defendant believed to be suffering an opiate-related drug overdose event, or to an individual who was in a position to assist the individual at risk of experiencing an opiate-related overdose event.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-712(2)(a), C.R.S. 2020.
2. The court should separately define “opiate antagonist” and “opiate-related drug overdose event” for the jury. See § 22-1-119.1(3)(a), C.R.S. 2020 (“‘Opiate antagonist’ means naloxone hydrochloride or any similarly acting drug that is not a controlled substance and that is approved by the federal food and drug administration for the treatment of a drug overdose.”); § 22-1-119.1(3)(b) (“‘Opiate-related drug overdose event’ means an acute condition, including a decreased level of consciousness or respiratory depression, that: (i) results from the consumption or use of a controlled substance or another substance with which a controlled substance was combined; (ii) a layperson would reasonably believe to be caused by an opiate-related drug overdose event; and (iii) requires medical assistance.” (formatting altered)).
3. The statute does not speak in terms of an affirmative defense but instead provides that a person who furnishes such aid “is immune from criminal prosecution.” § 18-1-712(2)(a). The Committee expresses no opinion concerning whether this provision allows for the determination of immunity prior to trial. See, e.g., *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”).
4. Subsection (2)(b) of the statute provides that the immunity also applies to employees or volunteers of various entities, including law enforcement agencies, harm reduction organizations, school districts, + and mental health professionals. Because the statute does not limit its application to any class of defendant, the Committee has not incorporated this subsection into its instruction.

5. The statute provides that it applies “for any act or omission made if the opiate antagonist is stolen.”

6. The Committee added this instruction in 2019. *See* Ch. 273, sec. 7, § 18-1-712, 2019 Colo. Sess. Laws 2575, 2579.

7. + In 2020, pursuant to a legislative amendment, the Committee added the language about expired opiate antagonists to the first numbered condition. *See* Ch. 287, sec. 5, § 18-1-712(2)(a), 2020 Colo. Sess. Laws 1419, 1420. The Committee also updated Comment 4 pursuant to a separate amendment. *See* Ch. 304, sec. 7, § 18-1-712(2)(b)(I), 2020 Colo. Sess. Laws 1524, 1527.

## H:32.7 VICTIM OF HUMAN TRAFFICKING OF A MINOR

The evidence presented in this case has raised the affirmative defense of “victim of human trafficking of a minor,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. at the time of the offense[s], he [she] was a victim of human trafficking of a minor for involuntary servitude or human trafficking of a minor for sexual servitude, and
2. he [she] was forced or coerced into engaging in the criminal act charged.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. See § 18-1-713, C.R.S. 2020.

2. See Instruction F:56.5 (defining “coercing”).
3. Assuming that the defendant is not charged with human trafficking of a minor for involuntary or sexual servitude, the court should provide modified instructions defining those crimes. See Instruction 3-5:01 (human trafficking for involuntary servitude); Instruction 3-5:04 (human trafficking of a minor for sexual servitude); Instruction 3-5:05 (human trafficking of a minor for sexual servitude (travel services)). Specifically, the court should make the following modifications: (1) the first sentence should read, “A person commits the crime of [human trafficking of a minor for involuntary servitude] [human trafficking of a minor for sexual servitude]”; (2) element number 1, “That the defendant,” should be replaced with “The person”; and (3) the two concluding paragraphs explaining the burden of proof should be omitted.

Additionally, because the elemental instruction for human trafficking for involuntary servitude is not specific to minors but instead typically requires an interrogatory, the court should change the phrase “another person” in the fifth element to “a person less than eighteen years of age.”

4. The statute provides that the minor being charged must prove the elements of this defense by a preponderance of the evidence. § 18-1-713(1). However, in Colorado, the prosecution must disprove an affirmative defense beyond a reasonable doubt. Therefore, assuming the defendant puts forth sufficient evidence warranting an instruction on this affirmative defense, this instruction requires the prosecution to disprove the affirmative defense beyond a reasonable doubt. See *People v. Garcia*, 113 P.3d 775, 783–84 (Colo. 2005) (“[T]o present an affirmative defense for jury consideration, the defendant must present ‘some credible evidence’ on the issue involving the claimed defense. . . . [O]nce that burden has been met, the prosecution has the burden of disproving the claimed affirmative defense beyond a reasonable doubt.” (quoting § 18-1-407, C.R.S. 2004)).
5. This affirmative defense does not apply to class 1 felonies. See § 18-1-713(1).

6. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 147, sec. 5, § 18-1-713, 2019 Colo. Sess. Laws 1764, 1766-67.

## H:33 INSUFFICIENT AGE

The evidence presented in this case has raised the affirmative defense of “insufficient age,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] was under ten years of age when he [she] committed the crime.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. *See* § 18-1-801, C.R.S. 2020; *see also* § 18-1-805, C.R.S. 2020 (stating that “[t]he issue of responsibility under section[] 18-1-801 . . . is an affirmative defense”).

2. As a practical matter, this affirmative defense will rarely be raised in adult prosecutions due to the significant differences between the age of

legal responsibility and the various age thresholds under the transfer and direct filing statutes. *See generally* §§ 19-2-517 to -518, C.R.S. 2020.

Moreover, in delinquency cases where there is a factual dispute concerning whether the juvenile had attained the age of responsibility when he or she allegedly committed the offense, the court may resolve the issue at a preliminary hearing. *See also* § 19-2-804(1), C.R.S. 2020 (in delinquency proceedings, “[j]urisdictional matters of the age and residence of the juvenile shall be deemed admitted by or on behalf of the juvenile unless specifically denied within a reasonable time prior to the trial”).

3. Do not give this instruction in a case where an adult defendant is charged with contributing to the delinquency of a minor. *See People v. Miller*, 830 P.2d 1092, 1094 (Colo. App. 1991) (“Although a child under the age of ten cannot be charged with an offense, it does not necessarily follow that the child cannot violate the law.”).

## H:34 SELF-INDUCED (VOLUNTARY) INTOXICATION

The evidence presented in this case has raised the question of self-induced intoxication with respect to the offense of [insert name of specific intent offense(s)].

For that [those] offense[s], you may consider whether or not evidence of self-induced intoxication negates the existence of the element[s] of [“with intent”] [“after deliberation and with intent”] [“intentionally”].

The prosecution has the burden of proving all the elements of the crimes charged beyond a reasonable doubt. If you find the defendant was intoxicated to such a degree that he [she] did not act with the required mental state, you should find him [her] not guilty of that offense.

[However, you may not consider evidence of self-induced intoxication for purposes of deciding whether the prosecution has proved the elements of [insert name(s) of general intent offense(s)].]

### COMMENT

1. See § 18-1-804(1), C.R.S. 2020.
2. See Instruction F:10 (defining “after deliberation”); Instruction F:185 (defining “intentionally,” and “with intent”); Instruction F:188 (defining “intoxication”); Instruction F:330 (defining “self-induced intoxication”).
3. Self-induced intoxication is not an affirmative defense. *People v. Harlan*, 8 P.3d 448, 470 (Colo. 2000). Rather, “the statute sets forth a rule concerning the admissibility of evidence of intoxication by the defendant to counter the prosecution’s evidence that the defendant had the requisite specific intent of the charged offense.” *Id.* at 470–71. Thus, the statute “absolves a defendant of liability only for a specific intent offense when the evidence of intoxication negates the existence of the specific intent.” *Id.* at 471.

4. An instruction informing a jury that it “may” consider evidence of self-induced intoxication in determining whether the defendant acted with specific intent is not erroneous. *See People v. Lucas*, 232 P.3d 155, 163 (Colo. App. 2009) (there is no requirement to instruct the jury that it “must” consider such evidence).
5. “[A] criminal defendant who maintains his innocence may receive an inconsistent jury instruction on voluntary intoxication provided there is a rational basis for the instruction in the evidentiary record.” *Brown v. People*, 239 P.3d 764, 770 (Colo. 2010).
6. Evidence of self-induced intoxication is admissible to counter the specific intent element of first-degree murder, which includes “after deliberation” as an element. *See People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).
7. If the defendant requests instructions on both involuntary intoxication (*see* Instruction H:35) and self-induced intoxication and the court determines that both instructions are appropriate, both instructions should be given, with the involuntary intoxication instruction appearing first. The court should also be sure to give Instruction H:35.5.SP (intoxication – multiple types), which explains to the jury how to consider these two instructions in tandem.
8. Although it is settled law that evidence of self-induced intoxication does not negate the mens rea of general intent crimes, it can be difficult to determine whether a particular offense is a general intent crime. *See, e.g., People v. Vigil*, 127 P.3d 916 (Colo. 2006) (holding, based on a review of legislative history, that sexual assault on a child is a general intent crime with a mens rea that cannot be negated by evidence of self-induced intoxication).

The final sentence, which is enclosed within brackets, curtails a jury’s consideration of evidence of the defendant’s intoxication where the defendant is also charged with general intent crimes. *See People v. Vanrees*, 125 P.3d 403, 410 (Colo. 2005) (trial court did not err by instructing jury, in supplemental instruction, that: “In determining whether or not the element of ‘knowingly’ has been proved beyond a reasonable doubt, you may

consider *any evidence, other than intoxication, presented in this case, or lack of evidence, that you believe to bear on that element.*").

9. In 2019, the Committee added the cross-reference to Instruction F:330 in Comment 2, and it revised Comment 7. The Committee also replaced the phrase “voluntary intoxication” with “self-induced intoxication” throughout the instruction.

## H:35 INTOXICATION (INVOLUNTARY)

The evidence presented in this case has raised the affirmative defense of “involuntary intoxication,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] lacked the capacity to conform his [her] conduct to the requirements of the law, because of intoxication, and
2. the intoxication was not self-induced.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. See § 18-1-804(3), C.R.S. 2020.
2. See Instruction F:188 (defining “intoxication”); Instruction F:330 (defining “self-induced intoxication”); see also *People v. Walden*, 224 P.3d

369, 379-80 (Colo. App. 2009) (recognizing that, for purposes of the affirmative defense of involuntary intoxication, the “legal meaning of the terms ‘intoxication,’ ‘voluntary,’ and ‘involuntary’ may depart, at least to some degree, from the meaning of these terms in common usage”).

3. In cases where there is a factual dispute concerning whether the defendant’s intoxication was self-induced, refer to Comment 7 of Instruction H:34 (intoxication (voluntary)).

4. A defendant’s addiction to an intoxicant is insufficient to establish involuntariness. *See Tacorante v. People*, 624 P.2d 1324, 1327 (Colo. 1981); *People v. Grenier*, 200 P.3d 1062, 1075 (Colo. App. 2008) (same). However, a division of the Court of Appeals has held that a defendant’s ignorance of the intoxicating effects of a voluntarily ingested substance may suffice to create an issue of fact. *See People v. Turner*, 680 P.2d 1290, 1293 (Colo. App. 1983) (instruction concerning involuntary intoxication warranted where defendant testified that he had not been warned of the intoxicating effects of ingesting excessive doses of Fiorinal, and that his past experience in taking excessive doses caused him to believe that he would simply fall asleep).

5. “[T]he medical condition of insulin-induced hypoglycemia may, depending upon the particular facts and circumstances involved, constitute the affirmative defense of involuntary intoxication as that defense is defined by section 18-1-804(3).” *People v. Garcia*, 113 P.3d 775, 782 (Colo. 2005).

6. *See People v. Voth*, 2013 CO 61 ¶ 22, 312 P.3d 144, 149 (“We hold that the meaning of the word ‘substance’ as used in section 18-1-804 is unambiguous and can be determined with reasonable certainty. After reviewing common dictionary definitions of ‘substance,’ relevant case law, and the statutory context in which the term appears, we conclude that the plain and ordinary meaning of the word ‘substance’ excludes viruses as a matter of law.”).

## **H:35.5.SP INTOXICATION – SPECIAL INSTRUCTION (MULTIPLE TYPES)**

You have been instructed on the affirmative defense of involuntary intoxication with respect to the offense of [insert name of specific intent offense(s)]. You have also received an instruction on whether or not evidence of the defendant's self-induced intoxication negates the existence of the element[s] of ["with intent"] ["after deliberation and with intent"] ["intentionally"] with respect to [that offense] [those offenses].

You should consider the affirmative defense of involuntary intoxication before considering the question of self-induced intoxication. If you find that the prosecution has failed to meet its burden of proof regarding the defense of involuntary intoxication, as described in that instruction, then you should disregard the instruction on self-induced intoxication.

If, however, you find that the prosecution has met its burden of proof regarding the defense of involuntary intoxication, then you should proceed to the instruction on self-induced intoxication. Your finding that the defendant's conduct was not authorized by the defense of involuntary intoxication should not influence your decision on whether evidence of the defendant's self-induced intoxication negates the existence of the element[s] of ["with intent"] ["after deliberation and with intent"] ["intentionally"]; rather, you should consider the question of self-induced intoxication separately.

### COMMENT

1. The court should give this instruction where (1) the defendant requests instructions on both involuntary intoxication (*see* Instruction H:35) and self-induced intoxication (*see* Instruction H:34), and (2) the court determines that both instructions are appropriate. This instruction is designed to guide the jury through the complex scenario where it is presented with both instructions.

The Committee has concluded that the jury should consider the involuntary intoxication affirmative defense first because a finding that the defendant's conduct was legally authorized by that defense will require a not guilty verdict, rendering self-induced intoxication moot. But if the jury finds that the defendant's conduct was *not* authorized by the affirmative defense of involuntary intoxication, it should proceed to the self-induced intoxication instruction because such a finding will not necessarily resolve the jury's determination of whether evidence of the defendant's self-induced intoxication negated the existence of a relevant mental state.

2. The Committee added this instruction in 2019.

## CHAPTER H: SECTION II (DEFENSES TO INCHOATE OFFENSES AND SPECIFIC CRIMES)

### H:36 CRIMINALITY OF CONDUCT – MISTAKE AS TO AGE

The evidence presented in this case has raised the affirmative defense of “mistake as to age,” as a defense to [insert name(s) of offense(s)].

The defendant’s conduct was legally authorized if:

1. the defendant reasonably believed [insert name of the alleged victim] was eighteen years of age or older, and
2. [insert name of the alleged victim] was in fact at least fifteen years of age.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-1-503.5(1), C.R.S. 2020 (affirmative defense applies if “the criminality of conduct depends on a child being younger than eighteen years of age”); § 18-1-503.5(2), C.R.S. 2020 (“If the criminality of conduct depends on a child’s being younger than eighteen years of age and the child was in fact younger than fifteen years of age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.”).
2. This affirmative defense is unavailable if “the criminality of conduct depends on the defendant being in a position of trust,” § 18-1-503.5(1), or where “the criminality of conduct depends on a child being younger than fifteen years of age.” § 18-1-503.5(3), C.R.S. 2020.
3. Section 18-1-503.5(1) establishes an affirmative defense that must be raised; it does not alter the mens rea that applies to an offense. See *Gorman v. People*, 19 P.3d 662, 668 (Colo. 2000) (rejecting the analysis in *People v. Bath*, 890 P.2d 269, 271 (Colo. App. 1994), and explaining that “[w]hile we agree with the court of appeals that the affirmative defense [then codified as section 18-3-406(1)] is applicable to the offense of contributing to the delinquency of a minor, we disapprove of its reasoning that” an affirmative defense statute can alter the mens rea for an offense).

## H:37 CRIMINAL ATTEMPT – ABANDONMENT AND RENUNCIATION

The evidence presented in this case has raised the affirmative defense of “abandonment and renunciation,” as a defense to attempted [insert name(s) of object offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] abandoned his [her] effort to commit the crime or otherwise prevented its commission, under circumstances manifesting the complete and voluntary renunciation of his [her] criminal intent, and
2. neither the abandonment nor the renunciation was motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another, or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of [that] [those] offense[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its

burden of proof with respect to the remaining elements of [that] [those] offense[s].

## COMMENT

1. See § 18-2-101(3), C.R.S. 2020 (establishing the affirmative defense of abandonment and renunciation); § 18-2-401(1), C.R.S. 2020 (limiting the defense where abandonment or renunciation is not voluntary and complete).

2. In *O'Shaughnessy v. People*, 2012 CO 9, ¶ 20 n.4, 269 P.3d 1233, 1237 n.4, the supreme court rejected a “bright-line rule . . . that the affirmative defense of abandonment is not available [in a prosecution for an attempt] once the defendant injures the victim.” Although the court held that the defendant in that case was not entitled to an instruction concerning the affirmative defense of abandonment because there was no credible evidence to support it, the court explained that even “though the crime of attempt is complete once the actor takes a substantial step toward the commission of the crime, the affirmative defense of abandonment applies if the actor completely and voluntarily renounces his criminal intent thereafter.” *Id.* at ¶ 9, 269 P.3d at 1235.

3. It is well-established that “[a]bandonment and renunciation of criminal purpose are not affirmative defenses to *completed* crimes.” *People v. Marmon*, 903 P.2d 651, 654 n.2 (Colo. 1995) (forgery); *People v. Scialabba*, 55 P.3d 207, 210 (Colo. App. 2002) (same; witness tampering). Thus, *O'Shaughnessy* is best understood as recognizing the exception that exists for the oxymoronic concept of completed attempts. See also *People v. Johnson*, 585 P.2d 306, 308 (Colo. App. 1978) (“even though, in a strict analytical sense, the crime of attempt is complete once the actor intentionally takes a substantial step towards the commission of the crime, nevertheless, the defense of abandonment is present if he thereafter voluntarily renounces his criminal intent”).

## H:38 CONSPIRACY – RENUNCIATION

The evidence presented in this case has raised the affirmative defense of “renunciation,” as a defense to conspiracy.

The defendant’s conduct was legally authorized if:

1. after conspiring to commit a crime, he [she] thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his [her] criminal intent, and
2. the renunciation was not motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of conspiracy to commit [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of conspiracy to commit [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See § 18-2-203, C.R.S. 2020 (establishing the affirmative defense of renunciation); § 18-2-401(1), C.R.S. 2020 (limiting the defense where the renunciation is not voluntary and complete).
2. The Committee has not included an instruction similar to COLJI-Crim. H:34 (2008), which established an affirmative defense of abandonment for the offense of conspiracy based on language in section 18-2-204, C.R.S. 2020 (“duration of conspiracy”).

Unlike the attempt statute, the conspiracy statute does not state that abandonment is an affirmative defense. Compare § 18-2-201, C.R.S. 2020 (conspiracy), with § 18-2-101(3), C.R.S. 2020 (establishing the affirmative defense of abandonment and renunciation for attempt offenses). Indeed, the conspiracy statute does not mention abandonment, and there is no separate statute explicitly identifying abandonment as an affirmative defense to a charge of conspiracy (as there is for renunciation of a conspiracy, which requires proof that the defendant actually have “thwarted the success of the conspiracy,” see § 18-2-203, C.R.S. 2020). Rather, the concept of abandonment appears in a statute that defines the “duration” of a conspiracy. See § 18-2-204, C.R.S. 2020.

Nevertheless, based on section 18-2-204, abandonment of a conspiracy has been characterized as an affirmative defense in case law, see, e.g., *People v. Romero*, 543 P.2d 56, 58-59 (Colo. 1975) (trial court did not err by refusing to instruct the jury concerning “the affirmative defense of abandonment”), and in previous model jury instructions. See COLJI-Crim. H:34 (2008); COLJI-Crim. 7:32 (1983).

However, the Committee has now concluded that the supreme court’s statement in *Romero* was dicta and that the earlier model instructions were erroneous. This view is consistent with the understanding of one commentator, who has explained the distinction as follows:

Renunciation should be distinguished from abandonment, discussed . . . under the subheading DURATION OF CONSPIRACY. Abandonment does not defend against a conspiracy conviction, but merely limits the abandoning conspirator's exposure by starting the limitations period running and ending the attribution of statements of other conspirators to him under the co-conspirator exception to the hearsay rule. Abandonment is easier to prove than renunciation, since actual prevention of the conspiracy's success is not required.

Marianne Wesson, *Crimes and Defenses in Colorado*, 57 (1989).

## **H:39 CRIMINAL SOLICITATION – SOLE VICTIM, INEVITABLY INCIDENT, OR OTHERWISE NOT LIABLE**

The evidence presented in this case has raised the affirmative defense of [“object achieved”] [“sole victim”] [“inevitably incident”] as a defense to criminal solicitation.

The defendant’s conduct was legally authorized if:

- [1. had the criminal object been achieved he [she] would have been the sole victim of the offense; or his [her] conduct would have been inevitably incident to its commission; or he [she] otherwise would not have been guilty under Instruction \_\_\_\_, defining [insert name of felony offense(s) solicited], or under Instruction \_\_\_\_, defining complicity liability.]
- [1. he [she] was the sole victim of the offense; or his [her] conduct was inevitably incident to commission of the offense.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of criminal solicitation. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of criminal solicitation must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-2-301(2), C.R.S. 2020.
2. The first example is designed for cases where the object of the solicitation was not achieved. If the solicited crime was completed, use the second example.
3. The second example does not include language reflecting the third alternative of section 18-2-301(2), C.R.S. 2020 (“or he otherwise would not be guilty under the statute defining the offense or under section 18-1-603 dealing with complicity”). It is unclear whether this instructional language would ever be necessary in a case where the solicited crime was completed because, presumably, in such circumstances the defendant would also be charged with the completed offense (and that charge would be separately submitted to the jury under a theory of complicity).
4. The first clause of section 18-2-301(1), C.R.S. 2020, establishes an exemption from criminal liability for “bona fide acts of persons authorized by law to investigate the commission of offenses by others.” It is unclear whether the General Assembly intended for this provision to create an affirmative defense that is distinct from the affirmative defense of “execution of public duty.” *See* § 18-1-701(1), C.R.S. 2020; Instruction H:08.

## H:40 CRIMINAL SOLICITATION – PREVENTION AND RENUNCIATION

The evidence presented in this case has raised the affirmative defense of “prevention and renunciation,” as a defense to criminal solicitation.

The defendant’s conduct was legally authorized if:

1. he [she], after soliciting another person to commit [insert name of felony offense(s) here], persuaded him [her] not to do so, or otherwise prevented the commission of the crime,
2. under circumstances manifesting a complete and voluntary renunciation of his [her] criminal intent, and
3. the renunciation was not motivated in whole or in part by: a belief that a circumstance existed which increased the probability of detection or apprehension of the defendant or another, or which made more difficult the consummation of the crime; or a decision to postpone the crime until another time, or to substitute another victim or another but similar objective.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of criminal solicitation. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of criminal solicitation must depend upon your determination whether the prosecution has met its burden of

proof with respect to the remaining elements of that offense.

#### COMMENT

1. See §§ 18-2-301(4), 18-2-401, C.R.S. 2020.
2. See *People v. Jacobs*, 91 P.3d 438, 441-42 (Colo. App. 2003) (because the general offense of solicitation does not apply to the separate substantive offense of soliciting for child prostitution, the affirmative defenses of prevention and renunciation under the general solicitation statute are also inapplicable).

## H:41 FELONY MURDER – DISENGAGEMENT

The evidence presented in this case has raised the affirmative defense of “disengagement,” as a defense to the offense of first degree murder (felony murder).

The defendant’s conduct was legally authorized if:

1. he [she] was not the only participant in the [insert name of offense(s) here], and
2. he [she] did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof, and
3. he [she] was not armed with a deadly weapon, and
4. he [she] had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance, and
5. he [she] did not engage himself [herself] in, or intend to engage in, or have a reasonable ground to believe that any other participant intended to engage in, conduct likely to result in death or serious bodily injury, and
6. he [she] endeavored to disengage himself [herself] from the commission of [insert name of offense(s) here] or flight therefrom immediately upon having reasonable grounds to believe that another participant was armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name(s) of offense(s)]. In that event, you must return a verdict of not guilty of first degree murder (felony murder).

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of first degree murder (felony murder) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-3-102(2), C.R.S. 2020.
2. See Instruction F:88 (defining "deadly weapon"); see also *Webster's Third New International Dictionary* 1135 (2002) (defining "importune" as meaning "to press or urge with frequent or unreasonable requests or troublesome persistence").
3. See *Auman v. People*, 109 P.3d 647, 657 (Colo. 2005) ("Like the plain language of the statutory offense, the affirmative defense provides no support for the theory that arrest, by itself, terminates a co-participant's liability for felony murder as a matter of law."); *People v. Lucas*, 992 P.2d 619, 625 (Colo. App. 1999) (defendant charged with felony murder was not entitled to affirmative defense instruction because he engaged in conduct likely to cause serious bodily injury by participating in the attack on the victim and personally hitting the victim multiple times).

## **H:42 MANSLAUGHTER – MEDICAL CAREGIVER**

The evidence presented in this case has raised the affirmative defense of “medical caregiver,” as a defense to manslaughter (intentionally aiding or causing another person to commit suicide).

The defendant’s conduct was legally authorized if:

1. he [she] was a medical caregiver, with prescriptive authority or authority to administer medication,
2. who prescribed or administered medication for palliative care,
3. to a terminally ill patient,
4. with the consent of the terminally ill patient, or his [her] agent.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of manslaughter (intentionally aiding or causing another person to commit suicide). In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict[s] concerning the charge[s] of manslaughter (intentionally aiding or causing another person to commit suicide) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-3-104(4)(a), C.R.S. 2020.
2. *See* Instruction F:12 (defining “agent”); Instruction F:221 (defining “medical caregiver”); Instruction F:257 (defining “palliative care”).

## **H:43 FALSE IMPRISONMENT – PEACE OFFICER ACTING IN GOOD FAITH**

The evidence presented in this case has raised the affirmative defense of “peace officer acting in good faith,” as a defense to false imprisonment.

The defendant’s conduct was legally authorized if:

1. he [she] was a peace officer,
2. acting in good faith within the scope of his [her] duties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of false imprisonment. In that event, you must return a verdict of not guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of false imprisonment must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### **COMMENT**

1. *See* § 18-3-303(1), C.R.S. 2020.
2. *See* Instruction F:263 (defining “peace officer”).

3. In *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996), a division of the Court of Appeals observed, in dicta, that “COLJI-Crim. No. 11:08 (1983), the pattern criminal jury instruction for false imprisonment pursuant to § 18-3-303, . . . provides that an element of the prosecution’s case is proof that the defendant is not a peace officer acting in good faith.” Although the division in *Reed* endorsed that statutory interpretation, the Committee has concluded the provision establishes an affirmative defense.

## H:44 VIOLATION OF CUSTODY – CHILD IN DANGER OR NOT ENTICED

The evidence presented in this case has raised the affirmative defense of [“child in danger”] [“child not enticed”], as a defense to violation of custody.

The defendant’s conduct was legally authorized if:

- [1. he [she] reasonably believed that his [her] conduct was necessary to preserve the child from danger to his [her] welfare.]
- [1. the child was at the time more than fourteen years old, and
2. he [she] was taken away at his [her] own instigation,
3. without enticement, and
4. the defendant had no purpose to commit a crime with or against the child.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of violation of custody. In that event, you must return a verdict of not guilty of violation of a custody order.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of violation of custody must depend upon your determination whether the prosecution has met its burden of proof

with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-3-304(3), C.R.S. 2020.
2. See *People v. Mossman*, 17 P.3d 165, 168-72 (Colo. App. 2000) (under *People v. Tippett*, 733 P.2d 1183, 1191 (Colo. 1987), evidence in support of the affirmative defense to violation of custody may be limited to the defendant's state of mind at or shortly before the time of the child's abduction; however, trial court committed reversible error by refusing defendant's request for an instruction concerning the affirmative defense where the evidence, including the improperly excluded evidence, was sufficient to support defendant's assertion that he had taken his daughter to protect her after she revealed to him that his ex-wife and another man were physically, mentally, and sexually abusing her, and defendant was aware that his ex-wife and the other man were living together in violation of a restraining order which had been entered to protect his daughter); see also *People v. Beilke*, 232 P.3d 146, 150 (Colo. App. 2009) (rejecting the argument that the *Mossmann* division misconstrued *Tippett*).

## **H:45 FAILURE TO REGISTER OR VERIFY LOCATION AS A SEX OFFENDER – UNCONTROLLABLE CIRCUMSTANCES**

The evidence presented in this case has raised the affirmative defense of “uncontrollable circumstances,” as a defense to failure to [register] [verify location] as a sex offender.

The defendant’s conduct was legally authorized if:

1. he [she] was prevented from complying by uncontrollable circumstances, and
2. he [she] did not contribute to the creation of the circumstances in reckless disregard of the requirement to comply, and
3. he [she] complied as soon as the circumstances ceased to exist.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of failure to [register] [verify location] as a sex offender. In that event, you must return a verdict of not guilty of failure to [register] [verify location] as a sex offender.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of failure to [register] [verify location] as a sex offender must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-3-412.5(1.5)(a), C.R.S. 2020.
2. In order to raise this affirmative defense, the defendant must comply with the pretrial notification procedure and afford the prosecution an opportunity to ask the court for a pretrial ruling. *See* § 18-3-412.5(1.5)(b), C.R.S. 2020; § 18-3-412.6(2)(b), C.R.S. 2020.

### **H:45.3 UNLAWFUL TERMINATION OF A PREGNANCY (MEDICAL CARE OR SERVICE)**

The evidence presented in this case has raised the affirmative defense of “medical care or service,” as a defense to unlawful termination of a pregnancy.

The defendant’s conduct was legally authorized if:

1. he [she] was providing medical, osteopathic, surgical, mental health, dental, nursing, optometric, healing, wellness, or pharmaceutical care; furnishing inpatient or outpatient hospital or clinic services; furnishing telemedicine services; or furnishing any service related to assisted reproduction or genetic testing.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of unlawful termination of a pregnancy. In that event, you must return a verdict of not guilty of unlawful termination of a pregnancy.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful termination of a pregnancy must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-3.5-102(1), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## **H:45.5 UNLAWFUL TERMINATION OF A PREGNANCY (DEFENDANT’S OWN PREGNANCY)**

The evidence presented in this case has raised the affirmative defense of “defendant’s own pregnancy,” as a defense to unlawful termination of a pregnancy.

The defendant’s conduct was legally authorized if:

1. she committed the elements of the offense of unlawful termination of a pregnancy with regard to her own pregnancy.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of unlawful termination of a pregnancy. In that event, you must return a verdict of not guilty of unlawful termination of a pregnancy.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful termination of a pregnancy must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-3.5-102(2), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## H:46 FOURTH DEGREE ARSON – CONTROLLED AGRICULTURAL BURN

The evidence presented in this case has raised the affirmative defense of “controlled agricultural burn,” as a defense to fourth degree arson.

The defendant’s conduct was legally authorized if:

1. he [she] started and maintained a fire as a controlled agricultural burn in a reasonably cautious manner, and
2. no person suffered bodily injury, serious bodily injury, or death.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of fourth degree arson. In that event, you must return a verdict of not guilty of fourth degree arson.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of fourth degree arson must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-4-105(5), C.R.S. 2020.
2. *See* Instruction F:72 (defining “controlled agricultural burn”).

## **H:47 FALSE IMPRISONMENT – THEFT INVESTIGATION**

The evidence presented in this case has raised the affirmative defense of “theft investigation,” as a defense to false imprisonment.

The defendant’s conduct was legally authorized if:

1. he [she] was the owner or an employee of a store or mercantile establishment, [or a peace officer,] and
2. the alleged victim[s] triggered an alarm or a theft detection device or concealed upon his [her] [their] person or otherwise carried away any unpurchased goods, wares, or merchandise held or owned by the store or mercantile establishment, and
3. the defendant, acting in good faith and upon probable cause based upon reasonable grounds therefor, detained and questioned [insert name of alleged victim(s) here], in a reasonable manner, for the purpose of ascertaining whether he [she] [they] was [were] guilty of theft.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of false imprisonment. In that event, you must return a verdict of not guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of false imprisonment must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See § 18-4-407, C.R.S. 2020.
2. See Instruction F:368 (defining “theft detection device”); Instructions 4-4:01 to 4-4:03 (theft).
3. Because the statute requires that the defendant’s “probable cause” be based on “reasonable grounds,” it appears that the use of this language in the instruction sufficiently explains the concept of “probable cause” such that it is not necessary to give a separate instruction defining the term pursuant to case law. See *People v. Tottenhoff*, 691 P.2d 340, 343 (Colo. 1984) (“Probable cause . . . exists when the facts and circumstances . . . are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed by the person.”).

## **H:47.5 EQUITY SKIMMING OF REAL PROPERTY (FULL PAYMENT)**

The evidence presented in this case has raised the affirmative defense of “full payment,” as a defense to equity skimming of real property.

The defendant’s conduct was legally authorized if:

- [1. all deficiencies in all underlying encumbrances at the time of acquisition had been fully satisfied and brought current, and
  2. any regular payments on the underlying encumbrances during the succeeding nine months after the date of acquisition have been timely paid in full.]
- 
- [1. any fees due to an association of real property owners for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property is a part have been paid in full.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of equity skimming of real property. In that event, you must return a verdict of not guilty of equity skimming of real property.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of equity skimming of real property must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-5-802(4), C.R.S. 2020.
2. Section 18-5-802(4)(a) specifies that this affirmative defense is unavailable where the defendant is charged with violating section 18-5-802(1)(b)(II), C.R.S. 2020 (collecting rent on behalf of any person other than the owner of the real property after a foreclosure in which title has vested).
3. The Committee added this instruction in 2015.

## **H:47.7 BIGAMY – REASONABLE BELIEF OR EXTENDED ABSENCE**

The evidence presented in this case has raised the affirmative defense of “reasonable belief or extended absence,” as a defense to bigamy.

The defendant’s conduct was legally authorized if:

1. at the time of the cohabitation, subsequent marriage, or subsequent civil union,
- [2. the defendant reasonably believed the prior [spouse] [civil union partner] to be dead.]
- [2. the prior [spouse] [civil union partner] had been continually absent for a period of five years during which time the defendant did not know the prior [spouse] [civil union partner] to be alive.]
- [2. the defendant reasonably believed that he [she] was [legally eligible to remarry or legally eligible to enter into a civil union] [legally eligible to marry or legally eligible to enter into a civil union].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of bigamy. In that event, you must return a verdict of not guilty of bigamy.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your

verdict concerning the charge of bigamy must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-6-201(1)(a)-(c), (1.5)(a)-(c), C.R.S. 2020.
2. *See* Instruction F:56.8 (defining “cohabitation”).
3. The Committee added this instruction in 2016.

## **H:48 CHILD ABUSE – SAFE SURRENDER OF A NEWBORN**

The evidence presented in this case has raised the affirmative defense of “safe surrender of a newborn,” as a defense to child abuse.

The defendant’s conduct was legally authorized if:

1. he [she] was the child’s parent, and
2. the child was seventy-two hours old or younger at the time of the alleged offense, and
3. he [she] safely, reasonably, and knowingly handed the child over to a [firefighter, when the firefighter was at a fire station.] [staff member engaged in the admission, care, or treatment of patients at a hospital or community clinic emergency center, when the staff member was at a hospital or community clinic emergency center.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of child abuse. In that event, you must return a verdict of not guilty of child abuse.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of child abuse must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-6-401(9), C.R.S. 2020.
2. *See* Instruction F:58.5 (defining “community clinic emergency center”); Instruction F:157 (defining “firefighter”).
3. In 2018, the Committee modified the third element pursuant to a legislative amendment, and it added a corresponding cross-reference in Comment 2. *See* Ch. 20, sec. 1, § 18-6-401(9)(a), 2018 Colo. Sess. Laws 269, 269.

## **H:49 LOCATING A PROTECTED PERSON – LAWFUL PURPOSE**

The evidence presented in this case has raised the affirmative defense of “lawful purpose,” as a defense to violation of a protection order.

The defendant’s conduct was legally authorized if:

1. the person who was [hired] [employed] [, or otherwise contracted with to locate or assist in the location of the protected person, was working pursuant to an agreement with [counsel for defendant] [defendant, who was representing himself [herself]], and
- [2. the defendant sought discovery of the location of the protected person for a lawful purpose as specified in a written agreement between the person doing the locating and [defendant] [defendant’s counsel], and
3. the written agreement stated that the location of the protected person would not be disclosed to defendant by the person doing the locating [or by defendant’s counsel] unless the protected person agreed to the disclosure in writing or the defendant obtained court permission to obtain disclosure of the location for the stated lawful purpose.]
- [2. the defendant was a defendant in a criminal case or a party to a [civil case] [an action for dissolution of marriage] [, or other legal proceeding], and
3. the written agreement stated that the lawful purpose for locating the protected person was to interview or issue a lawful subpoena or summons to the protected person [or for any other lawful purpose relating to the proper investigation of the case.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond

a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of violation of a protection order. In that event, you must return a verdict of not guilty of violation of a protection order.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of violation of a protection order must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-6-803.5(1)(b), C.R.S. 2020 (violation of a protection order; excepting conduct pursuant to section 18-13-126(1)(b) (locating protected persons), from which the above instruction is derived).
2. *See* Instruction F:14 (defining "assist"); Instruction F:293.5 (defining "protected person").
3. Although section 18-13-126(1)(b)(I)(B), C.R.S. 2020, explicitly requires that the agreement be "written," section 18-13-126(1)(b)(II)(B), C.R.S. 2020, does not. Nevertheless, the Committee has included the word "written" in the second alternative because it is implied by the context (specifically, the reference to what the agreement "states").

### **H:49.3 FALSE IMPRISONMENT OF AN AT-RISK PERSON (PHYSICALLY RESTRAINING) – PROMOTED WELFARE**

The evidence presented in this case has raised the affirmative defense of “promoted welfare,” as a defense to false imprisonment of an at-risk person (physically restraining).

The defendant’s conduct was legally authorized if:

1. the defendant was a person with responsibility for the care or supervision of the at-risk person, and
2. the defendant’s conduct with respect to the at-risk person was reasonable and appropriate under the circumstances, and
3. the defendant’s conduct was reasonably necessary to promote the safety and welfare of the at-risk person.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of false imprisonment of an at-risk person (physically restraining). In that event, you must return a verdict of not guilty of false imprisonment of an at-risk person (physically restraining).

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of false imprisonment of an at-risk person (physically restraining) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See § 18-6.5-103(9)(b), C.R.S. 2020.
2. See Instruction F:26.5 (defining “at-risk person”); *see also* Instruction F:44 (defining “caretaker”).
3. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 365, sec. 3, § 18-6.5-103(9)(b), 2019 Colo. Sess. Laws 3359, 3360.

## H:49.5 POSTING A PRIVATE IMAGE – NEWSWORTHY EVENT

The evidence presented in this case has raised the affirmative defense of “newsworthy event” as a defense to posting a private image for [harassment] [pecuniary gain].

The defendant’s conduct was legally authorized if:

1. the photograph, video, or image was related to a newsworthy event.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of posting a private image for [harassment] [pecuniary gain]. In that event, you must return a verdict of not guilty of posting a private image for [harassment] [pecuniary gain].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of posting a private image for [harassment] [pecuniary gain] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. In 2018, the legislature repealed this affirmative defense, with an effective date of July 1, 2018. *See* Ch. 192, secs. 1-3, §§ 18-7-107(2), 18-7-108(2), 2018 Colo. Sess. Laws 1276, 1276-78. Accordingly, if the charged

offense took place on or after July 1, 2018, the court should not provide this instruction.

## **H:49.8 POSTING OR POSSESSING A PRIVATE IMAGE BY A JUVENILE – COERCED, THREATENED, OR INTIMIDATED**

The evidence presented in this case has raised the affirmative defense of “coerced, threatened, or intimidated” as a defense to [posting] [possessing] a private image by a juvenile.

The [defendant’s] [juvenile’s] conduct was legally authorized if:

1. he [she] was coerced, threatened, or intimidated into distributing, displaying, publishing, possessing, or exchanging a sexually explicit image of a person under eighteen years of age.

The prosecution has the burden to prove, beyond a reasonable doubt, that the [defendant’s] [juvenile’s] conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the [defendant’s] [juvenile’s] conduct was not legally authorized by this defense, which is an essential element of [posting] [possessing] a private image by a juvenile. In that event, you must return a verdict of [not guilty] [non-commission] of [posting] [possessing] a private image by a juvenile.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the [defendant’s] [juvenile’s] conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [posting] [possessing] a private image by a juvenile must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. See § 18-7-109(4), C.R.S. 2020.

2. See Instruction F:281 (defining “possession”); Instruction F:340.5 (defining “sexually explicit image”).
3. The Committee added this instruction in 2017 pursuant to new legislation. See Ch. 390, sec. 4, § 18-7-109(4), 2017 Colo. Sess. Laws 2012, 2015.

## **H:49.9 POSTING AN IMAGE OF SUICIDE OF A MINOR – VALID PURPOSE**

The evidence presented in this case has raised the affirmative defense of “valid purpose” as a defense to posting an image of suicide of a minor.

The defendant’s conduct was legally authorized if:

- [1. the posting or distribution of the image was a fictional work or a documentary.]
- [1. the posting or distribution of the image was related to a matter of public interest or public concern.]
- [1. the posting or distribution of the image was related to the reporting of unlawful conduct.]
- [1. the posting or distribution of the image was related to the lawful and common practices of law enforcement, criminal reporting, legal proceedings, or medical treatment.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of posting an image of suicide of a minor. In that event, you must return a verdict of not guilty of posting an image of suicide of a minor.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of posting an image of suicide of a minor must depend upon your determination whether the prosecution has met its

burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-7-901(4), C.R.S. 2020.
2. See Instruction F:281 (defining “possession”); Instruction F:340.5 (defining “sexually explicit image”).
3. The court should select the appropriate bracketed alternative depending on the evidence raised by the defendant.
4. The statute provides that “[i]t is not an offense” if one of these conditions is satisfied. § 18-7-901(4). However, because this language appears in its own subsection, the Committee has chosen to classify the conditions as an affirmative defense rather than an element-negating traverse. See *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant’s burden to claim it as an affirmative defense.”). The Committee has not drafted model affirmative defense instructions.
5. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 388, sec. 1, § 18-7-901(4), 2019 Colo. Sess. Laws 3455, 3456.

## **H:50 OBSTRUCTING GOVERNMENTAL OPERATIONS (PUBLIC SERVANT, ARREST, OR LABOR DISPUTE)**

The evidence presented in this case has raised the affirmative defense of [“public servant”] [“arrest”] [“labor dispute”] as a defense to obstructing government operations.

The defendant’s conduct was legally authorized if:

1. the obstruction, impairment, or hindrance was of [unlawful action by a public servant] [the making of an arrest] [a governmental function, by lawful activities in connection with a labor dispute with the government].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of obstructing government operations. In that event, you must return a verdict of not guilty of obstructing government operations.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of obstructing government operations must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-102(2), C.R.S. 2020.

2. See Instruction F:162 (defining “government”).

## **H:50.5 OBSTRUCTING A PEACE OFFICER, FIREFIGHTER, EMERGENCY MEDICAL SERVICES PROVIDER, RESCUE SPECIALIST, OR VOLUNTEER – OBTAINED PERMISSION**

The evidence presented in this case has raised the affirmative defense of “obtained permission,” as a defense to obstructing a [peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer] [peace officer or firefighter].

The defendant’s conduct was legally authorized if:

1. the obstruction involved using or threatening to use an unmanned aircraft system as an obstacle, and
2. the defendant obtained permission to operate the unmanned aircraft system from a law enforcement agency or other entity that was coordinating the response of peace officers, firefighters, emergency medical service providers, rescue specialists, or volunteers to an emergency or accident, and
3. the defendant continued to communicate with such entity during the operation of the unmanned aircraft system, and
4. the defendant complied immediately with any instructions from the entity concerning the operation of the unmanned aircraft system.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of obstructing a [peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer] [peace officer or firefighter]. In that event, you must return a verdict of not

guilty of obstructing a [peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer] [peace officer or firefighter].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of obstructing a [peace officer, firefighter, emergency medical services provider, rescue specialist, or volunteer] [peace officer or firefighter] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-8-104(2.5), C.R.S. 2020.
2. *See* Instruction F:120 (defining “emergency medical service provider”); Instruction F:246.8 (defining “obstacle”); Instruction F:264 (defining “peace officer”); Instruction F:314 (defining “rescue specialist”); *see also* Instruction F:157 (defining “firefighter,” for purposes of assault offenses).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 385, sec. 2, § 18-8-104(2.5), 2018 Colo. Sess. Laws 2309, 2310.

## H:51 COMPOUNDING – RESTITUTION OR INDEMNIFICATION

The evidence presented in this case has raised the affirmative defense of “restitution or indemnification,” as a defense to compounding.

The defendant’s conduct was legally authorized if:

1. the benefit received by the defendant did not exceed an amount which he [she] reasonably believed to be due as restitution or indemnification for harm caused by the crime.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of compounding. In that event, you must return a verdict of not guilty of compounding.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of compounding must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-108(2), C.R.S. 2020.
2. *See* Instruction F:30 (defining “benefit”).

## **H:51.5 UNLAWFUL SALE OF PUBLIC SERVICES – LAWFUL PURPOSE**

The evidence presented in this case has raised the affirmative defense of “lawful purpose,” as a defense to unlawful sale of public services.

The defendant’s conduct was legally authorized if:

[1. he [she] had consent from the government entity to sell the specific service or appointment obtained or reserved.]

[1. he [she] obtained and sold or offered to sell only information.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of unlawful sale of public services. In that event, you must return a verdict of not guilty of unlawful sale of public services.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful sale of public services must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-117(2), C.R.S. 2020.
2. *See* Instruction F:164.5 (defining “government entity”).

3. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(2), 2016 Colo. Sess. Laws 1014, 1014-15.

## **H:52 ESCAPE (COMMITMENT) – VOLUNTARY RETURN**

The evidence presented in this case has raised the affirmative defense of “voluntary return,” as a defense to escape (commitment).

The defendant’s conduct was legally authorized if:

1. he [she] voluntarily returned to the place of confinement.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of escape. In that event, you must return a verdict of not guilty of escape (commitment).

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of escape (commitment) must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-208(7), C.R.S. 2020 (defense applies only to escapes from commitment in violation of section 18-8-208(6)).

## **H:52.3 TRADING IN PUBLIC OFFICE – CUSTOMARY CONTRIBUTION**

The evidence presented in this case has raised the affirmative defense of “customary contribution,” as a defense to trading in public office.

The defendant’s conduct was legally authorized if:

1. the pecuniary benefit was a customary contribution to political campaign funds, and
2. those funds were solicited and received by lawfully constituted political parties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of trading in public office. In that event, you must return a verdict of not guilty of trading in public office.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of trading in public office must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### **COMMENT**

1. *See* § 18-8-305(2), C.R.S. 2020.
2. The Committee added this instruction in 2015.

## H:52.5 DESIGNATION OF SUPPLIER – SCOPE OF AUTHORITY

The evidence presented in this case has raised the affirmative defense of “scope of authority,” as a defense to designation of supplier.

The defendant’s conduct was legally authorized if:

1. the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it did not meet bona fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of designation of supplier. In that event, you must return a verdict of not guilty of designation of supplier.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of designation of supplier must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-307(3), C.R.S. 2020.

2. The Committee added this instruction in 2015.

## H:53 PERJURY IN THE FIRST DEGREE – RETRACTION

The evidence presented in this case has raised the affirmative defense of “retraction,” as a defense to perjury in the first degree.

The defendant’s conduct was legally authorized if:

1. he [she] retracted his [her] false statement, and
2. he [she] did so during the same proceeding in which the false statement was made. [, or at a separate hearing at a separate stage of the same trial or administrative proceeding.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of perjury in the first degree. In that event, you must return a verdict of not guilty of perjury in the first degree.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of perjury in the first degree must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-8-508, C.R.S. 2020.

2. For purposes of this affirmative defense, a trial ending in a mistrial and the subsequent retrial are distinct trials, and not separate parts of the “same proceeding.” See *People v. Valdez*, 568 P.2d 71, 73 (Colo. App. 1977).

## **H:54 DISOBEDIENCE OF PUBLIC SAFETY ORDERS UNDER RIOT CONDITIONS – NEWS REPORTER OR MEDIA PERSON**

The evidence presented in this case has raised the affirmative defense of “news reporter or media person,” as a defense to disobedience of a public safety order under riot conditions.

The defendant’s conduct was legally authorized if:

1. he [she] was a news reporter or other person observing or recording the events on behalf of the public press or other news media, and
2. he [she] was not physically obstructing efforts by police, fire, military or other forces to cope with the riot or impending riot.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of disobedience of a public safety order under riot conditions. In that event, you must return a verdict of not guilty of disobedience of a public safety order under riot conditions.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of disobedience of a public safety order under riot conditions must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-9-105, C.R.S. 2020.

## **H:55 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS – LAWFUL ASSEMBLY**

The evidence presented in this case has raised the affirmative defense of “lawful assembly,” as a defense to interference with staff, faculty, or students of educational institutions.

The defendant’s conduct was legally authorized if:

1. he [she] was exercising his [her] right to lawful assembly and peaceful and orderly petition for the redress of grievances. [, including any labor dispute between an educational institution and its employees, any contractor or subcontractor, or any employee thereof.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of interference with staff, faculty, or students of educational institutions. In that event, you must return a verdict of not guilty of interference with staff, faculty, or students of educational institutions.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of interference with staff, faculty, or students of educational institutions must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-9-109(4), C.R.S. 2020.

## H:56 LOITERING – LAWFUL ASSEMBLY

The evidence presented in this case has raised the affirmative defense of “lawful assembly,” as a defense to loitering.

The defendant’s conduct was legally authorized if:

1. he [she] was exercising his [her] right to lawful assembly and peaceful and orderly petition for the redress of grievances. [, either in the course of a labor dispute or otherwise.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of loitering. In that event, you must return a verdict of not guilty of loitering.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of loitering must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-9-112(3), C.R.S. 2020.

## **H:57 CRUELTY TO ANIMALS – DOG FOUND RUNNING, WORRYING, OR INJURING SHEEP, CATTLE, OR OTHER LIVESTOCK**

The evidence presented in this case has raised the affirmative defense of “dog found running, worrying, or injuring sheep, cattle, or other livestock” as a defense to cruelty to animals.

The defendant’s conduct was legally authorized if:

1. the dog was found running, worrying, or injuring sheep, cattle, or other livestock.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of cruelty to animals. In that event, you must return a verdict of not guilty of cruelty to animals.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of cruelty to animals must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### **COMMENT**

1. *See* § 18-9-202(2.5), C.R.S. 2020.

## **H:58 UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – CONDUCT OF THE PERSON OR ANIMAL ATTACKED**

The evidence presented in this case has raised the affirmative defense of “conduct of the person or animal attacked” as a defense to unlawful ownership of a dangerous dog.

The defendant’s conduct was legally authorized if:

1. The dangerous dog had not engaged in or been trained for animal fighting, and
- [2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a domestic animal, the domestic animal was at large, was an estray, and had entered upon the property of the owner and the attack began, but did not necessarily end, upon such property.]
- [2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a domestic animal, the animal was biting or otherwise attacking the dangerous dog or its owner.]
- [2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a person, the victim of the attack was committing or attempting to commit [insert name of criminal offense, other than a petty offense], against the dog’s owner, and the attack did not occur on the owner’s property.]
- [2. at the time of the attack by the dangerous dog which caused [injury to] [the death of] a person, the victim of the attack was committing or attempting to commit [insert name of criminal offense, other than a petty offense], against a person on the owner’s property or the property itself and the attack began, but did not necessarily end, upon such property.]
- [2. the person who was the victim of the attack by the dangerous dog tormented, provoked, abused, or inflicted injury upon the dog in such an extreme manner which resulted in the attack.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful ownership of a dangerous dog. In that event, you must return a verdict of not guilty of unlawful ownership of a dangerous dog.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful ownership of a dangerous dog must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-9-204.5(3)(h)(I)(A)-(E), (II), C.R.S. 2020.
2. See Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner"); Instruction F:332 (defining "serious bodily injury"); Instruction G2:01 (criminal attempt).
3. Because all of the provisions of 18-9-204.5(3)(h)(I)(A)-(E) speak in terms of an "attack," it appears that the affirmative defenses in this instruction apply only when the allegation of dangerousness is based on section 18-9-204.5(2)(b)(I), C.R.S. 2020 ("'Dangerous dog' means any dog that . . . [i]nflicts bodily or serious bodily injury upon or causes the death of a person or domestic animal"). Accordingly, it appears that these affirmative defenses would not be available where the allegations of dangerousness are based on section 18-9-204.5(2)(b)(II), C.R.S. 2020 (demonstrated dangerous tendencies). However, where the evidence of

demonstrated dangerous tendencies involves evidence of a prior attack, it may be appropriate to draft a special instruction apprising the jury of the principles embodied in these affirmative defense instructions.

4. Depending on the evidence, it may be necessary to define “animal fighting.” *See* Instruction 9-2:06 (animal fighting); Instruction 9-2:07.SP (animal fighting – special instruction). If the defendant is not charged with animal fighting, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5. Where the evidence supports instructing the jury concerning more than one subsection of section 18-9-204.5(3)(h)(I)(A)-(E), use a separate instruction (with two numbered conditions) for each relevant subsection.

6. The dangerous dog statute includes additional exemptions from criminal liability. *See* § 18-9-204.5(6), C.R.S. 2020 (exempting, among other things, herding dogs and those dogs that are used by peace officers). However, the Committee has not drafted a model affirmative defense instruction encompassing these exemptions.

## H:59 KNIFE – HUNTING OR FISHING

The evidence presented in this case has raised the affirmative defense of “hunting or fishing,” as a defense to [insert name of weapon offense(s)].

The defendant’s conduct was legally authorized if:

1. the knife was a hunting or fishing knife, and
2. he [she] carried it for sports use.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name of weapon offense(s)]. In that event, you must return a verdict of not guilty of [insert name of weapon offense(s)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of weapon offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. See § 18-12-101(1)(f), C.R.S. 2020.

## **H:60 OFFENSES RELATING TO FIREARMS AND WEAPONS – PEACE OFFICERS**

The evidence presented in this case has raised the affirmative defense of “peace officer,” as a defense to [insert name of Article 12 offense(s)].

The defendant’s conduct was legally authorized if:

1. he [she] was a peace officer, and
2. he [she] was acting in the lawful discharge of his [her] duties.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name of Article 12 offense(s)]. In that event, you must return a verdict of not guilty of [insert name of Article 12 offense(s)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of Article 12 offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

### COMMENT

1. See § 18-12-101(2), C.R.S. 2020.
2. See Instruction F:263 (defining “peace officer”).

## **H:61 POSSESSING AN ILLEGAL OR DANGEROUS WEAPON – PEACE OFFICERS, ARMED SERVICEPERSONS, AND LICENSED POSSESSION**

The evidence presented in this case has raised the affirmative defense of [“peace officer”] [“armed serviceperson”] [“licensed possession”], as a defense to possessing [an illegal weapon] [a dangerous weapon].

The defendant’s conduct was legally authorized if:

1. he she was a [peace officer] [member of the Armed Forces of the United States] [member of the Colorado National Guard], and
2. he [she] was acting in the lawful discharge of his [her] duties.]
1. he [she] [had a valid permit and license for possession of such weapon].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of possessing [an illegal weapon] [a dangerous weapon]. In that event, you must return a verdict of not guilty of possessing [an illegal weapon] [a dangerous weapon].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possessing [an illegal weapon] [a dangerous weapon] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-12-102(5), C.R.S. 2020.

## **H:62 UNLAWFULLY CARRYING A CONCEALED WEAPON – PERMISSIBLE LOCATION OR VALID PERMIT**

The evidence presented in this case has raised the affirmative defense of [“permissible location”] [“valid permit”] as a defense to unlawfully carrying or possessing a concealed weapon.

The defendant’s conduct was legally authorized if:

- [1. he [she] was in his [her] own dwelling or place of business, or on property owned or under his [her] his control at the time of the act of carrying.]
- [1. he [she] was in a private automobile, or other private means of conveyance, and
2. was carrying the weapon for lawful protection of his [her] or another’s person or property while traveling.]
- [1. at the time of carrying a concealed weapon, he [she] held a valid written permit to carry a concealed weapon, or, if the weapon involved was a handgun, a valid permit to carry a concealed handgun or a valid temporary emergency permit to carry a concealed handgun, and
2. he [she] [was] [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2020.]
- [1. he [she] was a peace officer, and
2. he [she] was carrying the weapon in conformance with the policy of his [her] employing agency.]
- [1. he [she] was a United States probation officer or pretrial services officer, and
2. he [she] was on duty, and
3. he [she] was authorized to serve in the state of Colorado,

pursuant to [insert a short description of the relevant rule and/or regulation promulgated by the judicial conference of the United States.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawfully carrying or possessing a concealed weapon. In that event, you must return a verdict of not guilty of unlawfully carrying or possessing a concealed weapon.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawfully carrying or possessing a concealed weapon must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-12-105(2), C.R.S. 2020.
2. When using the bracketed language applicable to peace officers, define the term "peace officer." See Instruction F:263 (defining "peace officer"). In addition, draft an instruction explaining the written policy of the employing agency. See § 16-2.5-101(2), C.R.S. 2020.
3. The court should draft a supplemental instruction explaining how it has resolved any relevant legal matters, such as the validity of a permit or a determination of the governing provision(s) of the employment policy, rule, or regulation.

4. Where the evidence supports instructing the jury concerning more than one subsection of section 18-12-105(2), use a separate instruction for each relevant subsection.

## **H:63 UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS – PERMISSIBLE LOCATION OR PURPOSE; VALID PERMIT**

The evidence presented in this case has raised the affirmative defense of [“permissible location”] [“valid permit”] as a defense to unlawful possession of a weapon on [school] [college] [university] grounds.

The defendant’s conduct was legally authorized if:

1. the weapon was unloaded, and
2. it remained inside a motor vehicle while upon the real estate of any [public] [private] [college] [university] [seminary].]
1. he [she] was in his [her] own [dwelling] [place of business] [, or on property owned or under his [her] control] at the time of the act of carrying.]
1. he [she] was in a private [automobile] [means of conveyance], and
2. was carrying the weapon for lawful protection of [[his] [her] [another’s]] [person] [property],
3. while traveling.]
1. at the time of carrying a concealed weapon, he [she] held a valid written permit to carry a concealed weapon, and
2. he [she] was [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2020.]
1. the weapon involved was a handgun, and
2. at the time of carrying a concealed weapon, he [she] she held [a valid permit to carry a concealed handgun] [a valid temporary emergency permit to carry a concealed handgun], and

3. he [she] [was] [did] not [insert relevant provision(s) from § 18-12-214, C.R.S. 2020.]
  1. he [she] was a [school resource officer] [peace officer], and
  2. he [she] was carrying a weapon in conformance with the policy of his [her] employing agency.]
    1. he [she] had possession of the weapon for use in an educational program approved by a school (including, but not limited to, any course designed for the repair or maintenance of weapons).]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of unlawful possession of a weapon on [school] [college] [university] grounds. In that event, you must return a verdict of not guilty of unlawful possession of a weapon on [school] [college] [university] grounds.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful possession of a weapon on [school] [college] [university] grounds must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-12-105.5(3), C.R.S. 2020.

2. See Instruction F:329 (defining “school resource officer”).
3. When using the bracketed language applicable to peace officers, draft a separate instruction defining a “peace officer” in accordance with section 16-2.5-101, C.R.S. 2020. Due to the multitude of possible definitions, there is no model instruction in Chapter F. In addition, draft an instruction explaining the written policy of the employing agency. See § 16-2.5-101(2), C.R.S. 2020.
4. It may be necessary for the court to draft a supplemental instruction explaining its determinations with respect to the validity of a permit or the relevant governing provision(s) of the employment policy, rule, or regulation.

## **H:64 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – CHOICE OF EVILS**

The evidence presented in this case has raised the affirmative defense of “choice of evils,” as a defense to possession of a weapon by a previous offender.

The defendant’s conduct was legally authorized if:

1. he [she] possessed the weapon for the purpose of defending his [her] home, person or property from what he [she] reasonably believed to be a threat of imminent harm which was about to occur because of a situation occasioned or developed through no conduct of the defendant.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of possession of a weapon by a previous offender. In that event, you must return a verdict of not guilty of possession of a weapon by a previous offender.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possession of a weapon by a previous offender must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See Colo. Const. Art. II, § 13.
2. In *People v. Carbajal*, 2014 CO 60, ¶ 1, 328 P.3d 104, 105, the supreme court held that the trial court had not erred when it “modified the stock jury instruction regarding this affirmative defense and instructed the jury that Carbajal must have possessed the weapons to defend against what he ‘reasonably believed to be a threat of imminent harm.’” Reviewing its prior decisions, the court explained that the trial court’s imposition of this imminence requirement was proper because imminence is a statutory component of the choice of evils defense and, “under [*People v. Blue*, 544 P.2d 385 (Colo. 1975)] and [*People v. Ford*, 568 P.2d 26 (Colo. 1977)], the POWPO affirmative defense is the statutory defense of choice of evils.” *Carbajal*, ¶ 21, 328 P.3d at 109. Further, in a footnote, the court observed:

The choice of evils defense also requires that the conduct in which the defendant was engaged be necessary to avoid a harm “which is about to occur by reason of a situation occasioned or developed through no conduct of the [defendant].” § 18-1-702(1). The instruction in this case did not explain this requirement to the jury. To the extent that omitting this element of the defense was error, however, it inured to Carbajal’s benefit.

*Carbajal*, ¶ 21 n.5, 328 P.3d at 109 n.5. Accordingly, the model instruction includes the above language that was omitted from the instruction in *Carbajal*.

However, in *Carbajal* the court was not called upon to address the applicability of the following provision of the choice of evils defense: “and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.” § 18-1-702(1), C.R.S. 2020. And the Committee has elected to refrain from expressing an opinion concerning this issue. See also § 18-1-702(2), C.R.S. 2020 (“When evidence relating to the defense of justification under this section is offered by the

defendant, before it is submitted for the consideration of the jury, the court shall first rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.”).

## H:65 POSSESSION OF A HANDGUN BY A JUVENILE – PERMISSIBLE PURPOSE

The evidence presented in this case has raised the affirmative defense of “permissible purpose,” as a defense to possession of a handgun by a juvenile.

The defendant’s conduct was legally authorized if:

- [1. he [she] was in attendance at a hunter’s safety course or a firearms safety course.]
- [1. he [she] was engaging in practice in the use of a firearm or target shooting,
  2. at an established range authorized by the governing body of the jurisdiction in which such range was located or any other area where the discharge of a firearm was not prohibited.]
- [1. he [she] was engaging in an organized competition involving the use of a firearm or participating in or practicing for a performance by [insert name of a group organized under 501(c)(3) as determined by the federal internal revenue service] which uses firearms as a part of such performance.]
- [1. hunting or trapping pursuant to a valid [insert description a license pursuant to article 4 of title 33, C.R.S.] issued to him [her].]
- [1. traveling with any handgun in his [her] possession,
  2. being unloaded,
  3. to or from any [insert description of activity described in subparagraph (I), (II), (III), or (IV) of section 18-12-108.5(2)(a)].]
- [1. he [she] was on real property under the control of his [her] parent, legal guardian, grandparent, and

2. he [she] had the permission of his [her] parent, legal guardian, to possess a handgun.]
- [1. he [she] was at his [her] residence, and
2. with the permission of his [her] [parent] [legal guardian,
3. possessed a handgun for the purpose of exercising the right [insert a description of the right of self-defense, as defined by section 18-1-704, or of the right to use deadly force against an intruder, as defined by section 18-1-704.5].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of possession of a handgun by a juvenile. In that event, you must return a verdict of not guilty of possession of a handgun by a juvenile.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of possession of a handgun by a juvenile must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-12-108.5(2), C.R.S. 2020.
2. See Instruction F:199 (defining "loaded," pursuant to section 18-12-108.5(3), for purposes of explaining the meaning of the term "unloaded," as

used in the affirmative defense related to travel that is established by section 18-12-108.5 (2)(a)(V)).

3. See *People in the Interest of L.M.*, 17 P.3d 829, 830 (Colo. App. 2000) (“we conclude that the parental permission language in § 18-12-108.5(2)(b) is an affirmative defense to the offense of unlawful possession of a handgun by a juvenile”).

4. If the evidence warrants instructing the jury concerning more than one of the affirmative defenses that are defined in section 18-12-108.7(2), use a separate instruction for each such defense.

## **H:66 UNLAWFULLY PROVIDING A HANDGUN OR FIREARM TO A JUVENILE OR PERMITTING A JUVENILE TO POSSESS A HANDGUN OR FIREARM – PHYSICAL HARM FROM ATTEMPT TO DISARM**

The evidence presented in this case has raised the affirmative defense of “physical harm from attempt to disarm,” as a defense to [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]].

The defendant’s conduct was legally authorized if:

1. he [she] believed that the juvenile would physically harm him [her] if he [she] attempted to disarm the juvenile or prevent the juvenile from unlawfully possessing a handgun.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]]. In that event, you must return a verdict of not guilty of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [unlawfully providing a [handgun] [firearm] to a juvenile] [permitting a juvenile to possess a [handgun] [firearm]] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that

offense.

#### COMMENT

1. *See* § 18-12-108.7(4), C.R.S. 2020.

## **H:67 TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK – PERMISSIBLE TRANSFER**

The evidence presented in this case has raised the affirmative defense of “permissible transfer” as a defense to [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112].

The defendant’s conduct was legally authorized if:

- [1. the transfer was of [an antique firearm] [a curio or relic].]
- [1. the transfer was a bona fide gift or loan between immediate family members (which are limited to spouses, parents, children, siblings, grandparents, grandchildren, nieces, nephews, first cousins, aunts, and uncles).]
- [1. the transfer occurred [by operation of law] [because of the death of a person for whom the prospective transferor was an executor or administrator of an estate or a trustee of a trust created in a will].]
- [1. the transfer was temporary, and
  2. it occurred while in the home of the unlicensed transferee, and
  3. the unlicensed transferee was not prohibited from possessing firearms, and
  4. the unlicensed transferee reasonably believed that possession of the firearm was necessary to prevent imminent death or serious bodily injury to the unlicensed transferee.]
- [1. the transfer was a temporary transfer of possession,
  2. without transfer of ownership or a title to ownership,
  3. which took place [at a shooting range located in or on premises

owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in firearms] [at a target firearm shooting competition under the auspices of, or approved by, a state agency or a nonprofit organization] [while hunting, fishing, target shooting, or trapping], if the hunting, fishing, target shooting, or trapping] was legal in all places where the unlicensed transferee possessed the firearm, and the unlicensed transferee held any license or permit that was required for such hunting, fishing, target shooting, or trapping].

[1. the transfer was made to facilitate the repair or maintenance of the firearm, and

2. all parties who possessed the firearm as a result of the transfer could legally possess a firearm.]

[1. the transfer was a temporary transfer that occurred while in the continuous presence of the owner of the firearm.]

[1. the transfer was a temporary transfer for not more than seventy-two hours.]

[1. the transfer was from a person serving in the armed forces of the United States who was to be deployed outside of the United States within the next thirty days,

2. to a spouse, parent, child, sibling, grandparent, grandchild, niece, nephew, first cousin, aunt, or uncle of the person.]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which

is an essential element of [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112]. In that event, you must return a verdict of not guilty of [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [transfer of a firearm without a background check] [accepting possession of a firearm without approval] [insert a description of one of the other transfer offenses proscribed by section 18-12-112] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-12-112(6)(a)-(i), C.R.S. 2020.
2. See Instruction F:19 (defining "antique firearm"); Instruction F:82 (defining "curio or relic"); Instruction F:332 (defining "serious bodily injury").
3. When instructing the jury concerning the "repair or maintenance" exception of section 18-12-112(6)(f), draft a special instruction explaining the relevant portion(s) of the following provisions:

An owner, manager, or employee of a business that repairs or maintains firearms may rely upon a transferor's statement that he or she may legally possess a firearm unless the owner, manager, or employee has actual knowledge to the contrary and may return possession of the firearm to the transferor upon completion of the repairs or maintenance without a background check.

Unless a transferor of a firearm has actual knowledge to the contrary, the transferor may rely upon the statement of an owner, manager, or employee of a business that repairs or maintains firearms that no owner, manager, or employee of the business is prohibited from possessing a firearm.

§ 18-12-112(7)(a), (b), C.R.S. 2020.

4. Although section 18-12-112(6) states that the enumerated exceptions apply to the “provisions of this section,” it appears that all of the exceptions are intended to address conduct by a transferor in violation of section 18-12-112(1)(a), (9)(a).
5. If the evidence warrants instructing the jury concerning more than one of the affirmative defenses that are defined in section 18-12-112(6), use a separate instruction for each such defense.

## **H:67.2 UNLAWFUL SALE, TRANSFER, OR POSSESSION OF A LARGE-CAPACITY MAGAZINE – LAWFUL OWNERSHIP**

The evidence presented in this case has raised the affirmative defense of “lawful ownership,” as a defense to unlawful sale, transfer, or possession of a large-capacity magazine.

The defendant’s conduct was legally authorized if:

1. he [she] owned the large-capacity magazine on July 1, 2013, and
2. he [she] maintained continuous possession of the large-capacity magazine.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of unlawful sale, transfer, or possession of a large-capacity magazine. In that event, you must return a verdict of not guilty of unlawful sale, transfer, or possession of a large-capacity magazine.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of unlawful sale, transfer, or possession of a large-capacity magazine must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### COMMENT

1. *See* § 18-12-302(2)(a), C.R.S. 2020.

2. "Continuous possession" is not defined by statute. Cf. Instruction F:281 (defining "possession").
3. The Committee added this instruction in 2016.

## **H:67.4 ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL OR MARIJUANA BY AN UNDERAGE PERSON; ILLEGAL POSSESSION OF MARIJUANA PARAPHERNALIA BY AN UNDERAGE PERSON – REPORTING AN EMERGENCY**

The evidence presented in this case has raised the affirmative defense of “reporting an emergency” as a defense to [illegal possession or consumption of ethyl alcohol by an underage person] [illegal possession or consumption of marijuana by an underage person] [illegal possession of marijuana paraphernalia by an underage person].

The defendant’s conduct was legally authorized if:

1. he [she] called 911 and reported in good faith that another underage person was in need of medical assistance due to alcohol or marijuana consumption, and
2. he [she] called 911 and provided his [her] name to the 911 operator, and
3. he [she] was the first person to make the 911 report, and
4. he [she] remained on the scene with the underage person in need of medical assistance until assistance arrived and cooperated with medical assistance or law enforcement personnel on the scene.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [illegal possession or consumption of ethyl alcohol by an underage person] [illegal possession or consumption of

marijuana by an underage person] [illegal possession of marijuana paraphernalia by an underage person]. In that event, you must return a verdict of not guilty of [illegal possession or consumption of ethyl alcohol by an underage person] [illegal possession or consumption of marijuana by an underage person] [illegal possession of marijuana paraphernalia by an underage person].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [illegal possession or consumption of ethyl alcohol by an underage person] [illegal possession or consumption of marijuana by an underage person] [illegal possession of marijuana paraphernalia by an underage person] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. See § 18-13-122(7)(a), C.R.S. 2020 (providing for immunity “from arrest and prosecution under this section”).
2. See Instruction F:208.5 (defining “marijuana” (possession or consumption by underage person)).
3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event,” based on section 18-1-711(3)(h), C.R.S. 2020); Instruction H:68 (affirmative defense of “medical marijuana”).
4. The Committee expresses no opinion concerning whether this provision allows for the determination of immunity prior to trial. See, e.g., *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was

intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”).

5. *See also* § 18-13-122(7)(b) (“The immunity described in paragraph (a) of this subsection (7) also extends to the underage person who was in need of medical assistance due to alcohol or marijuana consumption if the conditions of said paragraph (a) are satisfied.”).

6. The Committee added this instruction in 2016.

## **H:67.6 CRIMINAL USURY – RATE NOT EXCESSIVE**

The evidence presented in this case has raised the affirmative defense of “rate not excessive,” as a defense to criminal usury.

The defendant’s conduct was legally authorized if:

1. at the time of making the loan finance charge it could not have been determined by a mathematical computation that the annual percentage rate would exceed an annual percentage rate of forty-five percent; or the loan finance charge was not in excess of an annual percentage rate of forty-five percent when the rate of the finance charge was calculated on the unpaid balance of the debt on the assumption that the debt was to be paid according to its terms and was not paid before the end of the agreed term, and
2. the provisions relating to the loan finance charge were set forth in a written agreement signed by all the parties and such written agreement was submitted to the court and the district attorney at least ten days prior to trial.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of criminal usury. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of criminal usury must depend upon your determination whether the prosecution has met its burden of proof with

respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-15-104(2), (3), C.R.S. 2020.
2. Regarding the second element, the court may wish to consider as a matter of law whether a written agreement was submitted to the court and the district attorney at least ten days prior to trial. If the court can conclude as a matter of law that an agreement was so submitted, it should excise the temporal language from the second element.
3. The Committee added this instruction in 2016.

## **H:67.8 COLLECTION OF PROHIBITED FEES BY A LOAN FINDER – EXEMPT PERSON OR ORGANIZATION**

The evidence presented in this case has raised the affirmative defense of “exempt person or organization,” as a defense to collection of prohibited fees by a loan finder.

The defendant’s conduct was legally authorized if:

1. the defendant was [a supervised financial organization or one of its employees, acting within the scope of his [her] employment] [a person duly licensed to make supervised loans] [a business development corporation] [a licensed pawnbroker, acting as such] [a governmental entity or employee thereof, acting in his [her] official capacity] [a mortgage broker, acting as such].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of collection of prohibited fees by a loan finder. In that event, you must return a verdict of not guilty of that offense.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of collection of prohibited fees by a loan finder must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 18-15-109(1)(c), (3), C.R.S. 2020.
2. *See* Instruction F:232.7 (defining “mortgage broker”).
3. If necessary, the court should provide additional instructions defining the relevant terms. *See, e.g.*, § 5-1-301(45), C.R.S. 2020 (defining “supervised financial organization”); § 5-2-302, C.R.S. 2020 (license to make supervised loans); §§ 7-48-101 to -116, C.R.S. 2020 (business development corporations); §§ 29-11.9-101 to -104, C.R.S. 2020 (pawnbrokers).
4. The Committee added this instruction in 2016.
5. In 2017, the Committee updated a statutory cross-reference in Comment 3 pursuant to a legislative amendment. *See* Ch. 246, sec. 5, § 18-15-109(1)(c)(IV), 2017 Colo. Sess. Laws 1030, 1041.

## H:68 MEDICAL MARIJUANA

The evidence presented in this case has raised the affirmative defense of “medical marijuana,” as a defense to [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

The defendant’s conduct was legally authorized if:

1. [the defendant was] [the defendant was a primary care-giver for] a patient who had been previously diagnosed by a physician as having a debilitating medical condition, and
2. the [defendant] [patient] had been advised by his [her] physician, in the context of a bona fide physician-patient relationship, that he [she] might benefit from the medical use of marijuana in connection with a debilitating medical condition, and
3. the [defendant] [patient] and [his [her] primary care-giver] [defendant] were collectively in possession of no more than two ounces of a usable form of marijuana, and no more than six marijuana plants (with three or fewer being mature flowering plants that were producing a usable form of marijuana) [, or a larger quantity of marijuana that was medically necessary to address the [defendant’s] [patient’s] debilitating medical condition][.]

[, and]

- [.] the [defendant] [patient] did not engage in the medical use of marijuana in a way that endangered the health or well-being of any person, or in plain view of, or in a place open to, the general public[.]

[, and]

- [.] the [defendant] [patient] was not under the age of eighteen, or,

if he [she] was under the age of eighteen, all of the following conditions had been satisfied: two physicians had diagnosed the [defendant] [patient] as having a debilitating medical condition; one of the diagnosing physicians had explained the possible risks and benefits of medical use of marijuana to the [defendant] [patient] and each of the [defendant's] [patient's] parents residing in Colorado; the diagnosing physicians had provided the [defendant] [patient] with the original or a copy of written documentation stating that the [defendant] [patient] had been diagnosed with a debilitating medical condition and the diagnosing physician's conclusion that the [defendant] [patient] might benefit from the medical use of marijuana; each of the [defendant's] [patient's] parents residing in Colorado had consented in writing to the state health agency to permit the [defendant] [patient] to engage in the medical use of marijuana; a parent residing in Colorado had consented in writing to serve as a [defendant's] [patient's] primary care-giver; a parent serving as a primary care-giver had submitted a complete application for a registry identification card to the state health agency (which must have included (a) the original or a copy of written documentation stating that the [defendant] [patient] had been diagnosed with a debilitating medical condition and the physician's conclusion that the patient might benefit from the medical use of marijuana; (b) the name, address, date of birth, and social security number of the [defendant] [patient]; (c) the name, address, and telephone number of the [defendant's] [patient's] physician; (d) the name and address of the [defendant's] [patient's] primary care-giver, if one was designated at the time of application; and (e) the written parental consent(s) described above)); and the state health agency had approved the [defendant's] [patient's] application and had transmitted the [defendant's] [patient's] registry identification card to the parent designated as a primary care-giver; and the primary care-giver was controlling the acquisition of marijuana and the dosage and frequency of its use by the [defendant] [patient][.]

[, and]

- [\_. the [defendant] [patient] did not fraudulently represent a medical condition to a physician, state health agency, or state or local law enforcement official for the purpose of falsely obtaining a registry identification card or for the purpose of avoiding arrest and prosecution; fraudulently use or commit theft of any person's registry identification card to acquire, possess, produce, use, sell, distribute, or transport marijuana (including, but not limited to, a card that was required to be returned where the patient was no longer diagnosed as having a debilitating medical condition); fraudulently produce, counterfeit, or tamper with one or more registry identification cards; or, without the written authorization of the marijuana registry patient, release or make public any confidential record or any confidential information contained in any such record that was provided to or by the marijuana registry of the state health agency[.]]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana. In that event, you must return a verdict of not guilty of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing]

marijuana must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* Colo. Const. Art. XVIII, § 14(2)(a), (b), (4)(a), (b), (5)(a), (6)(a)–(i), (8)(a)–(d); § 18-18-406.3(2)–(5), C.R.S. 2020; § 18-18-433, C.R.S. 2020 (“The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in conformance with . . . section 14 of article XVIII of the state constitution”).

2. *See* Instruction F:89 (defining “debilitating medical condition”); Instruction F:225 (defining “medical use”); Instruction F:258 (defining “parent”); Instruction F:259 (defining “patient”); Instruction F:279 (defining “physician”); Instruction F:285 (defining “primary care-giver”); Instruction F:360 (defining “tamper”); Instruction F:382 (defining “usable form of marijuana”); Instruction F:393.5 (defining “written documentation”); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining “state health agency” in a manner that is consistent with the use of the term “the department” in section 18-18-406.3, C.R.S. 2020).

3. When a defendant raises this affirmative defense as a primary care-giver, use the bracketed language referring to the “patient.”

4. In a case where the defendant was a registry patient and the prosecution alleges that the defendant engaged in a fraudulent activity prohibited by section 18-18-406.3(2)–(5), C.R.S. 2020, evidence proving the fraudulent activity will necessarily establish that the defendant acted knowingly. However, in a case where the defendant asserting the affirmative defense was a primary care-giver for a patient who allegedly engaged in a fraudulent activity prohibited by section 18-18-406.3(2)–(5), C.R.S. 2020, it is unclear whether the court should instruct the jury that, in order to disprove the affirmative defense, the prosecution must establish that the defendant had knowledge of the fraud. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

5. See *People v. Fioco*, 2014 COA 22, ¶¶ 13–24, 342 P.3d 530, 533 (holding, as a matter of first impression, that the medical marijuana affirmative defense did not apply to a defendant who obtained a physician’s assessment and certification of medical necessity after he committed the offense).

6. In 2016, the General Assembly amended section 18-18-406(3)(b)(I), C.R.S. 2020, to read, “It is not a violation of this subsection (3) if . . . [t]he person is lawfully cultivating medical marijuana pursuant to the authority granted in section 14 of article XVIII of the state constitution *in an enclosed and locked space*” (emphasis added). See Ch. 247, sec. 1, § 18-18-406(3)(b)(I), 2016 Colo. Sess. Laws 1017, 1017. Because this instruction already encompasses the affirmative defense authorized by the Colorado Constitution, the Committee has not drafted an affirmative defense instruction specific to the statute. Furthermore, because the constitutional defense applies regardless of whether the space is enclosed or locked – and because the statute cannot constitutionally narrow the breadth of this defense – the Committee has not included the “enclosed or locked space” language in its instruction.

7. Section 18-18-406(3.5) provides: “A person is not in compliance with the authority to assist another individual granted in section 14(2)(b) . . . of article XVIII of the state constitution . . . if the person possesses any marijuana plant he or she is growing on behalf of another individual, unless he or she is the primary caregiver for the individual and is in compliance with the requirements of section 25-1.5-106.” The Committee expresses no opinion regarding whether section 18-18-406(3.5) validly limits the affirmative defense set forth in section 14(2)(b) of article XVIII of the state constitution.

8. In 2015, the committee added Comment 5, citing to *People v. Fioco*.

9. In 2016, the Committee added Comment 6.

10. In 2017, the Committee added Comment 7 pursuant to new legislation, and it renumbered the subsequent elements. *See* Ch. 401, sec. 2, § 18-18-406(3.5), 2017 Colo. Sess. Laws 2090, 2091.

## H:69 RECREATIONAL MARIJUANA

The evidence presented in this case has raised the affirmative defense of “recreational marijuana” as a defense to [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana.

The defendant’s conduct was legally authorized if:

1. he [she] was twenty-one years of age or older, and
- [2. possessed, used, displayed, purchased, or transported marijuana accessories or one ounce or less of marijuana.]
- [2. possessed, grew, processed, or transported no more than six marijuana plants, with three or fewer being mature, flowering plants, and possessed the marijuana produced by the plants on the premises where the plants were grown, provided that the growing took place in an enclosed, locked space, was not conducted openly or publicly, and was not made available for sale, and
3. if the cultivation area was located in a residence where a person under twenty-one years of age lived, the cultivation area itself was enclosed and locked; or, if the cultivation area was located in a residence where no person under twenty-one years of age lived, the residence had external locks and, if a person under twenty-one years of age entered the residence, defendant ensured that access to the cultivation site was reasonably restricted for the duration of that person’s presence in the residence.]
- [2. transferred one ounce or less of marijuana without remuneration to a person who was twenty-one years of age or older.]
- [2. consumed marijuana, provided that the consumption was not conducted openly and publicly or in a manner that endangered

others.]

- [2. assisted another person who was twenty-one years of age or older in [insert act(s) described in Colo. Const. Art. XVIII, § 16(3)(a)-(d)].]
- [2. manufactured, possessed, or purchased marijuana accessories, or sold marijuana accessories to a person who was twenty-one years of age or older.]
- [2. possessed, displayed, or transported marijuana or marijuana products; purchased marijuana from a marijuana cultivation facility; purchased marijuana or marijuana products from a marijuana product manufacturing facility; or sold marijuana or marijuana products to consumers, and
3. had obtained a current, valid license to operate a retail marijuana store or was acting in his [her] capacity as an owner, employee or agent of a licensed retail marijuana store.]
- [2. cultivated, harvested, processed, packaged, transported, displayed, or possessed marijuana; delivered or transferred marijuana to a marijuana testing facility; sold marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; or purchased marijuana from a marijuana cultivation facility, and
3. had obtained a current, valid license to operate a marijuana cultivation facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana cultivation facility.]
- [2. packaged, processed, transported, manufactured, displayed, or possessed marijuana or marijuana products; delivered or transferred marijuana or marijuana products to a marijuana testing facility; sold marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; purchased marijuana from a marijuana cultivation facility; or

purchased marijuana or marijuana products from a marijuana product manufacturing facility, and

3. had obtained a current, valid license to operate a marijuana product manufacturing facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana product manufacturing facility.]
- [2. possessed, cultivated, processed, repackaged, stored, transported, displayed, transferred or delivered marijuana or marijuana products, and
3. had obtained a current, valid license to operate a marijuana testing facility or was acting in his [her] capacity as an owner, employee, or agent of a licensed marijuana testing facility.]
- [2. leased or otherwise allowed the use of property owned, occupied or controlled by any person, corporation or other entity for [insert activity or activities described in Colo. Const. Art. XVIII, § 16(4)(a)-(e)].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana. In that event, you must return a verdict of not guilty of [possession] [cultivation] [distribution] [use] [transfer] [sale] [dispensing] [manufacturing] [processing] [of] marijuana.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your

verdict concerning the charge of [possession] [cultivation] [distribution] [use] [transfer] [sale] [of] [dispensing] [manufacturing] [processing] marijuana must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See Colo. Const. Art. XVIII, § 16(3)(a)-(e), (4)(a)-(f); § 18-18-406(3)(b), C.R.S. 2020; § 18-18-433, C.R.S. 2020 (“The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in conformance with section 16 of article xviii of the state constitution. . . .”).

2. See Instruction F:122 (defining “enclosed”); Instruction F:200 (defining “locked space”); Instruction F:209 (defining “marijuana accessories”); Instruction F:211 (defining “marijuana cultivation facility”); Instruction F:212 (defining “marijuana establishment”); Instruction F:213 (defining “marijuana product manufacturing facility”); Instruction F:214 (defining “marijuana products”); Instruction F:215 (defining “marijuana testing facility”); Instruction F:223 (defining “medical marijuana center”); Instruction F:310 (defining “remuneration”); Instruction F:321 (defining “retail marijuana store”).

3. Section 18-18-406(3.5) provides: “A person is not in compliance with the authority to assist another individual granted in . . . section 16(3)(e) of article XVIII of the state constitution . . . if the person possesses any marijuana plant he or she is growing on behalf of another individual, unless he or she is the primary caregiver for the individual and is in compliance with the requirements of section 25-1.5-106.” The Committee expresses no opinion regarding whether section 18-18-406(3.5) validly limits the affirmative defense set forth in section 16(3)(e) of article XVIII of the state constitution.

4. See *People v. Lente*, 2017 CO 74, ¶ 27, 406 P.3d 829, 833 (holding that “making hash oil by extraction is manufacturing, not processing,” meaning prosecution for such extraction is not foreclosed by Amendment 64, Colo. Const. art. XVIII, § 16(3)(b)).

5. In 2017, the Committee added Comment 3 pursuant to new legislation, *see* Ch. 401, sec. 2, § 18-18-406(3.5), 2017 Colo. Sess. Laws 2090, 2091, and it also added Comment 4.

## **H:70 OFFENSES RELATED TO PROVIDING A PLACE FOR THE UNLAWFUL DISTRIBUTION, TRANSPORTATION, OR MANUFACTURE OF CONTROLLED SUBSTANCES (LACK OF KNOWLEDGE; REPORTED CONDUCT)**

The evidence presented in this case has raised the affirmative defense of ["lack of knowledge"] ["reported conduct"], as a defense to [insert name of offense from section 18-18-411(1), (2)].

The defendant's conduct was legally authorized if:

- [1. The person who committed the [insert description of controlled substance offense] did so while unlawfully on or in the structure or place, and
  2. the defendant lacked knowledge of the unlawful presence of that other person.]
- [1. the defendant had notified a law enforcement agency with jurisdiction to make an arrest for the [insert description of controlled substance offense].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense, which is an essential element of [insert name of offense from section 18-18-411(1), (2)]. In that event, you must return a verdict of not guilty of [insert name of offense from section 18-18-411(1), (2)].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of offense from section 18-18-

411(1), (2)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-18-411(3), C.R.S. 2020.

## **H:71 RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR (REASONABLE RELIANCE ON IDENTIFICATION)**

The evidence presented in this case has raised the affirmative defense of “reasonable reliance on identification,” as a defense to retail delivery of methamphetamine precursor drugs to a minor.

The defendant’s conduct was legally authorized if:

1. the defendant was the person performing the retail sale, and
2. he [she] was presented with and reasonably relied upon a document that identified the person receiving the methamphetamine precursor drug as being eighteen years of age or older.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of retail delivery of methamphetamine precursor drugs to a minor. In that event, you must return a verdict of not guilty of retail delivery of methamphetamine precursor drugs to a minor.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of retail delivery of methamphetamine precursor drugs to a minor must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

COMMENT

1. *See* § 18-18-412.8(2.5)(b), C.R.S. 2020.

## **H:72 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (LACK OF KNOWLEDGE AND PARTICIPATION)**

The evidence presented in this case has raised the affirmative defense of “lack of knowledge and participation,” as a defense to [insert name of offense relating to the retail sale of methamphetamine precursor drugs].

The defendant’s conduct was legally authorized if:

1. he [she] was an owner, operator, manager, or supervisor at the store in which, or from which, the unlawful retail sale of a methamphetamine precursor drug was made, and
2. he [she] did not have knowledge of the sale, and
3. he [she] did not participate in the sale, and
4. he [she] did not knowingly direct the person who made the sale to commit [insert name of the retail sale of methamphetamine precursor drug offense].

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of [insert name of offense relating to the retail sale of methamphetamine precursor drugs]. In that event, you must return a verdict of not guilty of [insert name of offense relating to the retail sale of methamphetamine precursor drugs].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of [insert name of offense relating to the

retail sale of methamphetamine precursor drugs] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 18-18-412.8(3)(b), C.R.S. 2020.

## **H:73 DRIVING WITHOUT A VALID LICENSE (EMERGENCY OR EXEMPTION)**

The evidence presented in this case has raised the affirmative defense of “emergency or exemption” as a defense to driving without a valid license.

The defendant’s conduct was legally authorized if:

1. the defendant’s driving was necessary as an emergency measure to avoid an imminent public or private injury, and
  2. the injury was about to occur by reason of a situation occasioned or developed through no conduct of the defendant, and
  3. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute prohibiting driving without a valid license.]
- [1. he [she] was [insert applicable exemption from section 42-2-102, C.R.S. 2020].]

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, [at least one of] the above numbered condition[s].

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of driving without a valid license. In that event, you must return a verdict of not guilty of driving without a valid license.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s

conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving without a valid license must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

#### COMMENT

1. *See* § 42-2-101(8)(a), (b), C.R.S. 2020; *see also* § 42-2-101(9), C.R.S. 2020 (“The issue of justification or exemption is an affirmative defense.”).

## **H:74 SPEEDING (EMERGENCY)**

The evidence presented in this case has raised the affirmative defense of “emergency” as a defense to speeding.

The defendant’s conduct was legally authorized if:

1. the defendant’s speeding was necessary as an emergency measure to avoid an imminent public or private injury, and
2. the injury was about to occur by reason of a situation occasioned or developed through no conduct of the defendant, and
3. the injury was of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweighed the desirability of avoiding the injury sought to be prevented by the statute prohibiting speeding.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of speeding. In that event, you must return a verdict of not guilty of speeding.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of speeding must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. *See* § 42-4-1101(9)(a), C.R.S. 2020.
2. Section 42-4-1101(9)(b), C.R.S. 2020, establishes an exemption for a driver of an authorized emergency vehicle who meets the requirements set forth in section 42-4-108, C.R.S. 2020. However, the Committee has not drafted a model affirmative defense instruction.

## **H:75 DRIVING UNDER A RESTRAINT FROM ANOTHER STATE (VALID LICENSE ISSUED SUBSEQUENT TO RESTRAINT)**

The evidence presented in this case has raised the affirmative defense of “valid license issued subsequent to restraint,” as a defense to driving under a restraint from another state.

The defendant’s conduct was legally authorized if:

1. he [she] possessed a valid driver’s license issued subsequent to the restraint that is the basis of the alleged violation.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of driving under a restraint from another state. In that event, you must return a verdict of not guilty of driving under a restraint from another state.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving under a restraint from another state must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

### **COMMENT**

1. *See* § 42-2-138(5), C.R.S. 2020.

## **H:76 DRIVING WITH EXCESSIVE ALCOHOL CONTENT – SUBSEQUENT CONSUMPTION OF ALCOHOL**

The evidence presented in this case has raised the affirmative defense of “subsequent consumption of alcohol,” as a defense to driving with excessive alcohol content.

The defendant’s conduct was legally authorized if:

1. he [she] consumed alcohol between the time that he [she] stopped driving and the time that the testing occurred, and
2. the defendant’s B.A.C. of 0.08 or more was reached as a result of alcohol consumed by the defendant after he [she] stopped driving.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant’s conduct was not legally authorized by this defense, which is an essential element of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter. In that event, you must return a verdict of not guilty of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant’s conduct was not legally authorized by this defense. In that event, your verdict concerning the charge of driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of that offense.

## COMMENT

1. See § 42-4-1301(2)(a), C.R.S. 2020.
2. In 2015, the Committee modified the first paragraph of the instruction and replaced a lengthy description of the offense (which previously read: “a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter”) with the more concise description that appears in Instruction 42:13 (“driving with excessive alcohol content”).

In 2015, the Committee corrected the instruction by deleting the word “all” and substituting the words: “at least one of the above.”



## CHAPTER I

### INSANITY

<a href="#"><u>I:01</u></a>	AFFIRMATIVE DEFENSE OF INSANITY
<a href="#"><u>I:02.INT</u></a>	AFFIRMATIVE DEFENSE OF INSANITY – INTERROGATORY (ONE FELONY CHARGE)
<a href="#"><u>I:03.INT</u></a>	AFFIRMATIVE DEFENSE OF INSANITY – INTERROGATORY (MORE THAN ONE FELONY CHARGE)
<a href="#"><u>I:04</u></a>	INFORMATIONAL INSTRUCTION ON COMMITMENT PROCEDURE
<a href="#"><u>I:05</u></a>	LIMITING INSTRUCTION AS TO EVIDENCE OBTAINED DURING A COURT-ORDERED EXAMINATION (PLEA OF NOT GUILTY BY REASON OF INSANITY)
<a href="#"><u>I:06</u></a>	SPECIAL VERDICT FORM – INSANITY

### CHAPTER COMMENTS

1. The instructions in this chapter apply to offenses committed on or after July 1, 1995. For offenses committed prior to that date, refer to earlier editions of COLJI-Crim.
2. When the jury is instructed concerning the affirmative defense of insanity, the following language should be included as the final element of the offense (and it should be numbered as a separate element, as shown in the example below, whether insanity is the only affirmative defense or an alternative to one of the other affirmative defenses, which are to be referenced using the “was not legally authorized” language that appears within the final bracketed element of each model elemental instruction):  
  
\_ . and that the defendant was not insane, as defined in  
Instruction \_\_\_\_.

3. This chapter is limited to the affirmative defense of insanity. In cases where the defendant enters a general plea of not guilty and mental condition evidence is admitted pursuant to section 16-8-107(1)(a) or section 16-8-107(1.5)(a), refer to Instruction D:04 (limiting instruction for evidence of the defendant's mental processes acquired during a court-ordered examination).

## I:01 AFFIRMATIVE DEFENSE OF INSANITY

The evidence in this case has raised the defense of insanity, as a defense to the crime[s] of [insert name of offense(s) here].

The defendant was insane at the time of the commission of the act[s] if:

1. he [she] was so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act; or
2. he [she] suffered from a condition of mind caused by a mental disease or defect that prevented him [her] from forming a culpable mental state that is an essential element of a crime charged.

But care should be taken not to confuse mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when an act is induced by any of these causes, the person is accountable to the law.

In addition, “diseased or defective in mind” does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Similarly, “mental disease or defect” means only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance. “Mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The prosecution has the burden to prove beyond a reasonable doubt that the defendant was not insane at the time of the commission of the act[s]. In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, both of the above numbered

conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove that the defendant was sane at the time of the commission of the act[s], which is an essential element of [insert name(s) of offense(s)]. In that event, you must find the defendant not guilty and have the foreperson sign the designated section of Part A of the verdict form[s] to indicate your verdict[s].

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved that the defendant was not insane at the time of the commission of the act[s]. In that event, your verdict[s] concerning the charge[s] of [insert name(s) of offense(s)] must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of [that] [those] offense[s].

#### COMMENT

1. See §§ 16-8-101.5(1)(a), (b), (2)(a), (b); 16-8-102(4.7), C.R.S. 2020.
2. See Instructions F:99 (defining “diseased or defective in mind,” which is incorporated into the elemental instruction above); Instruction F:183 (defining “insanity,” which is incorporated into the elemental instruction above); Instruction F:226 (defining “mental disease or defect,” which is incorporated into the elemental instruction above).
3. The phrase “incapable of distinguishing right from wrong” is not defined by statute. In *People v. Serravo*, 823 P.2d 128, 138-39 (Colo. 1992), the court provided the following guidance:

A clarifying instruction on the definition of legal insanity, therefore, should clearly state that, as related to the conduct charged as a crime, the phrase ‘incapable of distinguishing right from wrong’ refers to a person’s cognitive inability, due to a mental disease or defect, to distinguish right from wrong as measured by a societal standard of

morality, even though the person may be aware that the conduct in question is criminal. Any such instruction should also expressly inform the jury that the phrase ‘incapable of distinguishing right from wrong’ does not refer to a purely personal and subjective standard of morality.

However, in *People v. Galimanis*, 944 P.2d 626, 631-32 (Colo. App. 1997), a division of the Court of Appeals rejected, as erroneous, the suggestion in the “Notes on Use” following COLJI-Crim. No. 3:10-A (1993 Supp.), that a “[*Serravo* clarifying instruction] must be given in all insanity cases.” The court reasoned as follows: “In context, it is apparent in *Serravo* that when the supreme court noted that a clarifying instruction on the definition of legal insanity ‘should clearly state’ that right from wrong is measured by a societal standard of morality, it was referring only to instances when a clarifying instruction was necessary.” *Galimanis*, 944 P.2d at 632. Further, applying this reading of *Serravo* to the facts of the case at hand, the division in *Galimanis* concluded that a clarifying instruction was not warranted because: (1) “defendant did not contend that his actions were justified under his own moral beliefs or moral code, nor did he assert that he was conscious that what he was doing was right or wrong, either legally or morally”; and (2) “he provided no evidence that he was commanded by God to kill the victim.” *Id.* at 631.

4. The term “moral obliquity” is not defined by statute. Although COLJI-Crim. 3:11-A (1993) and COLJI-Crim. F(164) (2008) defined the term based on language from *People v. Serravo*, 823 P.2d at 137, the court in *Serravo* did not hold that the term must be defined for the jury in every case. Accordingly, the division in *People v. Galimanis*, 944 P.2d at 632, held that the decision whether to submit a definitional instruction is a matter of trial court discretion: “The supreme court has determined that the words ‘depravity’ and ‘moral obliquity,’ while not used in everyday conversation, are well within the comprehension of a jury. *Simms v. People*, 482 P.2d 974 (Colo. 1971). Thus, the failure of a trial court to define these terms further does not constitute error.”

5. Section 16-8-105.5(3), C.R.S. 2020, appears to contemplate that any defendant asserting the defense will be charged with at least one felony. It

is unclear whether the same procedure is to be used in the exceedingly rare case where a defendant who is charged only with misdemeanors raises the defense:

When the affirmative defense of not guilty by reason of insanity has been raised, the jury shall be given special verdict forms containing interrogatories. The trier of fact shall decide first the question of guilt as to felony charges that are before the court. If the trier of fact concludes that guilt has been proven beyond a reasonable doubt as to one or more of the felony charges submitted for consideration, the special interrogatories shall not be answered. Upon completion of its deliberations on the felony charges as previously set forth in this subsection (3), the trier of fact shall consider any other charges before the court in a similar manner; except that it shall not answer the special interrogatories regarding such charges if it has previously found guilt beyond a reasonable doubt with respect to one or more felony charges. The interrogatories shall provide for specific findings of the jury with respect to the affirmative defense of not guilty by reason of insanity.

*Cf. People v. Collins*, 752 P.2d 93, 97 (Colo. 1988) (declining to address, in a case construing a structurally similar provision of the predecessor statute, “the procedure to be followed pursuant to the statute when charges other than or in addition to felony charges are involved and the defendant is acquitted of all the felony charges”).

6. A division of the Court of Appeals has observed that “there would appear to be little if any reason to inform the jury of the presumption of sanity where . . . the defendant has effectively overcome the presumption by presenting evidence of insanity sufficient to allow the issue to go to the jury.” *People v. Welsh*, 176 P.3d 781, 786 (Colo. App. 2007) (trial court’s decision to give the jury an instruction explaining the presumption of sanity did not rise to the level of plain error); *see also People v. Hill*, 934 P.2d 821 (Colo. 1997) (rejecting the defendant’s contention that a jury instruction stating that the law presumes everyone to be sane effectively directed a verdict against him); *People v. Bielecki*, 964 P.2d 598, 606 (Colo. App. 1998)

(rejecting the defendant's contention that a jury instruction stating the presumption of sanity impermissibly shifted the burden of proof to him).

7. In *People v. Bielecki*, 964 P.2d at 605, the division held that "it was error to instruct the jury that if defendant was found guilty on any offense he could not be found not guilty by reason of insanity on any other offense." Significantly, the error recognized in *Bielecki* (which the division ultimately concluded was invited) was purely instructional. The division explicitly rejected the defendant's claim that the special interrogatory procedure mandated by section 16-8-105.5 imposed a similar restriction:

Construing a substantially identical statute on the affirmative defense of impaired mental condition, the supreme court held in *Collins* that the statute did not violate defendant's due process rights, or impermissibly preclude the jury from considering the impaired mental condition defense as to each offense charged, merely by providing that the jury need not answer the special interrogatories on impaired mental condition if it found the defendant guilty on any charge.

The *Collins* court explained that the purpose of the special interrogatories was to enable the trial court to determine whether an acquitted defendant should be (1) released outright or (2) committed for treatment because impaired mental condition was the sole reason for the acquittal. A finding of guilt on one or more felony counts rendered the interrogatories irrelevant since, once the jury had found the defendant guilty of a felony, he was subject to incarceration in the Department of Corrections at the trial court's discretion, and the reasons for finding him not guilty of other charges were no longer important.

*People v. Bielecki*, 964 P.2d at 604-05.

8. See Instruction B:01, Comment 4 (in cases where the defendant enters a plea of "not guilty by reason of insanity," modify the paragraph of the introductory instruction that explains the defendant's plea).

9. See *People v. Voth*, 2013 CO 61 ¶ 37, 312 P.3d 144, 152-53 (“The language in subsection (1)(a) [of section 16-8-101.5] is unequivocal: A defendant need only be insane ‘at the time of the commission of the act.’ Similarly, the language in subsection (1)(b) implicitly limits the relevant period of insanity to the time of the offense by allowing defendants to assert insanity to negate the existence of criminal mens rea, which is necessarily tethered to the time of the alleged criminal conduct. Thus, although Colorado’s Criminal Code does not specifically recognize temporary insanity, the mental disease or defect underlying an insanity plea can be temporary in nature because the general insanity statute only requires that a defendant prove insanity at the time he or she committed the alleged crime.”).

10. The above model instruction is designed for cases where the jury is instructed concerning the definitions of insanity under both section 16-8-101.5(1)(a) and section 16-8-101.5(1)(b). In a case where only one of these definitions is submitted for the jury’s consideration, modify the second sentence of the burden-of-proof paragraph as follows: “In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.”

## **I:02.INT AFFIRMATIVE DEFENSE OF INSANITY – INTERROGATORY (ONE FELONY CHARGE)**

If you found the defendant guilty of [insert the name of the felony charge], you should disregard the remainder of this instruction and sign Section A of the verdict form for that charge to indicate your verdict of guilty.

If, however, you found the defendant not guilty of [insert the name of the felony charge], you should sign Section A of the verdict form to indicate your verdict of not guilty, and you should also answer the following verdict question in Section B of the verdict form:

Did you find the defendant not guilty solely based on the defense of insanity? (Answer “Yes” or “No”)

The Court reminds you that the prosecution has the burden to prove beyond a reasonable doubt each element of the crime charged, including that the defendant was not insane at the time of the commission of the act.

If you decided that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act, you should mark “Yes” in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form. If you decided that the prosecution failed to prove any other element beyond a reasonable doubt, you should mark “No” in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form.

### **COMMENT**

1. *See* Instruction I:06 (special verdict form – insanity).

**I:03.INT AFFIRMATIVE DEFENSE OF INSANITY –  
INTERROGATORY (MORE THAN ONE FELONY CHARGE)**

If you found the defendant guilty of one or more of the following charges [list, in the disjunctive, all felony charges], you should disregard the remainder of this instruction and sign Section A of the verdict form for each charge to indicate your verdict of guilty or not guilty on each charge.

If, however, you found the defendant not guilty of all of the following charges [list, in the conjunctive, all felony charges], you should sign Section A of the verdict form for each charge to indicate your verdict of not guilty, and you should also answer the following verdict question in Section B of the verdict form for each charge:

Did you find the defendant not guilty solely based on the defense of insanity? (Answer “Yes” or “No”)

The Court reminds you that the prosecution has the burden to prove beyond a reasonable doubt each element of the crime charged, including that the defendant was not insane at the time of the commission of the act.

If you decided that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act, you should mark “Yes” in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form. If you decided that the prosecution failed to prove any other element beyond a reasonable doubt, you should mark “No” in the appropriate place in Section B of the verdict form, and have the foreperson sign the designated line in that section of the verdict form.

**COMMENT**

1. *See* Instruction I:06 (special verdict form – insanity).

## I:04 INFORMATIONAL INSTRUCTION ON COMMITMENT PROCEDURE

This is an informational instruction and must have no persuasive bearing on the verdict[s] you arrive at under the evidence.

If a defendant is found not guilty by reason of insanity, it is the court's duty to commit the defendant to the Department of Human Services until such time as the court determines that the defendant no longer requires hospitalization because he [she] no longer suffers from a mental disease or defect which is likely to cause him [her] to be dangerous to himself [herself], to others, or to the community in the reasonably foreseeable future.

If a defendant is found not guilty by reason of insanity, he or she will never again be tried on the merits of the criminal charges filed against him or her.

### COMMENT

1. In *People v. Thomson*, 591 P.2d 1031, 1032 (Colo. 1979), the supreme court reasoned that, because "[r]ecent studies and cases have recognized that today's juries are distracted from their fact finding function by their concern that a defendant will be returned to the community at large if found not guilty by reason of insanity," "a defendant who is relying on an insanity defense is entitled, upon request, to an instruction on commitment procedures." However, the court also directed trial courts to include the prefatory admonition that is set forth in the first paragraph of the above model instruction. *Id.* at 1032 n.1.

In *Cordova v. People*, 817 P.2d 66 (Colo. 1991), the court held, under the mental status statutes then in effect, that:

The fact that the defense of impaired mental condition is resolved in the trial on the defendant's not guilty plea, rather than in a separate trial as in the case of the insanity plea, provides no justification for refusing a defendant's request for an informational instruction on the

consequences of a verdict of not guilty by reason of impaired mental condition.

*Id.* at 73. And the unitary trial procedure that is now in effect (which is based on a definition of insanity that includes the definition of “impaired mental condition” applicable to offenses committed before July 1, 1995) is the same as the unitary trial procedure that previously applied only to the then-distinct defense of impaired mental condition. *See People v. Bielecki*, 964 P.2d 598, 604–05 (Colo. App. 1998). Thus, under *Cordova* and *Thompson*, an instruction describing the commitment procedure remains mandatory (if requested by the defense). *See People v. Tally*, 7 P.3d 172, 184 (Colo. App. 1999).

2. The model instruction states that the court will make any future determination as to whether a defendant who is found not guilty by reason of insanity should be released. However, this disclosure is not mandated by *Thomson*. *See People v. Tally*, 7 P.3d at 184 (no error where the trial court refused to amend the *Thomson* instruction to include information concerning what entity would determine whether sanity had been restored, though “the giving of such an instruction would not have been improper”).

3. Although COLJI-Crim. I:06 (2008) advised the jury that commitment would occur if the defendant was found not guilty by reason of insanity “of all *felony* charges” (emphasis added), the Committee has concluded that the adjective in this phrase does not convey any meaningful information because courts do not advise juries which charges are felonies. Moreover, as discussed in Comment 5 to Instruction I:01, it is unclear how the procedure is to be modified if a defendant charged only with misdemeanors asserts an insanity defense. Accordingly, the model instruction no longer includes the phrase “all felony charges.”

4. The final paragraph of the instruction is derived from *People v. Roark*, 643 P.2d 756, 764-65 (Colo. 1982) (holding that this language would “merely serve to answer the question that would naturally arise from reading the preceding paragraph, i.e., whether the defendant could be tried on the issue of guilt after release from the state hospital following a verdict of not guilty by reason of insanity”).

**I:05 LIMITING INSTRUCTION AS TO EVIDENCE  
OBTAINED DURING A COURT-ORDERED EXAMINATION  
(PLEA OF NOT GUILTY BY REASON OF INSANITY)**

You are about to hear evidence that you may consider as to the question of the defendant's sanity with respect to [a charged crime] [the crime(s) of (insert name of offense(s))]. You shall not consider it for any other purpose.

COMMENT

1. *See* § 16-8-107(1.5)(a), C.R.S. 2020 ("Except as otherwise provided in this subsection (1.5), evidence acquired directly or indirectly for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered examination pursuant to section 16-8-106 or acquired pursuant to section 16-8-103.6 is admissible only as to the issues raised by the defendant's plea of not guilty by reason of insanity, and the jury, at the request of either party, shall be so instructed . . .").
2. *See also* Instruction D:04 (limiting instruction for evidence of the defendant's mental processes acquired during a court-ordered examination).

**I:06 SPECIAL VERDICT FORM – INSANITY**

District Court, [City and] County of [ ], Colorado  
Case No. [ ], Div. [ ].

People of the State of Colorado

v.

[insert name of defendant]

JURY VERDICT, Count No. [ ]

CHARGE OF [insert name of offense here]

PART A

- I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], [insert name of offense].

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FOREPERSON\*

- II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], [insert name of offense].

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FOREPERSON\*

\* The foreperson should sign only one of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY, then II. above should be signed.

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## PART B

If you find the defendant not guilty of this charge [and you also find him [her] not guilty of (list, in the conjunctive, all felony charges)], you should answer the following question. However, if you find the defendant guilty of this charge [or you find him [her] guilty of one or more of the following charges (list, in the disjunctive, all felony charges)], you should leave this section blank.

As to Count No. \_\_\_\_\_, charging the defendant with [insert name of offense], did you find the defendant not guilty solely based on the defense of insanity?

Yes             No

---

FOREPERSON\*\*

\*\* If you find the defendant “not guilty” of this charge [and of all other charges listed above], the foreperson should use ink to mark the appropriate place indicating the answer to the verdict question, and then sign on the designated line. You should mark “Yes” if you decide that the only element of the crime charged that the prosecution failed to prove beyond a reasonable doubt is that the defendant was sane at the time of the commission of the act. If you decide that the prosecution failed to prove any other element, you should mark “No.”

## COMMENT

1. See § 16-8-105.5(3), C.R.S. 2020 (“When the affirmative defense of not guilty by reason of insanity has been raised, the jury shall be given special verdict forms containing interrogatories.”).
2. In a case where the defendant is charged with more than one felony, use a separate copy of this form for each charge.

3. If a jury deadlocks as to all felony charges, it appears that the statutory precondition to consideration of the insanity defense is not satisfied. Section 16-8-105.5(3), C.R.S. 2020, states that “[t]he trier of fact *shall decide* first the question of guilt as to felony charges that are before the court” (emphasis added).

4. Assuming that a defendant charged only with misdemeanors can raise the affirmative defense of not guilty by reason of insanity, a court in such circumstances should use a separate form for each charge and modify the directional language. However, the Committee expresses no opinion concerning how the directional language should be modified because it is unclear whether, in such a scenario, section 16-8-105.5(3) requires the court to instruct the jury that it is not to answer the insanity interrogatory if it finds the defendant guilty of any misdemeanor charge.

## CHAPTER J

### CULPABILITY BASED ON BEHAVIOR OF ANOTHER

<a href="#"><u>J:01</u></a>	LIABILITY FOR BEHAVIOR OF ANOTHER BY LAW
<a href="#"><u>J:02</u></a>	LIABILITY FOR BEHAVIOR OF AN INNOCENT PERSON
<a href="#"><u>J:03</u></a>	COMPLICITY
<a href="#"><u>J:03.5.SP</u></a>	COMPLICITY – SPECIAL INSTRUCTION (MULTIPLE THEORIES OF LIABILITY)
<a href="#"><u>J:04</u></a>	DEFENSES THAT ARE NOT AVAILABLE WHEN CRIMINAL LIABILITY IS BASED ON THE BEHAVIOR OF ANOTHER

### CHAPTER COMMENTS

1. The Committee added this chapter in 2018. Instructions J:02 and J:04 previously appeared in Chapter G1. Instructions J:01 and J:03.5.SP are newly created, while Instruction J:03 has been heavily modified.

## J:01 LIABILITY FOR BEHAVIOR OF ANOTHER BY LAW

A person is legally accountable for the behavior of another person if he [she] is made accountable for the conduct of that person by a specific law.

### COMMENT

1. See § 18-1-602(1)(a), C.R.S. 2020.
2. See Instruction H:06 (affirmative defense of “defendant as victim or incidental actor”).
3. This instruction is distinct from complicity liability. Under a complicity theory of liability, the defendant may be found guilty of *any* crime (provided that it is charged) if the prosecution proves beyond a reasonable doubt all the conditions outlined in Instruction J:03, including that the defendant aided, abetted, advised, or encouraged another person in planning or committing that crime. See Instruction J:03. In contrast, this instruction only applies where *a particular statute* provides that a person can be legally culpable for another person’s criminal conduct.
4. The Committee added this instruction in 2018.

## J:02 LIABILITY FOR BEHAVIOR OF AN INNOCENT PERSON

A person is legally accountable for the behavior of another person if he [she] acts with the mental state required for the commission of the offense and causes an “innocent person” to engage in such behavior.

For purposes of this instruction, an “innocent person” includes any person who is not guilty of the offense in question, despite his [her] behavior, because of [duress] [legal incapacity or exemption] [unawareness of the criminal nature of the conduct in question or of the defendant’s criminal purpose], or any other factor precluding the mental state required for the offense in question.

### COMMENT

1. See § 18-1-602(1)(b), (2), C.R.S. 2020.
2. See Instruction H:30 (affirmative defense of “duress”); see also *People v. Moore*, 877 P.2d 840, 841–42 n.5 (Colo. 1994) (observing, in dicta, that because the defendant “forced [his wife] to sexually assault their twelve-year-old daughter,” he “could have been convicted of sexual assault on a child under § 18-1-602”).
3. Although section 18-1-602(2) does not specify what type of “exemption” from criminal liability would qualify an actor as an “innocent person,” it appears this is a reference to exemptions such as self-defense, execution of a public duty under authority of law, etc.
4. In 2018, the Committee moved this instruction from Chapter G1, where it had been numbered G1:03.

## J:03 COMPLICITY

Complicity is not a separate crime. Rather, it is a legal theory by which the defendant may be found guilty of a crime that was committed by another person.

For the defendant to be guilty as a complicitor of the crime of [insert offense], as defined at the end of this Instruction, the prosecution must prove each of the following conditions beyond a reasonable doubt:

1. Another person committed the crime of [insert offense], as defined at the end of this Instruction, and
2. the defendant, with the desire or the purpose or design to aid, abet, advise, or encourage the other person in planning or committing that crime,
3. aided, abetted, advised, or encouraged the other person in planning or committing that crime, and
- [4. the defendant was aware of all of the elements of that crime, as defined at the end of this Instruction.]
- [4. the defendant was aware of element numbers [identify the appropriate elements, e.g., “1, 2, and 4” – see Comment 2] of that crime, as defined at the end of this Instruction.]
- [5. and the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

For purposes of this Instruction, another person committed the crime of [insert offense] if the prosecution proves each of the following elements beyond a reasonable doubt:

1. That the other person,
2. in the State of Colorado, at or about the date and place at issue,
3. [insert remaining elements of the offense].

After considering all the evidence, if you decide the prosecution has proven each of the conditions of complicity liability beyond a reasonable doubt, you should find the defendant guilty of [insert offense].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the conditions of complicity liability beyond a reasonable doubt, you should find the defendant not guilty of [insert offense].

#### COMMENT

1. See § 18-1-603, C.R.S. 2020.
2. Regarding the bracketing of the fourth element: Under Colorado law, complicity liability demands that the defendant must have been aware of either some or all of the elements of the principal's underlying crime, depending on the crime. More specifically, the defendant must have been aware of "those elements of the offense describing the prohibited act itself and the circumstances surrounding its commission, including a required mental state, if any." See *People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164. But the defendant need not have been aware of "any element requiring that such act have a particular effect, or cause a particular result." See *id.* Therefore, if one of the elements of the underlying crime involves an act having a particular effect or causing a particular result, the court should use the second bracketed alternative, and it should omit that element number from its numbering of the relevant elements. Otherwise, the court should use the first bracketed alternative.

For example, suppose the defendant is tried as a complicitor of extreme-indifference murder, a crime which requires proof that the prohibited act had a particular effect or caused a particular result – element number 6 of extreme-indifference murder is: "thereby caused the death of another." See Instruction 3-1:04. In drafting the instruction for complicity liability, the court should use the second bracketed alternative in the fourth element, and it should specify that the defendant must have been aware of element numbers "1, 2, 3, 4, and 5" (i.e., *not* element number 6). On the other hand, if the defendant is tried as a complicitor of third-degree

burglary, a crime which does not require proof that the prohibited act had a particular effect or caused a particular result, *see* Instruction 4-2:06, the court should use the first bracketed alternative in the fourth element.

3. *Childress* provides that the complicitor must act with “*the intent*, in the commonly understood sense of *desiring or having a purpose or design*, to aid, abet, advise, or encourage the principal in his criminal act or conduct.” *Id.* (emphasis added). Because jurors may find themselves separately instructed on the definition of the culpable state of mind of *intent*, *see* Instruction F:185, the Committee has opted to use the phrase “the desire or the purpose or design,” instead of “intent,” in the second element to avoid potential confusion.

4. Because complicity is a theory of liability rather than a separate crime itself, the Committee notes that in certain circumstances, the court may need to instruct the jury on both complicity liability *and* principal liability with respect to the same crime. This situation would arise if: (1) the prosecution asks the court to give a complicity instruction – whereby the jury could find the defendant guilty of committing the crime as a complicitor – *in addition to* the more typical elemental instruction of the underlying crime – whereby the jury could find the defendant guilty of committing the crime himself or herself (i.e., as a principal); and (2) the evidence supports giving both instructions. When the prosecution requests that the jury be instructed on the two alternative theories of liability with respect to the same crime, the court should determine as a matter of law whether the evidence warrants submitting both theories of liability to the jury on that crime. If the court determines that instructions on both theories of liability are warranted, it should ask the jury to consider the two theories of liability separately. *See* Instruction J:03.5.SP.

5. In cases where the theory of complicity liability extends to lesser offenses (whether included or nonincluded), the court should modify the instruction to make this clear. *See, e.g., Grissom v. People*, 115 P.3d 1280, 1288 (Colo. 2005) (defendant, charged as complicitor, was entitled to an instruction, under a complicity theory of liability, on the lesser-included offense).

6. See Instruction H:07 (timely warning as an affirmative defense to complicity liability).
7. + See *People v. Jackson*, 2018 COA 79, ¶¶ 67–68, 474 P.3d 60, 74–75 (rejecting the defendant’s argument that the court should have provided separate complicity instructions for each offense because “the court instructed the jury that each count charged ‘a separate and distinct offense’ and that ‘the evidence and the law applicable to each count had to be considered separately, uninfluenced by [the jury’s] decision as to any other count’” (alteration in original)), *aff’d*, 2020 CO 75.
8. Earlier versions of the complicity liability instruction required the court to give an additional instruction defining the elements of the underlying crime. This version does not require a separate instruction defining the elements of the underlying crime because it includes language identifying the elements of the underlying crime.
9. If the court decides to instruct the jury on the theory of complicity liability with respect to multiple crimes, it should provide a separate complicity liability instruction for each crime.
10. Previously, the Committee had developed two different complicity liability instructions, which had appeared in Chapter G1 and were numbered G1:06 and G1:07. In 2018, the Committee consolidated those two instructions into this single instruction, which, pursuant to *Childress*, extensively modifies the two previous instructions.
11. + In 2020, the Committee added Comment 7.

### **J:03.5.SP COMPLICITY – SPECIAL INSTRUCTION (MULTIPLE THEORIES OF CULPABILITY)**

The prosecution alleges that the defendant is guilty of the crime of [insert relevant offense] as a principal or as a complicitor. You have received separate instructions regarding these two theories of liability: Instruction \_\_\_ describes the principal theory of liability, and Instruction \_\_\_ describes the complicity theory of liability. You should consider the two theories separately. Your determination of whether the defendant is guilty of the above-referenced crime as a principal should not affect your determination of whether the defendant is guilty of the above-referenced crime as a complicitor. Similarly, your determination of whether the defendant is guilty of the above-referenced crime as a complicitor should not affect your determination of whether the defendant is guilty of the above-referenced crime as a principal.

You may find the defendant not guilty of the above-referenced crime under both theories of liability – principal liability and complicity liability. Or you may find the defendant guilty of the above-referenced crime as a principal, as a complicitor, or as both a principal and a complicitor.

#### **COMMENT**

1. The court should only give this instruction when the prosecution is pursuing multiple theories of liability on the same crime and the court finds that the evidence warrants submitting to the jury both theories of liability on that crime.
2. If the prosecution is pursuing multiple theories of liability on multiple crimes, the court should give a particularized version of this special instruction for each crime. *See* Instruction J:03, Comment 9.
3. The Committee added this instruction in 2018.

## **J:04 DEFENSES THAT ARE NOT AVAILABLE WHEN CRIMINAL LIABILITY IS BASED ON THE BEHAVIOR OF ANOTHER**

If the defendant's criminal liability is based upon the behavior of another, it is no defense to the crime of [insert name(s) of crime(s) here] that [the other person has not been prosecuted for or convicted of any crime based upon the behavior in question] [the other person has been convicted of a different crime] [the other person was legally incapable of committing the crime in an individual capacity].

### COMMENT

1. *See* § 18-1-605, C.R.S. 2020 (this provision, enumerating unavailable defenses, applies "[i]n any prosecution for an offense in which criminal liability is based upon the behavior of another pursuant to sections 18-1-601 to 18-1-604").
2. In 2018, the Committee moved this instruction here from Chapter G1, where it had been numbered G1:08.



## CHAPTER 1.3

### CRIME OF VIOLENCE SENTENCE ENHANCEMENT INTERROGATORIES

<a href="#"><u>1.3:01.INT</u></a>	CRIME OF VIOLENCE – INTERROGATORY (DEADLY WEAPON)
<a href="#"><u>1.3:02.INT</u></a>	CRIME OF VIOLENCE – INTERROGATORY (SERIOUS BODILY INJURY OR DEATH)
<a href="#"><u>1.3:03.INT</u></a>	CRIME OF VIOLENCE – INTERROGATORY (AT- RISK ADULT OR JUVENILE)
<a href="#"><u>1.3:04.INT</u></a>	CRIME OF VIOLENCE – INTERROGATORY (FELONY UNLAWFUL SEXUAL OFFENSE; THREAT, INTIMIDATION, FORCE, OR BODILY INJURY)
<a href="#"><u>1.3:05.INT</u></a>	CRIME OF VIOLENCE – INTERROGATORY (DANGEROUS WEAPON OR SEMIAUTOMATIC ASSAULT WEAPON)

### CHAPTER COMMENTS

1. The primary crime of violence sentence enhancement provision, § 18-1.3-406(1)(a), C.R.S. 2020, is applicable to a wide array of enumerated offenses, and it is also potentially applicable to numerous other offenses by virtue of the provision pertaining to at-risk victims. *See* § 18-1.3-406(2)(a)(II)(A), C.R.S. 2020 (any crime involving a deadly weapon or infliction of serious bodily injury or death is a crime of violence if committed against an at-risk adult or at-risk juvenile). Accordingly, rather than include crime of violence interrogatories in multiple chapters of model elemental instructions, the Committee consolidated the model crime of violence interrogatories in this chapter. Further, in light of the statutory pleading requirements that govern the crime of violence sentence enhancement provisions, *see* § 18-1.3-406(3), (5), (7), C.R.S. 2020, the Committee elected not to include cross-referencing citations to these interrogatories as part of the comments that follow the model elemental instructions for substantive offenses.

2. In cases involving complicity, it may be appropriate to modify one or more crime of violence interrogatory by adding the words “or a complicitor” immediately after “the defendant.” See *People v. Swanson*, 638 P.2d 45, 50 (Colo. 1981) (“The mandatory sentence for conviction of crime of violence is based on a recognition of the increased potential for harm arising from the manner in which the crime was committed. This heightened danger is present regardless of which robber held the gun. We conclude therefore that an accessory to crime of violence may be charged, tried and punished as a principal.”). However, no such modification should be made to 1.3:03.INT (at-risk adult or juvenile), because that interrogatory is focused exclusively on the status of the victim (and thus does not include the words “the defendant”).

### **1.3:01.INT CRIME OF VIOLENCE – INTERROGATORY (DEADLY WEAPON)**

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant use, or possess and threaten the use of, a deadly weapon? (Answer “Yes” or “No”)

The defendant used, or possessed and threatened the use of, a deadly weapon only if:

1. the defendant used, or possessed and threatened the use of, a deadly weapon,
2. during the [commission of] [attempted commission of] [conspiracy to commit] [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], or in the immediate flight therefrom.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-1.3-406(2)(a)(I)(A), (4), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction G2:01 (criminal attempt); Instruction G2:05 (conspiracy); see, e.g., Instruction E:28 (special verdict form).
3. In the context of felony murder, the supreme court has held that “the scope of immediate flight is a factual question for a jury to decide because immediate flight differs according to the unique facts and circumstances of each case, such as the time and distance between the felony and the killing.” *Auman v. People*, 109 P.3d 647, 659 (Colo. 2005). Although the phrase “in the immediate flight therefrom” is not defined by statute, the supreme court has interpreted it as follows:

According to the plain language of the immediate flight provision of the statute, there are four limitations on liability for felony murder when a death occurs during flight from the predicate felony.

First, the flight from the predicate felony must be “immediate,” which requires a close temporal connection between the predicate felony, the flight, and the resulting death. See *Webster’s New World College Dictionary* 713 (4th ed. 1999) (defining “immediate” as “without delay” or “of the present time”).

Second, the word “flight” limits felony-murder liability in such cases to those circumstances in which death is caused while a participant is escaping or running away from the predicate felony. *Id.* at 541 (defining “flight” as “a fleeing from . . . to run away”).

Third, the death must occur either “in the course of” or “in furtherance of” immediate flight, so that a defendant commits felony murder only if a death is caused during a participant’s immediate flight or while a person is acting to promote immediate flight from the predicate felony. See *id.* at 333 (defining “in the course of” as “in the progress or process of; during”); and *id.* at 575 (defining

“furtherance” as “a furthering, or helping forward; advancement; promotion”).

Fourth, the immediate flight must be “therefrom,” indicating that the flight must be from the predicate felony, as opposed to being from some other episode or event.

*Auman v. People*, 109 P.3d at 656; see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* and holding that: “[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.”).

### **1.3:02.INT CRIME OF VIOLENCE – INTERROGATORY (SERIOUS BODILY INJURY OR DEATH)**

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant cause serious bodily injury or death? (Answer “Yes” or “No”)

The defendant caused serious bodily injury or death only if:

1. the defendant caused serious bodily injury or death to any person except another participant,
2. during the [commission of] [attempted commission of] [conspiracy to commit] [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K)], or in the immediate flight therefrom.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-406(2)(a)(I)(B), (4), C.R.S. 2020.
2. *See* Instruction F:332 (defining “serious bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).
3. *See* Instruction 1.3:01.INT, Comment 3 (discussing the meaning of “immediate flight therefrom”).

### **1.3:03.INT CRIME OF VIOLENCE – INTERROGATORY (AT-RISK ADULT OR JUVENILE)**

If you find the defendant not guilty of [insert name of crime], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of crime], and you also find that the defendant [used, or possessed and threatened the use of, a deadly weapon] [caused serious bodily injury or death] you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status? (Answer “Yes” or “No”)

The victim was a person with protected status only if:

- [1. the victim was seventy years of age or older.]
- [1. the victim was eighteen years of age or older, and  
2. was a person with a disability.]
- [1. the victim was under the age of eighteen years, and  
2. was a person with a disability.]

The prosecution has the burden to prove [the] [each] numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-406(2)(a)(II)(A), (c), C.R.S. 2020.
2. *See* Instruction F:24 (defining “at-risk adult”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:273 (defining “person with a disability”); *see, e.g.*, Instruction E:28 (special verdict form).

### **1.3:04.INT CRIME OF VIOLENCE – INTERROGATORY (FELONY UNLAWFUL SEXUAL OFFENSE; THREAT, INTIMIDATION, FORCE, OR BODILY INJURY)**

If you find the defendant not guilty of [insert name of felony unlawful sexual offense], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of felony unlawful sexual offense], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant use threat, intimidation, or force against the victim, or cause bodily injury to the victim? (Answer “Yes” or “No”)

The defendant used threat, intimidation, or force against the victim, or caused bodily injury to the victim, only if:

1. the defendant used threat, intimidation, or force against the victim or caused the victim physical pain, illness, or any impairment of physical or mental condition.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-406(2)(b)(I), (II), C.R.S. 2020 (an “unlawful sexual offense” is any felony offense set forth in section 18-3-411(1)).
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).

**1.3:05.INT CRIME OF VIOLENCE – INTERROGATORY  
(DANGEROUS WEAPON OR SEMIAUTOMATIC ASSAULT  
WEAPON)**

If you find the defendant not guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K), (2)(b)(I)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense from section 18-1.3-406(2)(a)(II)(A)-(K), (2)(b)(I)], and you also find that the [defendant [used, or possessed and threatened the use of, a deadly weapon] [caused serious bodily injury or death]] [the victim was a person with protected status], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant use a dangerous weapon or semiautomatic assault weapon? (Answer “Yes” or “No”)

The defendant used a dangerous weapon or semiautomatic assault weapon only if:

1. the defendant used a firearm silencer, machine gun, short shotgun, short rifle, ballistic knife, or any semiautomatic center fire firearm that was equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-406(7)(a), C.R.S. 2020 (“In any case in which the accused is charged with a crime of violence as defined in this section and the indictment or information specifies the use of a dangerous weapon as defined in sections 18-12-101 and 18-12-102, or the use of a semiautomatic assault weapon as defined in paragraph (b) of this subsection (7), upon conviction for said crime of violence, the judge shall impose an additional sentence to the department of corrections of five years for the use of such weapon. The sentence of five years shall be in addition to the mandatory sentence imposed for the substantive offense and shall be served consecutively to any other sentence and shall not be subject to suspension or probation.”).
2. *See* Instruction F:29 (defining “ballistic knife”); Instruction F:86 (defining “dangerous weapon”); Instruction F:154 (defining “firearm”); Instruction F:156 (defining “firearm silencer”); Instruction F:203 (defining “machine gun”); Instruction F:344 (defining “short rifle”); Instruction F:331 (defining “semiautomatic assault weapon”); Instruction F:345 (defining “short shotgun”); *see, e.g.*, Instruction E:28 (special verdict form).



## CHAPTER 3-1

### MURDER, MANSLAUGHTER, AND HOMICIDE

- [3-1:01](#) MURDER IN THE FIRST DEGREE (AFTER DELIBERATION)
- [3-1:02](#) MURDER IN THE FIRST DEGREE (FELONY MURDER)
- [3-1:03](#) MURDER IN THE FIRST DEGREE (EXECUTION BASED UPON PERJURY)
- [3-1:04](#) MURDER IN THE FIRST DEGREE (EXTREME INDIFFERENCE)
- [3-1:05](#) MURDER IN THE FIRST DEGREE (CONTROLLED SUBSTANCE ON SCHOOL GROUNDS)
- [3-1:06](#) MURDER IN THE FIRST DEGREE (CHILD UNDER TWELVE; POSITION OF TRUST)
- [3-1:07](#) MURDER IN THE SECOND DEGREE
- [3-1:08.INT](#) MURDER IN THE SECOND DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)
- [3-1:08.5.SP+](#) MURDER IN THE SECOND DEGREE, SUDDEN HEAT OF PASSION – SPECIAL INSTRUCTION (GENDER IDENTITY OR EXPRESSION OR SEXUAL ORIENTATION)
- [3-1:09](#) MANSLAUGHTER (RECKLESS)
- [3-1:10](#) MANSLAUGHTER (CAUSED OR AIDED SUICIDE)
- [3-1:11](#) CRIMINALLY NEGLIGENT HOMICIDE
- [3-1:12](#) VEHICULAR HOMICIDE (RECKLESS)
- [3-1:13](#) VEHICULAR HOMICIDE (UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS)
- [3-1:14.SP](#) VEHICULAR HOMICIDE – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)
- [3-1:15.SP](#) VEHICULAR HOMICIDE – SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)
- [3-1:16.INT](#) VEHICULAR HOMICIDE – INTERROGATORY (IMMEDIATE FLIGHT FROM THE COMMISSION OF ANOTHER FELONY)



### **3-1:01 MURDER IN THE FIRST DEGREE (AFTER DELIBERATION)**

The elements of the crime of murder in the first degree (after deliberation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after deliberation, and
4. with the intent,
5. to cause the death of a person other than himself [herself],
6. caused the death of that person or of another person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (after deliberation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (after deliberation).

#### COMMENT

1. See § 18-3-102(1)(a), C.R.S. 2020.
2. See Instruction F:10 (defining "after deliberation"); Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

3. In *People v. Lowe*, 660 P.2d 1261, 1271 (Colo. 1983), *abrogated on other grounds by Callis v. People*, 692 P.2d 1045 (Colo. 1984), the supreme court outlined the following procedural steps as being necessary “to insure that the intent of the [first-degree murder] statute is preserved and to make clear the effect of our decision”:

The prosecution should be allowed to charge multiple theories of first-degree murder in separate counts. The prosecution may, but should not be required to, elect among theories after the evidence is closed. If there is sufficient evidence in the record, all theories charged should be submitted to the jury for a special verdict. The jury should be informed that the defendant is charged with one crime, first-degree murder. The jury’s special verdict should indicate which theories of first-degree murder, if any, have been proved by the evidence.

*Id.* (footnotes omitted). Further, the court provided an example of a special verdict form that would have been “appropriate” for the case at hand (where the defendant was charged with murder after deliberation and felony-murder by reason of sexual assault on a child):

I. We, the jury, find the defendant, [insert name], NOT GUILTY of first-degree murder.

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Foreperson

II. We, the jury, find the defendant, [insert name], GUILTY of first-degree murder and further find that

(1) the defendant, [insert name], [ ] committed first-degree murder after deliberation;

(2) the defendant, [insert name], [ ] committed first-degree murder by felony murder.

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Foreperson

The foreperson should sign only one of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY, then II. above should be signed.

If you find the defendant guilty of the crime charged, the foreperson must complete this GUILTY verdict by placing an "X" in the appropriate square(s). Either one or both squares shall be filled in.

*Id.* at 1271 n.14 (modified to include a colon and bracketed insertion points for the defendant's name).

In *People v. Glover*, 893 P.2d 1311, 1315 (Colo. 1995), the supreme court stated that, "[u]nder *Lowe* and [*People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983)], when a defendant has been convicted on two different counts of first-degree murder for a single homicide, the convictions should be vacated, and the trial court should be directed to enter as many convictions and impose as many sentences as are legally possible to fully effectuate the jury's verdict." However, in *Candelaria v. People*, 148 P.3d 178 (Colo. 2006), the court explained that the pronouncement in *Glover* should be understood within the procedural context of that case:

In *Glover*, where the trial court refused to reach the merits of the defendant's postconviction challenge to a special finding of murder after deliberation, on the ground that his mittimus reflected a generic first degree murder conviction, which was also supported by a special finding of felony murder, we held that the trial court should have amended the mittimus to reflect a conviction for first degree deliberate murder and should have entertained the defendant's postconviction challenge because a third conviction for the underlying felony of robbery required the court to maximize sentences by vacating the defendant's conviction for the greater offense of felony murder, while retaining his convictions for deliberate murder and robbery. *We nowhere suggested that entry of a*

*single, generic first degree murder conviction, as prescribed by People v. Lowe, 660 P.2d 1261, 1270–71 (Colo. 1983), would not be proper in the absence of such a merger or, for that matter, that the jury’s special finding of felony murder could not still be relied on in maximizing the defendant’s sentence, if he were to successfully challenge his conviction for deliberate murder.*

*Id.* at 184 n.4 (emphasis added).

4. In the sixth element, insert the name of the person who was killed when submitting more than one count of first degree murder after deliberation.

5. The Committee has not drafted a separate instruction for the offense defined by section 18-3-107(1), C.R.S. 2020 (first degree murder of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties). + To submit an instruction for that offense, add the following element: “the victim was a peace officer, firefighter, or emergency medical service provider, engaged in the performance of his or her duties.” See Instruction F:119 (defining “emergency medical service provider”); Instruction F:124 (defining “engaged in the performance of his [her] duties”); F:157 (defining “firefighter”); Instruction F:263 (defining “peace officer”).

6. See *Martinez v. People*, 2015 CO 16, ¶ 11, 344 P.3d 862, 867 (“The trial court in this case erroneously instructed the jury that ‘after deliberation’ means an interval of time ‘sufficient for one thought to follow another.’ The prosecution culled this language from an 1895 case, *Van Houten v. People*, that considered how quickly premeditation can occur in the first-degree murder context. More recently, however, this court has rejected the *Van Houten* language as inconsistent with the element of deliberation that the current first-degree murder statute requires.” (citation omitted)).

7. + See *People v. Jackson*, 2020 CO 75, ¶¶ 21, 43, 472 P.3d 553, 559, 563 (holding that, because Colorado’s first-degree murder statute “deems the identity of the person harmed immaterial to the issue of intent and holds a perpetrator just as liable when he kills an unintended victim as when he kills his intended victim,” the doctrine of transferred intent is

“unnecessary” in first-degree murder cases, as the statute “accomplishes directly that which the doctrine purports to accomplish indirectly via a legal fiction”; further holding that attempted first-degree murder is a lesser included offense of first-degree murder).

8. In 2015, the Committee added Comment 6, citing to *Martinez v. People, supra*.

9. In 2016, the Committee modified the parenthetical quotation in Comment 5 pursuant to new legislation. See Ch. 353, sec. 1, § 18-1.3-401(4)(b)(I), 2016 Colo. Sess. Laws 1447, 1447.

10. + In 2020, the Committee revised Comment 5, and it added Comment 7.

### **3-1:02 MURDER IN THE FIRST DEGREE (FELONY MURDER)**

The elements of the crime of murder in the first degree (felony murder) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. acting alone or with one or more persons,
4. committed or attempted to commit [insert name(s) of qualifying offense(s) enumerated in section 18-3-102(1)(b)], and
5. in the course of or in furtherance of the crime of [insert name(s) of qualifying offense(s) enumerated in § 18-3-102(1)(b)] that he [she] was committing or attempting to commit, or in the immediate flight therefrom,
6. the death of a person, other than one of the participants, was caused by anyone.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (felony murder).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (felony murder).

#### COMMENT

1. See § 18-3-102(1)(b), C.R.S. 2020.

2. See Instruction F:267 (defining “person,” when referring to the victim of a homicide); Instruction G2:01 (criminal attempt).
3. Provide the jury with an elemental instruction defining the qualifying offense(s) referenced in the fourth and fifth elements. In addition, if a qualifying crime incorporates the definition of another crime, provide the jury with an elemental instruction that fully defines the subsidiary offense. See *Auman v. People*, 109 P.3d 647, 671 (Colo. 2005) (reversing felony murder conviction premised on second degree burglary conviction because of error in jury instruction that defined theft for purposes of second degree burglary).
4. See Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).
5. See Instruction 3-1:01, Comment 5 (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).
6. See Instruction H:41 (disengagement as an affirmative defense to felony murder).
7. “[T]he scope of immediate flight is a factual question for a jury to decide because immediate flight differs according to the unique facts and circumstances of each case, such as the time and distance between the felony and the killing.” *Auman v. People*, 109 P.3d 647, 659 (Colo. 2005). Although the phrase “in the immediate flight therefrom” is not defined by statute, the supreme court has interpreted it as follows:

According to the plain language of the immediate flight provision of the statute, there are four limitations on liability for felony murder when a death occurs during flight from the predicate felony.

First, the flight from the predicate felony must be “immediate,” which requires a close temporal connection between the predicate felony, the flight, and the resulting death. See *Webster’s New World*

*College Dictionary* 713 (4th ed. 1999) (defining “immediate” as “without delay” or “of the present time”).

Second, the word “flight” limits felony-murder liability in such cases to those circumstances in which death is caused while a participant is escaping or running away from the predicate felony. *Id.* at 541 (defining “flight” as “a fleeing from . . . to run away”).

Third, the death must occur either “in the course of” or “in furtherance of” immediate flight, so that a defendant commits felony murder only if a death is caused during a participant’s immediate flight or while a person is acting to promote immediate flight from the predicate felony. *See id.* at 333 (defining “in the course of” as “in the progress or process of; during”); and *id.* at 575 (defining “furtherance” as “a furthering, or helping forward; advancement; promotion”).

Fourth, the immediate flight must be “therefrom,” indicating that the flight must be from the predicate felony, as opposed to being from some other episode or event.

*Auman v. People*, 109 P.3d at 656; *see also People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* and holding that: “[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.”).

8. *See People v. Doubleday*, 2016 CO 3, ¶ 26, 364 P.3d 193, 197 (“[T]o establish that a defendant has committed or attempted to commit a predicate offense so as to support a felony murder conviction, the prosecution must prove beyond a reasonable doubt all elements of that predicate offense, including the inapplicability of any properly asserted affirmative defense.”).

9. In 2017, the Committee added Comment 8.

### **3-1:03 MURDER IN THE FIRST DEGREE (EXECUTION BASED UPON PERJURY)**

The elements of the crime of murder in the first degree (execution based upon perjury) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. procured the conviction and execution,
  4. of any innocent person,
  5. by perjury or subornation of perjury.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (execution based upon perjury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (execution based upon perjury).

#### COMMENT

1. See § 18-3-102(1)(c), C.R.S. 2020.
2. Provide the jury with an instruction defining the offense of perjury. See Instructions 8-5:01, 8-5:03.
3. The term "subornation" is not defined by statute. See *Black's Law Dictionary*, 1653 (10th ed. 2014) (defining "subornation of perjury" as the

“crime of persuading another to commit perjury; the act of procuring a witness to testify falsely”).

4. The term procure is not defined by statute for purposes of this offense. *See Webster’s Third New International Dictionary 1809 (2002)* (defining “procure” as meaning “to cause to happen or be done: bring about”).

5. *See Instruction 3-1:01, Comment 3* (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

6. *See Instruction 3-1:01, Comment 5* (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).

### **3-1:04 MURDER IN THE FIRST DEGREE (EXTREME INDIFFERENCE)**

The elements of the crime of murder in the first degree (extreme indifference) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally,
  5. engaged in conduct which created a grave risk of death to a person, or persons, other than himself [herself], and
  6. thereby caused the death of another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (extreme indifference).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (extreme indifference).

#### COMMENT

1. *See* § 18-3-102(1)(d), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:267 (defining “person,” when referring to the victim of a homicide).
3. In the fifth element, the absence of bracketing for the terms “person, or persons,” is deliberate. See *Candelaria v. People*, 148 P.3d 178, 181-83 (Colo. 2006) (observing that “‘extreme indifference’ murder . . . has a rich history of evolution in statutory and case law,” and tracing those developments to explain why the court has consistently held that the amended version of section 18-3-102(d) now in effect “necessarily comprehends killing acts that put at grave risk a number of individuals not targeted by the defendant, as well as acts putting at risk a single victim, without knowing or caring who that may be”); see also *People v. Anderson*, 2019 CO 34, ¶¶ 15, 22, 442 P.3d 76, 79, 81 (holding that extreme indifference murder involves “a killing act objectively demonstrating a willingness to take life indiscriminately,” meaning it is not limited to conduct endangering multiple people).
4. See Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).
5. See Instruction 3-1:01, Comment 5 (discussing first degree murder of a peace officer or firefighter engaged in the performance of his or her duties).
6. “Universal malice” is not defined by statute. See *Candelaria v. People*, 148 P.3d at 181; *People v. Jefferson*, 748 P.2d 1223, 1228 (Colo. 1988); *Longinotti v. People*, 102 P. 165, 168 (Colo. 1909).
7. See *Montoya v. People*, 2017 CO 40, ¶ 16, 394 P.3d 676, 683 (holding that the mens rea of “knowingly” governs both actions required for extreme indifference murder – i.e., (1) engaging in conduct which created a grave risk of death to a person or persons, and (2) causing the death of another – but that in any event, “knowingly engaging in [conduct which created a grave risk of death] and thereby causing the death of a person or persons is the equivalent of knowingly causing the death of another”).

8. In 2015, the Committee modified the first sentence of Comment 6 by deleting the words “the above definition was developed through case law.”
9. In 2017, the Committee added Comment 7.
10. In 2019, the Committee added the citation to *Anderson* in Comment 3.

### **3-1:05 MURDER IN THE FIRST DEGREE (CONTROLLED SUBSTANCE ON SCHOOL GROUNDS)**

The elements of the crime of murder in the first degree (controlled substance on school grounds) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. committed unlawful distribution, dispensation, or sale of a controlled substance,
  4. to a person under the age of eighteen years,
  5. on school grounds, and
  6. the death of such person was caused by the use of such controlled substance.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (controlled substance on school grounds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (controlled substance on school grounds).

#### COMMENT

1. See § 18-3-102(1)(e), C.R.S. 2020.

2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); Instruction F:254 (defining “on school grounds”); Instruction F:267 (defining “person,” when referring to the victim of a homicide).
3. In the third element, the absence of bracketing is deliberate. See § 18-18-405(1)(a), C.R.S. 2020 (defining an offense that includes, among other types of conduct that are not incorporated by section 18-3-102(1)(e), unlawful distribution, dispensation, or sale of a controlled substance); *People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005) (“The one-sentence proscription [in section 18-18-405(1)(a)] is structured as a series of acts, with reference to the same controlled substance and governed by a common mens rea. The acts chosen for specific inclusion are not themselves mutually exclusive but overlap in various ways and cover a continuum of conduct from the production of a controlled substance to its delivery to another person, under any of a number of circumstances.”).
4. See Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).

### **3-1:06 MURDER IN THE FIRST DEGREE (CHILD UNDER TWELVE; POSITION OF TRUST)**

The elements of the crime of murder in the first degree (child under twelve; position of trust) are:

1. That the defendant,
  2. in the State of Colorado at or about the date and place charged,
  3. knowingly,
  4. caused the death of a child who had not yet attained twelve years of age, and
  5. the defendant was in a position of trust with respect to the child.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the first degree (child under twelve; position of trust).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the first degree (child under twelve; position of trust).

#### **COMMENT**

1. See § 18-3-102(1)(f), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:267 (defining “person,” when referring to the victim of a homicide); Instruction F:280 (defining “position of trust”).

3. See Instruction 3-1:01, Comment 3 (explaining how to instruct the jury when the prosecution charges multiple theories of first-degree murder in separate counts).
4. See *Friend v. People*, 2018 CO 90, ¶ 37, 429 P.3d 1191, 1197 (holding that child abuse resulting in death is a lesser included offense of child abuse murder).
5. In 2019, the Committee added Comment 4.

### 3-1:07 MURDER IN THE SECOND DEGREE

The elements of the crime of murder in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the death of another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of murder in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of murder in the second degree.

#### COMMENT

1. See § 18-3-103(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:267 (defining “person,” when referring to the victim of a homicide).
3. See *People v. Archuleta*, 2017 COA 9, ¶¶ 40, 45, 411 P.3d 233, 241 (holding that the trial court did not misstate the law when, in defining “cause” in the context of causing another’s death, it stated that “a defendant must take his victim as he finds him, and it is no defense that the victim was suffering from preexisting physical ailments, illnesses, injuries, conditions or infirmities”).
4. In 2019, the Committee added Comment 3.

### **3-1:08.INT MURDER IN THE SECOND DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)**

If you find the defendant not guilty of second degree murder, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree murder, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer “Yes” or “No”)

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the death was performed upon a sudden heat of passion,
2. caused by a serious and highly provoking act of the intended victim,
3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and
4. between the provocation and the killing, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting

upon a provoked and sudden heat of passion, mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of passion, mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-103(3)(b), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. + See Instruction 3-1:08.5.SP (special instruction – gender identity or expression or sexual orientation).
4. See *Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) (“A provocation instruction is warranted whenever a defendant shows some supporting evidence – regardless of how incredible, unreasonable, improbable, or slight it may be – to establish each factor described in subsection (3)(b) of the second-degree murder statute.”); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).
5. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. See *Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) (“We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault.”). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is

deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:18, Comments 1–4 (Supplemental Instruction—When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

6. *See People v. Tardif*, 2017 COA 136, ¶¶ 24–25, 433 P.3d 60, 66 (holding that, where the defendant testified that he “didn’t really process anything” but “just more or less acted” in shooting the victim, the evidence supported giving the heat of passion instruction).

7. In 2019, the Committee added Comment 6.

8. + In 2020, pursuant to new legislation, the Committee added Comment 3—citing to a newly created special instruction—and renumbered the subsequent comments. *See* Instruction 3-1:08.5.SP, Comment 3.

**+ 3-1:08.5.SP MURDER IN THE SECOND DEGREE, SUDDEN HEAT OF PASSION – SPECIAL INSTRUCTION (GENDER IDENTITY OR EXPRESSION OR SEXUAL ORIENTATION)**

If you find the defendant not guilty of second-degree murder, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second-degree murder, you have been separately instructed to determine whether the defendant was acting upon a provoked and sudden heat of passion. You are hereby instructed that the defendant’s act did not constitute an act performed upon a sudden heat of passion if it resulted solely from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

COMMENT

1. *See* § 18-3-103(3)(c), C.R.S. 2020.
2. *See* Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 279, sec. 6, § 18-3-103(3)(c), 2020 Colo. Sess. Laws 1364, 1368.

### 3-1:09 MANSLAUGHTER (RECKLESS)

The elements of the crime of manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. caused the death of another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manslaughter.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manslaughter.

#### COMMENT

1. *See* § 18-3-104(1)(a), C.R.S. 2020.
2. *See* Instruction F:267 (defining “person,” when referring to the victim of a homicide); Instruction F:308 (defining “recklessly”).

### 3-1:10 MANSLAUGHTER (CAUSED OR AIDED SUICIDE)

The elements of the crime of manslaughter are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. caused or aided another person to commit suicide.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manslaughter.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manslaughter.

#### COMMENT

1. *See* § 18-3-104(1)(b), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”).
3. *See* Instruction H:42 (affirmative defense of “medical caregiver”).

### 3-1:11 CRIMINALLY NEGLIGENT HOMICIDE

The elements of the crime of criminally negligent homicide are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. caused the death of another person,
4. by conduct amounting to criminal negligence.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminally negligent homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminally negligent homicide.

#### COMMENT

1. *See* § 18-3-105, C.R.S. 2020.
2. *See* Instruction F:79 (defining "criminal negligence"); Instruction F:267 (defining "person," when referring to the victim of a homicide).

### 3-1:12 VEHICULAR HOMICIDE (RECKLESS)

The elements of the crime of vehicular homicide are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. operated or drove a motor vehicle,
  4. in a reckless manner, and
  5. such conduct was the proximate cause of the death of another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular homicide.

#### COMMENT

1. *See* § 18-3-106(1)(a), C.R.S. 2020.
2. *See* Instruction F:236 (defining “motor vehicle”); Instruction F:308 (defining “recklessly”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2014) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002)

(discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. See Instruction 3-1:13, Comment 3 (discussing how to define the terms “operated” and “drove”).

### 3-1:13 VEHICULAR HOMICIDE (UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS)

The elements of the crime of vehicular homicide are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated or drove a motor vehicle,
4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and
5. such conduct was the proximate cause of the death of another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular homicide.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular homicide.

#### COMMENT

1. See § 18-3-106(1)(b)(I), C.R.S. 2020.
2. See Instruction F:109 (defining "driving under the influence"); Instruction F:236 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs").
3. Sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV) (vehicular assault), apply to a person who "*operates* or drives a motor vehicle while under the influence." (Emphasis added.) By

contrast, the traffic offense of driving under the influence (DUI) does not include a reference to operation; rather, the DUI statute specifies that it is unlawful for a person who is under the influence “to *drive* a motor vehicle or vehicle.” § 42-4-1301(1)(a), C.R.S. 2020 (emphasis added). Because neither “drive” nor “operate” is defined by statute (either in the criminal code, or in the traffic code), a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent:

We have held that “drive” means to exercise “actual physical control” over a motor vehicle. *People v. Swain*, 959 P.2d 426, 429, 431 (1998) (so holding in context of a DUI case where defendant’s keys were in the ignition and the truck’s radio was playing, but defendant was asleep or passed out in the front seat); *Brewer v. Motor Vehicle Div., Dep’t of Revenue*, 720 P.2d 564, 566–67 (Colo. 1986) (holding under the express consent statute that driving means being “in actual physical control” of a motor vehicle and is not limited to “placing and controlling a vehicle in motion”). The term “operate” is somewhat broader, connoting the action of causing something “to occur . . . [or] to cause to function usually by direct personal effort.” *People v. Gregor*, 26 P.3d 530, 532 (Colo. Ct. App. 2000) (quoting *Webster’s Third New International Dictionary* 1580–81 (1986)).

*People v. Stewart*, 55 P.3d 107, 115 (Colo. 2002).

Further, although the phrase “driving under the influence” is defined identically for purposes of sections 18-3-106(1)(b)(I), (IV)(vehicular homicide) and 18-3-205(1)(b)(I), (IV) (vehicular assault), the wording of that shared definition is slightly different from the definition of “driving under the influence” that appears as part of the traffic code in section 42-4-1301(1)(f), C.R.S. 2020. Compare Instruction F:109 (defining “driving under the influence” (vehicular homicide and vehicular assault)), with Instruction F:110 (defining “driving under the influence” (traffic code)). And there are significant differences between the definition of a “motor vehicle” in section 18-1-901(3)(k), C.R.S. 2020, and the definition of that same term that appears in section 42-1-102(58), C.R.S. 2020. Compare Instruction F:236 (defining “motor vehicle” for Title 18), with Instruction F:239 (defining “motor vehicle” for Title 42).

Finally, there are two internal inconsistencies within the statutory sections that define the criminal offenses of vehicular homicide and vehicular assault.

First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to *motor* vehicles, the definitions of “driving under the influence” in sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving “a vehicle,” with no references to motorization. In cases involving vehicles that are indisputably motorized, this discrepancy will be inconsequential. However, in a case where there is a controversy concerning whether the vehicle in question was motorized, the court should add the word “motor” to the statutory definition that appears in Instruction F:109.

Second, as noted above, sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) both apply to a person who “*operates* or drives” (emphasis added) a motor vehicle while under the influence. Yet neither “operate” nor “operating” is included as part of the definition of “driving under the influence” in sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I). In cases involving only an allegation of “driving,” this discrepancy will be inconsequential. However, in other situations, the statutory definition that appears in Instruction F:109 may need to be modified as follows: (1) in a case involving only an allegation of operation, by substituting “operating” for “driving”; and (2) in a case involving an allegation of operation and/or driving, by adding the word “operating.”

4. In 2015, the Committee corrected two statutory citations in Comment 3.

### **3-1:14.SP VEHICULAR HOMICIDE – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)**

As to the charge of vehicular homicide, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time more than 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time more than 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a

fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. *See* § 18-3-106(2)(a)-(c), C.R.S. 2020.

**3-1:15.SP VEHICULAR HOMICIDE – SPECIAL  
INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL  
LEVEL)**

As to the charge of vehicular homicide, a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant's blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-3-106(2)(d), C.R.S. 2020.

### **3-1:16.INT VEHICULAR HOMICIDE – INTERROGATORY (IMMEDIATE FLIGHT FROM THE COMMISSION OF ANOTHER FELONY)**

If you find the defendant not guilty of vehicular homicide, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of vehicular homicide, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the vehicular homicide while in immediate flight from another crime? (Answer “Yes” or “No”)

The defendant committed the vehicular homicide while in immediate flight from another crime only if:

1. the defendant committed the vehicular homicide while in immediate flight from the commission of [insert name(s) of felony offense(s)].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-1.3-401(8)(g), C.R.S. 2020 (“If the defendant is convicted of class 4 or class 3 felony vehicular homicide under section 18-3-106(1)(a) or

(1)(b), and while committing vehicular homicide the defendant was in immediate flight from the commission of another felony, the court shall be required to sentence the defendant to the department of corrections for a term of at least the midpoint in the presumptive range but not more than twice the maximum term authorized in the presumptive range for the punishment of the class of felony vehicular homicide of which the defendant is convicted.”).

2. *See, e.g.,* Instruction E:28 (special verdict form).



## CHAPTER 3-2

### ASSAULTS AND SIMILAR OFFENSES

- [3-2:01](#) ASSAULT IN THE FIRST DEGREE (DEADLY WEAPON)
- [3-2:02](#) ASSAULT IN THE FIRST DEGREE (PERMANENT DISFIGUREMENT)
- [3-2:03](#) ASSAULT IN THE FIRST DEGREE (EXTREME INDIFFERENCE)
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### **3-2:01 ASSAULT IN THE FIRST DEGREE (DEADLY WEAPON)**

The elements of the crime of assault in the first degree (deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to cause serious bodily injury to another person,
5. caused serious bodily injury to any person,
6. by means of a deadly weapon.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (deadly weapon).

#### COMMENT

1. See § 18-3-202(1)(a), C.R.S. 2020.
2. See Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury").

3. + *See People v. Procasky*, 2019 COA 181, ¶ 42, 467 P.3d 1252, 1261 (holding that felony menacing and attempted first-degree assault do not merge).

4. + In 2020, the Committee added Comment 3.

### **3-2:02 ASSAULT IN THE FIRST DEGREE (PERMANENT DISFIGUREMENT)**

The elements of the crime of assault in the first degree (permanent disfigurement) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of another person's body,
  5. caused such an injury to any person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (permanent disfigurement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (permanent disfigurement).

#### COMMENT

1. See § 18-3-202(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").

3. In *People v. Dominguez*, 568 P.2d 54, 55 (Colo. 1977), the supreme court declared section 18-3-202(1)(b) unconstitutional because it imposed a higher penalty for essentially the same conduct proscribed in section 18-3-203(1)(a). However, in 1994 the General Assembly cured the infirmity by repealing section 18-3-203(1)(a). See Ch. 287, sec. 8, § 18-3-203(1)(a), 1994 Colo. Sess. Laws 1717.

### **3-2:03 ASSAULT IN THE FIRST DEGREE (EXTREME INDIFFERENCE)**

The elements of the crime of assault in the first degree (extreme indifference) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. under circumstances manifesting extreme indifference to the value of human life,
5. engaged in conduct which created a grave risk of death to another person, and
6. thereby caused serious bodily injury to any person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (extreme indifference).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (extreme indifference).

#### COMMENT

1. See § 18-3-202(1)(c), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:332 (defining "serious bodily injury").

3. See *People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011) (trial court did not abuse its discretion by rejecting proffered jury instruction defining the terms “extreme indifference” and “grave risk of death” for purposes of assault in the first degree; both terms are ones which reasonable persons of common intelligence would be familiar with, and the jury indicated no confusion about their meaning).

### **3-2:04 ASSAULT IN THE FIRST DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER)**

The elements of the crime of assault in the first degree (peace officer, firefighter, or emergency medical service provider) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to cause serious bodily injury upon the person of a peace officer, firefighter, or emergency medical service provider,
5. threatened with a deadly weapon a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, and
6. the defendant knew, or reasonably should have known, that the victim was a peace officer, firefighter, or emergency medical service provider acting in the performance of his [her] duties.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (peace officer, firefighter, or emergency medical service provider).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (peace officer, firefighter, or emergency medical service provider).

## COMMENT

1. See § 18-3-202(1)(e), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:124 (defining “engaged in the performance of his [her] duties”); Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “with intent”); Instruction F:263 (defining “peace officer”); Instruction F:332 (defining “serious bodily injury”).
3. See *People v. Denhartog*, 2019 COA 23, ¶¶ 24, 28, 452 P.3d 148, 155 (holding that to qualify as “threatening” under the statute, the defendant must have “expressed a purpose or intent to cause injury or harm to the officer or the officer’s property,” and concluding that where the defendant suddenly reversed his jeep and struck an officer’s motorcycle, there was no such intent to harm the officer).
4. In 2019, the Committee added Comment 3.

### **3-2:05 ASSAULT IN THE FIRST DEGREE (JUDGE OR OFFICER OF COURT)**

The elements of the crime of assault in the first degree (judge or officer of court) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to cause serious bodily injury upon the person of a judge or an officer of a court of competent jurisdiction,
  5. threatened with a deadly weapon a judge or an officer of a court of competent jurisdiction, and
  6. the defendant knew, or reasonably should have known, that the victim was a judge or an officer of a court of competent jurisdiction.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (judge or officer of court).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (judge or officer of court).

#### COMMENT

1. See § 18-3-202(1)(e.5), C.R.S. 2020.

2. See Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:332 (defining “serious bodily injury”).
3. The terms “court of competent jurisdiction” and “officer” are not defined for purposes of section 18-3-202(1)(e.5).

### **3-2:06 ASSAULT IN THE FIRST DEGREE (CONFINED OR IN CUSTODY)**

The elements of the crime of assault in the first degree (confined or in custody) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while lawfully confined or in custody, as a result of being charged with or convicted of a crime or as a result of being charged or adjudicated as a delinquent child, and
4. with intent,
5. to cause serious bodily injury to a person employed by or under contract with a detention facility, or to a person employed by the division in the department of human services responsible for youth services and who is a youth services counselor or is in the youth services worker classification series,
6. threatened such a person with a deadly weapon,
7. while such a person was engaged in the performance of his [her] duties, and
8. the defendant knew, or reasonably should have known, that the person was engaged in the performance of his [her] duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (confined or in custody).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (confined or in custody).

#### COMMENT

1. *See* § 18-3-202(1)(f), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:96 (defining “detention facility”); Instruction F:185 (defining “with intent”).
3. Pursuant to § 18-3-202(1)(f), C.R.S. 2020, where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be “in custody” for purposes of this instruction.

### **3-2:06.5 ASSAULT IN THE FIRST DEGREE (RESTRICT BREATHING)**

The elements of the crime of assault in the first degree (restrict breathing) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to cause serious bodily injury,
  5. applied sufficient pressure to impede or restrict the breathing or circulation of the blood of another person,
  6. by applying such pressure to the neck or by blocking the nose or mouth of the other person, and
  7. thereby caused serious bodily injury.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the first degree (restrict breathing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the first degree (restrict breathing).

#### COMMENT

1. See § 18-3-202(1)(g), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:332 (defining “serious bodily injury”).
3. The Committee added this instruction in 2016 pursuant to new legislation. See Ch. 327, sec. 1, § 18-3-202(1)(g), 2016 Colo. Sess. Laws 1327, 1327.

### **3-2:07.INT ASSAULT IN THE FIRST DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)**

If you find the defendant not guilty of assault in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the first degree, you should sign the verdict form to indicate your finding of guilt and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer “Yes” or “No”)

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the injury was performed upon a sudden heat of passion,
2. caused by a serious and highly provoking act of the intended victim,
3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and
4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting

upon a provoked and sudden heat of passion, mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of passion, mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-202(2)(a), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. + See Instruction 3-2:07.5.SP (special instruction – gender identity or expression or sexual orientation).
4. See *Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) (“A provocation instruction is warranted whenever a defendant shows some supporting evidence – regardless of how incredible, unreasonable, improbable, or slight it may be – to establish each factor described in subsection (3)(b) of the second-degree murder statute.”); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).
5. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. See *Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) (“We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault.”). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is

deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:18, Comments 1–4 (Supplemental Instruction—When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

6. + In 2020, pursuant to new legislation, the Committee added Comment 3—citing to a newly created special instruction—and renumbered the subsequent comments. *See* Instruction 3-2:07.5.SP, Comment 3.

**+ 3-2:07.5.SP ASSAULT IN THE FIRST DEGREE, SUDDEN HEAT OF PASSION – SPECIAL INSTRUCTION (GENDER IDENTITY OR EXPRESSION OR SEXUAL ORIENTATION)**

If you find the defendant not guilty of assault in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the first degree, you have been separately instructed to determine whether the defendant was acting upon a provoked and sudden heat of passion. You are hereby instructed that the defendant’s act did not constitute an act performed upon a sudden heat of passion if it resulted solely from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

COMMENT

1. *See* § 18-3-202(2)(e), C.R.S. 2020.
2. *See* Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 279, sec. 8, § 18-3-202(2)(e), 2020 Colo. Sess. Laws 1364, 1369.

### **3-2:08.INT ASSAULT IN THE FIRST DEGREE – INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of assault in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-6.5-103(3)(a), C.R.S. 2020.

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).
3. First degree assaults of at-risk persons may be subject to heat of passion mitigation. See § 18-6.5-103(3)(a), C.R.S. 2020. Accordingly, where supported by the evidence, also use Instruction 3-2:07.INT.
4. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(3)(a), 2016 Colo. Sess. Laws 545, 548.

### **3-2:09 ASSAULT IN THE SECOND DEGREE (BODILY INJURY WITH A DEADLY WEAPON)**

The elements of the crime of assault in the second degree (bodily injury with a deadly weapon) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to cause bodily injury to another person,
  5. caused such injury to any person,
  6. by means of a deadly weapon.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (bodily injury with a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (bodily injury with a deadly weapon).

#### COMMENT

1. See § 18-3-203(1)(b), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:88 (defining "deadly weapon"); Instruction F:185 (defining "with intent").

3. + *See People v. Lee*, 2020 CO 81, ¶ 3, 476 P.3d 351, 353 (“[A] defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon subsection of the second degree assault statute, section 18-3-203(1)(b), and the strangulation subsection of that statute, section 18-3-203(1)(i). Rather, the defendant must be charged under the strangulation subsection.”).
4. + In 2020, the Committee added Comment 3.

### **3-2:10 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – BODILY INJURY)**

The elements of the crime of assault in the second degree (peace officer, firefighter, or emergency medical service provider – bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to prevent a person whom he [she] knew, or should have known, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty,
5. intentionally,
6. caused bodily injury to any person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider – bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider – bodily injury).

## COMMENT

1. See § 18-3-203(1)(c), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:263 (defining “peace officer”).
3. See *People v. Montoya*, 104 P.3d 303, 306 (Colo. App. 2004) (“[T]he word ‘firefighter’ in § 18-3-201 and § 18-3-203(1)(c) encompasses a person . . . who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.”).
4. In 2015, the Committee added the words “emergency medical care provider” to the fourth element. See Ch. 337, sec. 2, § 18-3-203(1)(c), 2015 Colo. Sess. Laws 1366, 1366. It also added the phrase “bodily injury” to the parenthetical to distinguish this instruction from Instruction 3-2:10.5 (assault in the second degree (peace officer, firefighter, or emergency medical service provider – *serious* bodily injury)).

### **3-2:10.5 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – SERIOUS BODILY INJURY)**

The elements of the crime of assault in the second degree (peace officer, firefighter, or emergency medical service provider – serious bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to prevent a person whom he [she] knew, or should have known, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty,
5. intentionally,
6. caused serious bodily injury to any person.
- [7. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider – serious bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (peace officer, firefighter, or emergency medical service provider – serious bodily injury).

## COMMENT

1. See § 18-3-203(1)(c.5), C.R.S. 2020.
2. See Instruction F:119 (defining “emergency medical service provider”); Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:263 (defining “peace officer”); Instruction F:332 (defining “serious bodily injury”).
3. See *People v. Montoya*, 104 P.3d 303, 306 (Colo. App. 2004) (“[T]he word ‘firefighter’ in § 18-3-201 and § 18-3-203(1)(c) encompasses a person . . . who is employed by the fire department to respond to such emergencies as medical calls, fire calls, and car accidents. The statute is not limited to firefighters performing fire suppression functions.”).
4. The Committee added this instruction in 2015. See Ch. 211, sec. 1, § 18-3-203(1)(c.5), 2015 Colo. Sess. Laws 771, 771.

### **3-2:11 ASSAULT IN THE SECOND DEGREE (RECKLESS)**

The elements of the crime of assault in the second degree (reckless) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. caused serious bodily injury to another person,
5. by means of a deadly weapon.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (reckless).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (reckless).

#### COMMENT

1. See § 18-3-203(1)(d), C.R.S. 2020.
2. See Instruction F:88 (defining "deadly weapon"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

### **3-2:12 ASSAULT IN THE SECOND DEGREE (UNLAWFUL ADMINISTRATION OF DRUGS)**

The elements of the crime of assault in the second degree (unlawful administration of drugs) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally,
  4. for a purpose other than lawful medical or therapeutic treatment,
  5. caused stupor, unconsciousness, or other physical or mental impairment or injury to another person,
  6. by administering a drug, substance, or preparation capable of producing the intended harm,
  7. without that person's consent.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (unlawful administration of drugs).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (unlawful administration of drugs).

## COMMENT

1. *See* § 18-3-203(1)(e), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”).

### **3-2:13 ASSAULT IN THE SECOND DEGREE (LAWFULLY CONFINED OR IN CUSTODY)**

The elements of the crime of assault in the second degree (lawfully confined or in custody) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and violently,
4. while lawfully confined or in custody,
5. applied physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, or a judge or an officer of a court of competent jurisdiction,
6. and the defendant knew, or reasonably should have known, that the victim was a peace officer, firefighter, or emergency medical service provider engaged in the performance of his [her] duties, or a judge or an officer of a court of competent jurisdiction.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (lawfully confined or in custody).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (lawfully confined or in custody).

## COMMENT

1. See § 18-3-203(1)(f), C.R.S. 2020.
2. See Instruction F:119 (defining “emergency medical service provider”); Instruction F:124 (defining “engaged in the performance of his [her] duties”); Instruction F:157 (defining “firefighter”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”).
3. The terms “lawfully confined” and “in custody” are not defined by statute, and the provision that uses these terms to define the above type of second degree assault is not modified by a clause that specifies that the confinement or custody must have been the “result of” a charge, conviction, or adjudication (as is the case for the provision that defines the type of second degree assault described in Instruction 3-2:14, and the type of first degree assault described in Instruction 3-2:06). Accordingly, a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent, which makes clear that the phrase “while lawfully confined or in custody” encompasses confinements that occur in facilities, as well as custodial situations that take place in the field. See *People v. Olinger*, 566 P.2d 1367, 1368 (Colo. App. 1977) (“the word ‘confined’ in the second degree assault statute connotes detention in an institution”); see, e.g., *People v. Armstrong*, 720 P.2d 165, 169 (Colo. 1986) (“[W]e hold that an arrest precedes ‘in custody’ for purposes of section 18-3-203(1)(f), when the person subject to an arrest resists that arrest.”); *People in Interest of D.S.L.*, 134 P.3d 522, 525 (Colo. App. 2006) (“To be deemed to be in custody for purposes of [section 18-3-203(1)(f)], a person need not be subject to a formal arrest. All that is required is that the ‘peace officer must have applied a level of physical control over the person being detained so as reasonably to ensure that the person does not leave.’” (quoting *People v. Rawson*, 97 P.3d 315, 323 (Colo. App. 2004))); *People v. Ortega*, 899 P.2d 236, 238 (Colo. App. 1994) (“[W]hen, as here, an officer has detained a suspect for purposes of further investigation rather than arrest, but nevertheless has applied a sufficient level of physical control so as reasonably to ensure that the suspect does not leave, then the suspect is in custody for purposes of § 18-3-203(1)(f)”; see also *People v. Thornton*, 929 P.2d 729, 733 (Colo.

1996) (interpreting the phrase “in custody or confinement,” as used in section 18-8-208(3), C.R.S. 2020 (escape), and explaining: “A teaching of *Armstrong* is that custody connotes physical control. . . . However, physical control, in a situation not involving resistance to arrest, does not necessarily require physical restraint through application of force. . . . The officer’s presence and the suspect’s submission in concert may be sufficient to establish the assurance, requisite to a determination of physical control, that the suspect will not leave.”).

4. Pursuant to § 18-3-202(1)(f), C.R.S. 2020, where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be “in custody” for purposes of this instruction.

### **3-2:14 ASSAULT IN THE SECOND DEGREE (LAWFULLY CONFINED OR IN CUSTODY; CHARGED, CONVICTED, OR ADJUDICATED)**

The elements of the crime of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and violently,
4. while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child,
5. applied physical force against a person engaged in the performance of his [her] duties while employed by or under contract with a detention facility, or while employed by the division in the department of human services responsible for youth services as a youth services counselor or in the youth services worker classification series, and
6. the defendant knew, or reasonably should have known, that the victim was a person engaged in the performance of his [her] duties while employed by or under contract with a detention facility, or employed by the division in the department of human services responsible for youth services.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (lawfully confined or in custody; charged, convicted, or adjudicated).

#### COMMENT

1. *See* § 18-3-203(1)(f), C.R.S. 2020.
2. *See* Instruction F:96 (defining “detention facility”); Instruction F:124 (defining “engaged in the performance of his [her] duties”); Instruction F:195 (defining “knowingly”).
3. Pursuant to § 18-3-203(1)(f), where appropriate, the court should consider instructing the jury that a person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility and who is required to report back to the detention facility at a specified time is deemed to be “in custody” for purposes of this instruction.

### **3-2:15 ASSAULT IN THE SECOND DEGREE (WHILE CONFINED IN A DETENTION FACILITY; BODILY FLUIDS OR HAZARDOUS MATERIAL)**

The elements of the crime of assault in the second degree (while confined in a detention facility; bodily fluids or hazardous material) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while lawfully confined in a detention facility within this state,
4. with the intent,
5. to infect, injure, harm, harass, annoy, threaten, or alarm,
6. a person in a detention facility whom the defendant knew, or reasonably should have known, to be an employee of a detention facility,
7. caused such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material,
8. by any means, including, but not limited to, throwing, tossing, or expelling such fluid or material.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (while confined in a detention facility; bodily fluids or hazardous material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree

(while confined in a detention facility; bodily fluids or hazardous material).

#### COMMENT

1. See § 18-3-203(1)(f.5)(I), C.R.S. 2020.
2. See Instruction F:97 (defining “detention facility”); Instruction F:121 (defining “employee of a detention facility”); Instruction F:185 (defining “intentionally” and “with intent”).
3. See *People v. Miller*, 97 P.3d 171, 173 (Colo. App. 2003) (“although the language ‘lawfully confined to a detention facility’ may lend itself to multiple interpretations, the language of § 18-3-203(1)(f.5)(I) and (III)(A) and (B) and its legislative history compel the conclusion that the statute applies to individuals in lawful custody of law enforcement officials”).
4. See *People v. Luna*, 2013 COA 67, ¶¶ 30–32, 410 P.3d 475, 480 (for purposes of sections 18-3-203(1)(f.5)(I), (III)(A), being placed under arrest in a patrol vehicle by a police officer constitutes being lawfully confined in a “detention facility” by an “employee of a detention facility”).

### **3-2:16 ASSAULT IN THE SECOND DEGREE (INTENT TO CAUSE BODILY INJURY; CAUSING SERIOUS BODILY INJURY)**

The elements of the crime of assault in the second degree (intent to cause bodily injury; causing serious bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to cause bodily injury to another person,
5. caused serious bodily injury to that person or another person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (intent to cause bodily injury; causing serious bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (intent to cause bodily injury; causing serious bodily injury).

#### COMMENT

1. See § 18-3-203(1)(g), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury").

### **3-2:16.5 ASSAULT IN THE SECOND DEGREE (BODILY FLUIDS OR HAZARDOUS MATERIAL; EMERGENCY RESPONDERS ENGAGED IN DUTIES)**

The elements of the crime of assault in the second degree (bodily fluids or hazardous material; emergency responders engaged in duties) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to infect, injure, or harm another person,
5. whom the defendant knew or reasonably should have known to be engaged in the performance of his or her duties as a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider,
6. caused such person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material,
7. by any means, including by throwing, tossing, or expelling such fluid or material.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (bodily fluids or hazardous material; emergency responders engaged in duties).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree

(bodily fluids or hazardous material; emergency responders engaged in duties).

#### COMMENT

1. *See* § 18-3-203(1)(h), C.R.S. 2020.
2. *See* Instruction F:118 (defining “emergency medical care provider”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:123 (defining “engaged in the performance of his [her] duties”); Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “with intent”); Instruction F:263 (defining “peace officer”).
3. The Committee added this instruction in 2015. *See* Ch. 337, sec. 2, § 18-3-203(1)(h), 2015 Colo. Sess. Laws 1366, 1366-67.

### **3-2:16.7 ASSAULT IN THE SECOND DEGREE (RESTRICT BREATHING)**

The elements of the crime of assault in the second degree (restrict breathing) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with the intent,
  4. to cause bodily injury,
  5. applied sufficient pressure to impede or restrict the breathing or circulation of the blood of another person,
  6. by applying such pressure to the neck or by blocking the nose or mouth of the other person, and
  7. thereby caused bodily injury.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (restrict breathing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree (restrict breathing).

#### COMMENT

1. See § 18-3-203(1)(i), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”).
3. + See *People v. Lee*, 2020 CO 81, ¶ 3, 476 P.3d 351, 353 (“[A] defendant may not be charged with second degree assault based on conduct involving strangulation under both the deadly weapon subsection of the second degree assault statute, section 18-3-203(1)(b), and the strangulation subsection of that statute, section 18-3-203(1)(i). Rather, the defendant must be charged under the strangulation subsection.”).
4. The Committee added this instruction in 2016 pursuant to new legislation. See Ch. 327, sec. 2, § 18-3-203(1)(i), 2016 Colo. Sess. Laws 1327, 1327-28.
5. + In 2020, the Committee added Comment 3.

### **3-2:17.INT ASSAULT IN THE SECOND DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)**

If you find the defendant not guilty of assault in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer “Yes” or “No”)

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the injury was performed upon a sudden heat of passion,
2. caused by a serious and highly provoking act of the intended victim,
3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and
4. between the provocation and the assault, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting

upon a provoked and sudden heat of passion, mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of passion, mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-203(2)(a), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. + See Instruction 3-2:17.5.SP (special instruction – gender identity or expression or sexual orientation).
4. See *Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004) (“A provocation instruction is warranted whenever a defendant shows some supporting evidence – regardless of how incredible, unreasonable, improbable, or slight it may be – to establish each factor described in subsection (3)(b) of the second-degree murder statute.”); *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001) (when a provocation instruction is given, it must make clear that the prosecution bears the burden of proving a lack of provocation).
5. Although the supreme court has held, in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), that a trial court was without authority to enter a judgment of conviction for mitigated second degree assault where the jury was deadlocked with respect to the heat of passion interrogatory, it is unclear if this aspect of the holding in *Brighi* was dependent on an erroneous characterization of heat of passion as an *element* of mitigated second degree assault. See *Rowe v. People*, 856 P.2d 486, 490 (Colo. 1993) (“We disapprove of footnote two in *People v. Brighi*, 755 P.2d 1218, 1221 (Colo. 1988), to the extent that it suggests that heat of passion is an element of second-degree assault.”). Nevertheless, *Brighi* is still good authority for the proposition that a trial court has discretion to inquire whether a jury is

deadlocked as to the charge, or as to the heat of passion mitigator. *See generally* Instruction E:18, Comments 1–4 (Supplemental Instruction—When Jurors Fail to Agree).

However, the Committee expresses no opinion concerning what level judgment of conviction a trial court should enter where a jury is unanimous as to guilt and firmly deadlocked as to heat of passion. This remains an unanswered question in Colorado. *See People v. Ramirez*, 56 P.3d 89, 93 n.7 (Colo. 2002) (upholding a conviction for second degree murder and concluding that, because there was no evidence to support a heat of passion interrogatory, it was unnecessary to decide whether (1) the court of appeals had correctly returned the case to the trial court for resentencing, reasoning that the absence of a jury finding concerning the heat of passion mitigator afforded the defendant the benefit of the assumption that the jury intended the lesser felony; or (2) the prosecution should instead have the option to retry the defendant on the charge of second degree murder); *see also People v. Harris*, 797 P.2d 816 (Colo. App. 1990) (because the jury found the defendant guilty of first degree assault and neglected to check a box on the verdict form indicating whether he had acted under a heat of passion, the court was required to enter a finding that he had in fact acted under a heat of passion).

6. + In 2020, pursuant to new legislation, the Committee added Comment 3—citing to a newly created special instruction—and renumbered the subsequent comments. *See* Instruction 3-2:17.5.SP, Comment 3.

**+ 3-2:17.5.SP ASSAULT IN THE SECOND DEGREE, SUDDEN HEAT OF PASSION – SPECIAL INSTRUCTION (GENDER IDENTITY OR EXPRESSION OR SEXUAL ORIENTATION)**

If you find the defendant not guilty of assault in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the second degree, you have been separately instructed to determine whether the defendant was acting upon a provoked and sudden heat of passion. You are hereby instructed that the defendant’s act did not constitute an act performed upon a sudden heat of passion if it resulted solely from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

COMMENT

1. See § 18-3-203(2)(d), C.R.S. 2020.
2. See Instruction F:161.3 (defining “gender identity” and “gender expression”); Instruction F:342 (defining “sexual orientation”).
3. + In 2020, the Committee added this instruction pursuant to new legislation. See Ch. 279, sec. 9, § 18-3-203(2)(d), 2020 Colo. Sess. Laws 1364, 1369.

**3-2:18.INT ASSAULT IN THE SECOND DEGREE –  
INTERROGATORY (SERIOUS BODILY INJURY DURING  
SPECIFIED FELONY)**

If you find the defendant not guilty of assault in the second degree [, or if you find the defendant guilty of assault in the second degree but find that he [she] committed the assault under a provoked and sudden heat of passion], you should disregard this instruction and sign the verdict form to indicate your verdict.

If, however, you find the defendant guilty of assault in the second degree [, and you also find that the defendant did not act upon a provoked and sudden heat of passion], you should sign the verdict form to indicate your guilty verdict and answer the following verdict question on the verdict form:

Did a non-participant suffer serious bodily injury? (Answer “Yes” or “No”)

A non-participant suffered serious bodily injury only if:

1. [Insert name of victim] suffered serious bodily injury,
2. during the commission or attempted commission or flight from the commission or attempted commission of [insert name of qualifying felony offense(s) from section 18-3-203(2)(b.5)], and
3. he [she] was not a participant in the crime.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place,

and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-203(2)(b.5), C.R.S. 2020.
2. See Instruction F:332 (defining “serious bodily injury”); Instruction G2:01 (criminal attempt); *see, e.g.*, Instruction E:28 (special verdict form).
3. Section 18-3-203(2)(b.5) states that this sentence enhancement provision is not applicable where the assault is committed under a sudden and provoked heat of passion. Accordingly, it may be necessary to give the jury both Instruction 3-2:17.INT and Instruction 3-2:18.INT (using the “and you also find that the defendant did not act upon a provoked and sudden heat of passion” language that appears in brackets in the first two paragraphs of 3-2:18.INT).
4. If the defendant is not separately charged with a qualifying felony offense(s), give the jury the elemental instruction for the offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the qualifying felony offense(s).

### **3-2:19.INT ASSAULT IN THE SECOND DEGREE – INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of assault in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-6.5-103(3)(b), C.R.S. 2020.

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).

3. Second degree assaults of at-risk persons may be subject to heat of passion mitigation. *See* § 18-6.5-103(3)(b), C.R.S. 2020. Accordingly, where supported by the evidence, also use Instruction 3-2:17.INT.

4. In 2016, the Committee modified this instruction pursuant to a legislative amendment. *See* Ch. 172, sec. 3, § 18-6.5-103(3)(b), 2016 Colo. Sess. Laws 545, 548.

### **3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY)**

The elements of the crime of assault in the third degree (knowingly or recklessly) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or recklessly,
4. caused bodily injury to another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the third degree (knowingly or recklessly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the third degree (knowingly or recklessly).

#### COMMENT

1. See § 18-3-204(1)(a), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly").

### **3-2:21 ASSAULT IN THE THIRD DEGREE (NEGLIGENCE AND DEADLY WEAPON)**

The elements of the crime of assault in the third degree (negligence and deadly weapon) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with criminal negligence,
  4. caused bodily injury to another person,
  5. by means of a deadly weapon.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the third degree (negligence and deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the third degree (negligence and deadly weapon).

#### COMMENT

1. See § 18-3-204(1)(a), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:79 (defining "criminal negligence"); Instruction F:88 (defining "deadly weapon").

### **3-2:22 ASSAULT IN THE THIRD DEGREE (EMERGENCY RESPONDERS COMING INTO CONTACT WITH BODILY FLUIDS OR HAZARDOUS MATERIAL)**

The elements of the crime of assault in the third degree (emergency responders coming into contact with bodily fluids or hazardous material) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to harass, annoy, threaten, or alarm,
5. a person whom the defendant knew, or reasonably should have known, to be a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider,
6. caused the other person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or toxic, caustic, or hazardous material,
7. by any means, including throwing, tossing, or expelling the fluid or material.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second degree (emergency responders coming into contact with bodily fluids or hazardous material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second degree

(emergency responders coming into contact with bodily fluids or hazardous material).

#### COMMENT

1. See § 18-3-204(1)(b), C.R.S. 2020.
2. See Instruction F:118 (defining “emergency medical care provider”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:123 (defining “engaged in the performance of his [her] duties”); Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “with intent”); Instruction F:263 (defining “peace officer”).
3. In 2015, to reflect a legislative amendment, the Committee deleted the words “infect, injure, harm” from the fourth element. See Ch. 337, sec. 3, § 18-3-204(1)(b), 2015 Colo. Sess. Laws 1366, 1367.

### **3-2:23.INT ASSAULT IN THE THIRD DEGREE – INTERROGATORY (EMERGENCY RESPONDERS ENGAGED IN DUTIES)**

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his [her] duties? (Answer “Yes” or “No”)

The victim was a peace officer, emergency medical service provider, emergency medical care provider, or firefighter engaged in the performance of his [her] duties only if:

1. he [she] was a peace officer, an emergency medical service provider, an emergency medical care provider, or a firefighter, and
2. he [she] was engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-501(1.5)(a), C.R.S. 2020.
2. *See* Instruction F:118 (defining “emergency medical care provider”); Instruction F:119 (defining “emergency medical service provider”); Instruction F:123 (defining “engaged in the performance of his [her] duties”); Instruction F:157 (defining “firefighter”); Instruction F:263 (defining “peace officer”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-2:24.INT ASSAULT IN THE THIRD DEGREE – INTERROGATORY (MENTAL HEALTH PROFESSIONAL ENGAGED IN DUTIES)**

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a mental health professional engaged in the performance of his [her] duties? (Answer “Yes” or “No”)

The victim was a mental health professional engaged in the performance of his [her] duties only if:

1. he [she] was a “mental health professional,”
2. employed by or under contract with the department of human services,
3. engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-501(1.7)(a), C.R.S. 2020.
2. *See* Instruction F:227 (defining “mental health professional”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Although section 18-1.3-501(1.5)(b), C.R.S. 2020, defines the phrase “engaged in the performance of his [her] duties” for purposes of the enumerated types of first responders, section 18-1.3-501(1.7), C.R.S. 2020, does not include a similar provision indicating how the same phrase is to be defined for purposes of a “mental health professional.”

### **3-2:25.INT ASSAULT IN THE THIRD DEGREE – INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of assault in the third degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of assault in the third degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-6.5-103(3)(c), C.R.S. 2020.

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).

3. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(3)(c), 2016 Colo. Sess. Laws 545, 548.

### 3-2:26 VEHICULAR ASSAULT (RECKLESS)

The elements of the crime of vehicular assault (reckless) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. operated or drove a motor vehicle,
  4. in a reckless manner, and
  5. such conduct was the proximate cause of serious bodily injury to another person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular assault (reckless).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular assault (reckless).

#### COMMENT

1. See § 18-3-205(1)(a), C.R.S. 2020.
2. See Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury"); see also CJI-Civ. 9:18 (2014) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the

jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

### 3-2:27 VEHICULAR ASSAULT (UNDER THE INFLUENCE)

The elements of the crime of vehicular assault (under the influence) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated or drove a motor vehicle,
4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs,
5. and such conduct was the proximate cause of serious bodily injury to another person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular assault (under the influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular assault (under the influence).

#### COMMENT

1. *See* § 18-3-205(1)(b)(I), C.R.S. 2020.
2. *See* Instruction F:109 (defining “driving under the influence”); Instruction F:236 (defining “motor vehicle”); Instruction F:252 (defining “one or more drugs”); Instruction F:332 (defining “serious bodily injury”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2014) (“The [Colorado Supreme Court Committee on Civil

Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. Sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV)(vehicular assault), apply to a person who “operates or drives a motor vehicle while under the influence.” (Emphasis added.) By contrast, the traffic offense of driving under the influence (DUI) does not include a reference to operation; rather, the DUI statute specifies that it is unlawful for a person who is under the influence “to *drive* a motor vehicle or vehicle.” § 42-4-1301(1)(a), C.R.S. 2020 (emphasis added). Because neither “drive” nor “operate” is defined by statute (either in the criminal code, or in the traffic code), a court exercising its discretion to draft a supplemental definitional instruction should refer to precedent:

We have held that “drive” means to exercise “actual physical control” over a motor vehicle. *People v. Swain*, 959 P.2d 426, 429, 431 (1998) (so holding in context of a DUI case where defendant’s keys were in the ignition and the truck’s radio was playing, but defendant was asleep or passed out in the front seat); *Brewer v. Motor Vehicle Div., Dep’t of Revenue*, 720 P.2d 564, 566–67 (Colo. 1986) (holding under the express consent statute that driving means being “in actual physical control” of a motor vehicle and is not limited to “placing and controlling a vehicle in motion”). The term “operate” is somewhat broader, connoting the action of causing something “to occur . . . [or] to cause to function usually by direct personal effort.” *People v. Gregor*, 26 P.3d 530, 532 (Colo. Ct. App. 2000) (quoting *Webster’s Third New International Dictionary* 1580–81 (1986)).

*People v. Stewart*, 55 P.3d 107, 115 (Colo. 2002).

Further, although the phrase “driving under the influence” is defined identically for purposes of sections 18-3-106(1)(b)(I), (IV) (vehicular homicide) and 18-3-205(1)(b)(I), (IV)(vehicular assault), the wording of that

shared definition is slightly different from the definition of “driving under the influence” that appears as part of the traffic code in section 42-4-1301(1)(f), C.R.S. 2020. *Compare* Instruction F:109 (defining “driving under the influence” (vehicular homicide and vehicular assault)), *with* Instruction F:110 (defining “driving under the influence” (traffic code)). And there are significant differences between the definition of a “motor vehicle” in section 18-1-901(3)(k), C.R.S. 2020, and the definition of that same term that appears in section 42-1-102(58), C.R.S. 2020. *Compare* Instruction F:236 (defining “motor vehicle” for Title 18), *with* Instruction F:239 (defining “motor vehicle” for Title 42).

Finally, there are two internal inconsistencies within the statutory sections that define the criminal offenses of vehicular homicide and vehicular assault.

First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to *motor* vehicles, the definitions of “driving under the influence” in sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving “a vehicle,” with no references to motorization. In cases involving vehicles that are indisputably motorized, this discrepancy will be inconsequential. However, in a case where there is a controversy concerning whether the vehicle in question was motorized, the court should add the word “motor” to the statutory definition that appears in Instruction F:109.

Second, as noted above, sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) both apply to a person who “*operates* or drives” (emphasis added) a motor vehicle while under the influence. Yet neither “operate” nor “operating” is included as part of the definition of “driving under the influence” in sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I). In cases involving only an allegation of “driving,” this discrepancy will be inconsequential. However, in other situations, the statutory definition that appears in Instruction F:109 may need to be modified as follows: (1) in a case involving only an allegation of operation, by substituting “operating” for “driving;” and (2) in a case involving an allegation of operation and/or driving, by adding the word “operating.”

4. In 2015, the Committee corrected two statutory citations in Comment 3.

### **3-2:28.SP VEHICULAR ASSAULT – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)**

As to the charge of vehicular assault, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a

fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. *See* § 18-3-205(2)(a)-(c), C.R.S. 2020.

### **3-2:29.SP VEHICULAR ASSAULT – SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)**

As to the charge of vehicular assault, a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant's blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. *See* § 18-3-205(2)(d), C.R.S. 2020.

### 3-2:30 MENACING

The elements of the crime of menacing are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. by any threat or physical action,
5. placed or attempted to place another person in fear of imminent serious bodily injury.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of menacing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of menacing.

#### COMMENT

1. *See* § 18-3-206(1), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:332 (defining “serious bodily injury”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether

the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

### **3-2:31.INT MENACING – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)**

If you find the defendant not guilty of menacing, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of menacing, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the menacing involve the use or suggested use of a deadly weapon? (Answer “Yes” or “No”)

The menacing involved the use or suggested use of a deadly weapon only if:

1. the defendant committed the menacing by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or by representing verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-206(1)(a), (b), C.R.S. 2020.

2. See Instruction F:88 (defining “deadly weapon”).

### 3-2:32 EXTORTION (UNLAWFUL ACT)

The elements of the crime of extortion (unlawful act) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without legal authority, and
4. with the intent,
5. to induce another person against that other person's will to perform an act or to refrain from performing a lawful act,
6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and
7. threatened to cause the result[s] by performing or causing an unlawful act to be performed.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (unlawful act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (unlawful act).

#### COMMENT

1. See § 18-3-207(1)(a), (b)(I), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”); Instruction F:357 (defining “substantial threat”).
3. + See *People v. Knox*, 2019 COA 152, ¶ 51, 467 P.3d 1218, 1228 (“[T]he threat of litigation does not constitute criminal extortion.”).
4. + In 2020, the Committee added Comment 3.

### 3-2:33 EXTORTION (THIRD PARTY)

The elements of the crime of extortion (third party) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without legal authority, and
4. with the intent,
5. to induce another person against that other person's will to perform an act or to refrain from performing a lawful act,
6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and
7. threatened to cause the result[s] by invoking action by a third party, including but not limited to, the state or any of its political subdivisions, whose interests were not substantially related to the interests pursued by the defendant.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (third party).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (third party).

#### COMMENT

1. See § 18-3-207(1)(a), (b)(II), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”); Instruction F:357 (defining “substantial threat”).

### 3-2:34 EXTORTION (IMMIGRATION STATUS)

The elements of the crime of extortion (immigration status) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to induce another person against that other person's will to give the defendant money or another item of value,
5. threatened to report to law enforcement officials the immigration status of the threatened person or another person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortion (immigration status).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortion (immigration status).

#### COMMENT

1. *See* § 18-3-207(1.5), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent").

### 3-2:35 AGGRAVATED EXTORTION

The elements of the crime of aggravated extortion are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without legal authority, and
4. with the intent,
5. to induce another person against that other person's will to perform an act or refrain from performing a lawful act,
6. made a substantial threat to confine or restrain, cause economic hardship or bodily injury to, or damage the property or reputation of, the threatened person or another person, and
7. threatened to cause the result[s] by means of chemical, biological, or harmful radioactive agents, weapons, or poison.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated extortion.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated extortion.

#### COMMENT

1. See § 18-3-207(2), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”); Instruction F:357 (defining “substantial threat”).

### 3-2:36 RECKLESS ENDANGERMENT

The elements of the crime of reckless endangerment are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. engaged in conduct which created a substantial risk of serious bodily injury to another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of reckless endangerment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of reckless endangerment.

#### COMMENT

1. *See* § 18-3-208, C.R.S. 2020.
2. *See* Instruction F:308 (defining “recklessly”); Instruction F:332 (defining “serious bodily injury”).

### **3-2:37.INT RECKLESS ENDANGERMENT – INTERROGATORY (MENTAL HEALTH PROFESSIONAL ENGAGED IN DUTIES)**

If you find the defendant not guilty of reckless endangerment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of reckless endangerment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a mental health professional engaged in the performance of his [her] duties? (Answer “Yes” or “No”)

The victim was a mental health professional engaged in the performance of his [her] duties only if:

1. he [she] was a “mental health professional,”
2. employed by or under contract with the department of human services,
3. engaged in the performance of his [her] duties.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-501(1.7)(a), C.R.S. 2020.
2. *See* Instruction F:227 (defining “mental health professional”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Although section 18-1.3-501(1.5)(b), C.R.S. 2020, defines the phrase “engaged in the performance of his [her] duties” for purposes of the enumerated types of first responders, section 18-1.3-501(1.7), C.R.S. 2020, does not include a similar provision indicating how the same phrase is to be defined for purposes of a “mental health professional.”

## CHAPTER 3-3

### KIDNAPPING AND RELATED OFFENSES

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INTERNET LURING OF A CHILD  
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INTERNET LURING OF A CHILD –  
INTERROGATORY

### **3-3:01 FIRST DEGREE KIDNAPPING (FORCIBLY SEIZED AND CARRIED)**

The elements of the crime of first degree kidnapping (forcibly seized and carried) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with the intent,
  4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,
  5. forcibly seized and carried any person from one place to another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (forcibly seized and carried).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (forcibly seized and carried).

#### COMMENT

1. See § 18-3-301(1)(a), C.R.S. 2020.

2. See Instruction F:21 (defining “anything of value”); Instruction F:185 (defining “with intent”); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase “seized and carried”).

3. The term “concession” is not defined by statute. See *People v. San Emerterio*, 839 P.2d 1161, 1165–68 (Colo. 1992) (the term “concession,” as used in first degree kidnapping statute is broad enough to include a promise that has sufficient subjective value to the kidnapper that he would hinge release of a victim upon that promise; it is immaterial that the kidnapper might not have control over the victim after release, and might be unable to secure the victim’s performance of the promise on which the kidnapper conditioned release); see also *People v. Weare*, 155 P.3d 527, 529-30 (Colo. App. 2006) (first degree kidnapping does not require proof that the kidnapper intended to release the victim upon obtaining the concession sought; statutory phrase “in order to secure a release” simply describes the purpose of the concession the offender must intend to force the victim to make, and not to add a separate intent requirement).

4. + See *People v. Pratarelli*, 2020 COA 33, ¶¶ 17–18, 471 P.3d 1177, 1182 (noting that the statute does not define “forcibly” or “force,” and using dictionary definitions to determine that the prosecution needed to prove that the defendant “used (or threatened to use) power, violence, or pressure against [the victim] to seize and carry her, and that he did so against opposition or resistance”).

5. + In 2020, the Committee added Comment 4.

### **3-3:02 FIRST DEGREE KIDNAPPING (ENTICED OR PERSUADED)**

The elements of the crime of first degree kidnapping (enticed or persuaded) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with the intent,
  4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,
  5. enticed or persuaded any person to go from one place to another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (enticed or persuaded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (enticed or persuaded).

#### COMMENT

1. See § 18-3-301(1)(b), C.R.S. 2020.
2. See Instruction F:21 (defining "anything of value"); Instruction F:185 (defining "with intent"); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase "seized and carried").

3. *See* Instruction 3-3:01, Comment 3 (discussing the term “concession”).

### **3-3:03 FIRST DEGREE KIDNAPPING (IMPRISONED OR FORCIBLY SECRETED)**

The elements of the crime of first degree kidnapping (imprisoned or forcibly secreted) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with the intent,
  4. to force a person to make any concession or give up anything of value in order to secure a release of a person under the defendant's actual or apparent control,
  5. imprisoned or forcibly secreted any person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree kidnapping (imprisoned or forcibly secreted).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree kidnapping (imprisoned or forcibly secreted).

#### COMMENT

1. See § 18-3-301(1)(c), C.R.S. 2020.
2. See Instruction F:21 (defining "anything of value"); Instruction F:185 (defining "with intent"); Instruction 3-3:05, Comment 4 (discussing decisions addressing the phrase "seized and carried"); *see also Webster's*

*Third New International Dictionary* 2052 (2002) (defining “secret” as meaning “to deposit or conceal in a hiding place”).

3. See Instruction 3-3:01, Comment 3 (discussing the term “concession”).

### **3-3:04.INT FIRST DEGREE KIDNAPPING – INTERROGATORY (BODILY INJURY)**

If you find the defendant not guilty of first degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree kidnapping, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim harmed during the kidnapping? (Answer “Yes” or “No”)

The victim was harmed during the kidnapping only if:

1. the person who was kidnapped suffered bodily injury.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-301(2), C.R.S. 2020 (“Whoever commits first degree kidnapping is guilty of a class 1 felony if the person kidnapped shall have suffered bodily injury”); § 18-3-301(3), C.R.S. 2020 (“Whoever commits first degree kidnapping commits a class 2 felony if, prior to his conviction, the person kidnapped was liberated unharmed.”).

2. See Instruction F:36 (defining “bodily injury”); see, e.g., Instruction E:28 (special verdict form).

3. Because the definition of “bodily injury” encompasses “physical pain, illness or physical or mental impairment, *however slight*,” *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) (emphasis added), the interrogatory equates the absence of “bodily injury,” under section 18-3-301(2), with the condition of being “unharmed,” under section 18-3-301(3). See *Miller v. District Court*, 593 P.2d 1379 (Colo. 1979) (“liberated unharmed” means without having suffered bodily injury); see also *People v. Hines*, 572 P.2d at 470 (“It may be that in some [first degree kidnapping] cases injuries might be so trifling as to be excluded from the category of ‘bodily injury’ the legislature contemplated. Should such a borderline case arise, the question whether bodily injury occurred would be one of statutory construction.”). However, an ambiguity could arise in a case where there is no evidence showing whether the victim suffered bodily injury or was “liberated unharmed” (for example, where the victim’s welfare and whereabouts are unknown at the time of trial).

In COLJI-Crim. (1983), the Committee addressed this possible ambiguity by relying on a non-statutory concept of “presumed . . . harm to the victim” if the victim had not been released by the time of trial. See COLJI-Crim. Ch. 11, Notes on Chapter Use, 197 (1983). Thus, COLJI-Crim. 11:01 (1983), which was based on the same language of section 18-3-301 that remains in effect today, defined a class one felony offense of first degree kidnapping for which no finding of bodily injury was required if the jury made a finding that “the person kidnapped has not been released.” See COLJI-Crim. 11:01, Notes on Use (1983).

Thereafter, in COLJI-Crim. 3-3:03 (2008), the Committee abandoned the presumption that a victim who has not been released has been harmed. That interrogatory simply asked the jury to determine whether the prosecution had proved that the person who was kidnapped had suffered “bodily injury.”

4. This edition of COLJI-Crim. does not include an interrogatory addressing the following provision of section 18-3-301(2): “no person convicted of first degree kidnapping shall suffer the death penalty if the

person kidnapped was liberated alive prior to the conviction of the kidnapper." See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (the Eighth Amendment categorically bars death sentences for nonhomicide crimes).

### 3-3:05 SECOND DEGREE KIDNAPPING (SEIZED AND CARRIED)

The elements of the crime of second degree kidnapping (seized and carried) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. seized and carried any person from one place to another,
  5. without his [her] consent, and
  6. without lawful justification.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree kidnapping (seized and carried).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree kidnapping (seized and carried).

#### COMMENT

1. See § 18-3-302(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The supreme court has held that the term “without lawful justification” is:

such a basic concept that the use of explanatory synonyms add little, if anything, to the central core of meaning inherent in the term itself. In the context of the crime of second degree kidnapping, therefore, the term “without lawful justification” simply means an act not authorized or permitted by law – in other words, an act performed without lawful authority.

*People v. Schuett*, 833 P.2d 44, 47 (Colo. 1992).

4. It is within a trial court’s discretion to give an instruction defining the term “seized and carried” as meaning “any movement, however short in distance.” *People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008). Further, if a court elects to define this term, it is not obligated to include language addressing the resulting increased risk of harm:

[A]s clarified in [*People v. Harlan*, 8 P.3d 448, 476 (Colo. 2000)], a substantial increase in the risk of harm is not a material element of the crime upon which a jury must be instructed. It is, instead, only “a factual circumstance reviewing courts consider in some cases to determine whether there is sufficient evidence to prove that the defendant moved the victim from one place to another.”

*People v. Owens*, 97 P.3d 227, 237 (Colo. App. 2004) (quoting *People v. Harlan*, 8 P.3d at 476).

5. + See *People v. Pratarelli*, 2020 COA 33, ¶ 27, 471 P.3d 1177, 1183 (“[A] custodial parent may not be convicted of second degree kidnapping.” (citing *Armendariz v. People*, 711 P.2d 1268, 1270 (Colo. 1986))).

6. + In 2020, the Committee added Comment 5.

### **3-3:06 SECOND DEGREE KIDNAPPING (TAKING, ENTICING, OR DECOYING A MINOR)**

The elements of the crime of second degree kidnapping (taking, enticing, or decoying a minor) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to keep or conceal the child from the child's parent or guardian, or to sell, trade, or barter the child for consideration,
5. took, enticed, or decoyed away a child under the age of eighteen,
6. not his [her] own.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree kidnapping (taking, enticing, or decoying a minor).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree kidnapping (taking, enticing, or decoying a minor).

#### COMMENT

1. See § 18-3-302(2), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:185 (defining “with intent”).
3. See Instruction H:36 (defining the affirmative defense of “mistake as to age”).
4. The phrase “not his own” is undefined, but the use of the terms “parent” and “guardian” would seem to suggest that the phrase “not his own” was intended to refer to the absence of a custodial relationship. A division of the Court of Appeals has implied as much. See *People v. Woodward*, 631 P.2d 1188, 1190 (Colo. App. 1981) (“The child kidnapping statute prohibits unauthorized interference with a parent’s *custodial* right to their [sic] children.” (emphasis added)).
5. The term “consideration” is not defined in section 18-3-302. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

### **3-3:07.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (VICTIM OF SEXUAL OFFENSE OR ROBBERY)**

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, you should sign the verdict form to indicate your finding of guilt and answer the following verdict question on the verdict form:

Was the person kidnapped also the victim of another specified crime?  
(Answer “Yes” or “No”)

The person kidnapped was also the victim of another specified crime only if:

1. the person kidnapped was the victim of the crime of [insert sexual offense(s)] [robbery].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3-302(3), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with robbery or a relevant sexual offense, give the jury the elemental instruction for the referenced offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

### 3-3:08.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (CONSIDERATION)

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the kidnapping committed with the intent to gain something?  
(Answer “Yes” or “No”)

The kidnapping was committed with the intent to gain something only if:

1. the kidnapping was accomplished with intent to sell, trade, or barter the victim for consideration.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-302(4)(a)(I), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); see, e.g., Instruction E:28 (special verdict form).

3. The term “consideration” is not defined in section 18-3-302. *See, e.g., Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

### **3-3:09.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)**

If you find the defendant not guilty of second degree kidnapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree kidnapping, and you answer “No” to the question of whether the person kidnapped also was the victim of another specified crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the kidnapping committed by the use or suggested use of a deadly weapon? (Answer “Yes” or “No”)

The kidnapping was committed by the use or suggested use of a deadly weapon only if:

1. the kidnapping was accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or by the kidnapper representing verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-302(4)(a)(II), (III), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); *see, e.g.*, Instruction E:28 (special verdict form).

### 3-3:10 FALSE IMPRISONMENT

The elements of the crime of false imprisonment are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. confined or detained another person,
  5. without the other person's consent, and
  6. without proper legal authority.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false imprisonment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false imprisonment.

#### COMMENT

1. See § 18-3-303(1), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly").
3. See Instruction H:43 (affirmative defense of "peace officer acting in good faith"); Instruction H:47 (affirmative defense of "theft investigation").
4. In *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996), a division of the Court of Appeals observed, in dicta, that "COLJI-Crim. No. 11:08 (1983),

the pattern criminal jury instruction for false imprisonment pursuant to § 18-3-303, . . . provides that an element of the prosecution’s case is proof that the defendant is not a peace officer acting in good faith.” Although the division in *Reed* endorsed that interpretation of the statute, the Committee is now of the view that the final sentence of section 18-3-303(1) establishes an affirmative defense. See Instruction H:43 (affirmative defense of “peace officer acting in good faith”).

### **3-3:11.INT FALSE IMPRISONMENT – INTERROGATORY (EXTENDED DETENTION)**

If you find the defendant not guilty of false imprisonment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false imprisonment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false imprisonment involve force and extended detention?  
(Answer “Yes” or “No”)

The false imprisonment involved force and extended detention only if:

1. the defendant used force, or threat of force, to confine or detain the victim, and
2. he [she] confined or detained the victim for twelve hours or longer.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-3-303(2)(a), C.R.S. 2020.

2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2018, pursuant to a legislative amendment, the Committee modified the statutory citation in Comment 1, and it added the parenthetical in the instruction's title. *See* Ch. 299, sec. 1, § 18-3-303(2)(a), 2018 Colo. Sess. Laws 1821, 1821.

### **3-3:11.3.INT FALSE IMPRISONMENT – INTERROGATORY (PATTERN OF PUNISHMENT)**

If you find the defendant not guilty of false imprisonment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false imprisonment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the false imprisonment part of a pattern of punishment?  
(Answer “Yes” or “No”)

The false imprisonment was part of a pattern of punishment only if:

1. the victim was less than eighteen years of age, and
2. the defendant confined or detained the victim in a locked or barricaded room under circumstances that cause bodily injury or serious emotional distress, and
3. such confinement or detention was part of a continued pattern of cruel punishment or unreasonable isolation or confinement of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-303(2)(b), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 299, sec. 1, § 18-3-303(2)(b), 2018 Colo. Sess. Laws 1821, 1821.

### **3-3:11.7.INT FALSE IMPRISONMENT – INTERROGATORY (PHYSICAL RESTRAINTS)**

If you find the defendant not guilty of false imprisonment, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false imprisonment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false imprisonment involve physical restraints? (Answer “Yes” or “No”)

The false imprisonment involved physical restraints only if:

1. the victim was less than eighteen years of age, and
2. the defendant confined or detained the victim by means of tying, caging, chaining, or otherwise using similar physical restraints to restrict the victim’s freedom of movement,
3. under circumstances that cause bodily injury or serious emotional distress.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-303(2)(c), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 299, sec. 1, § 18-3-303(2)(c), 2018 Colo. Sess. Laws 1821, 1822.

### **3-3:12 VIOLATION OF CUSTODY (TAKING OR ENTICING)**

The elements of the crime of violation of custody (taking or enticing) are:

1. That the defendant, whether or not he [she] was a natural or foster parent of the child,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that he [she] had no privilege to do so or heedless in that regard,
4. took or enticed any child, under the age of eighteen, from the custody or care of the child's parents, guardian, or other lawful custodian or person with parental responsibilities with respect to the child.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of custody (taking or enticing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of custody (taking or enticing).

#### COMMENT

1. *See* § 18-3-304(1), C.R.S. 2020.
2. *See* Instruction F:50 (defining "child").

3. See Instruction H:36 (defining the affirmative defense of “mistake as to age”); Instruction H:44 (defining the affirmative defenses of “child in danger” and “child not enticed”).

4. The term “heedless” is not defined by statute. The Committee recommends using the language of the statute, without elaboration.

### **3-3:13 VIOLATION OF CUSTODY (COURT ORDER)**

The elements of the crime of violation of custody (court order) are:

1. That the defendant, whether or not he [she] was the child's parent,
2. in the State of Colorado, at or about the date and place charged,
3. violated an order of any district or juvenile court of this state, granting the custody of a child or parental responsibilities with respect to a child under the age of eighteen to any person, agency, or institution,
4. with the intent,
5. to deprive the lawful custodian or person with parental responsibilities of the custody or care of a child under the age of eighteen.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of custody (court order).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of custody (court order).

#### COMMENT

1. See § 18-3-304(2), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:185 (defining "with intent").

3. Although a trial court has discretion to provide the jury with an instruction defining the term “custody order,” such an instruction should not include any references to noncustodial aspects of the order. *See People v. Sorrendino*, 37 P.3d 501, 505-07 (Colo. App. 2001).

4. The placement of the mens rea is consistent with *People v. Metcalf*, 926 P.2d 133, 137-38 (Colo. App. 1996) (section 18-3-304(2) does not require the prosecution to prove that the defendant knew he was violating a court order; the statutory language requiring intent is limited to the deprivation of custody of the child, and is not extended to the additional elements of the offense).

### **3-3:14.INT VIOLATION OF CUSTODY – INTERROGATORY**

If you find the defendant not guilty of violation of custody, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of violation of custody, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant remove the child from this country? (Answer “Yes” or “No”)

The defendant removed the child from this country only if:

1. in the course of committing the offense,
2. the defendant removed the child from this country.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-3-304(2.5), C.R.S. 2020.
2. See Instruction F:50 (defining “child”); see, e.g., Instruction E:28 (special verdict form).

### 3-3:15 ENTICEMENT OF A CHILD

The elements of the crime of enticement of a child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to commit the crime of sexual assault or unlawful sexual contact upon the child,
5. invited, persuaded, or attempted to invite or persuade a child, under the age of fifteen,
6. to enter any vehicle, building, room, or secluded place.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of enticement of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of enticement of a child.

#### COMMENT

1. *See* § 18-3-305(1), C.R.S. 2020.
2. *See* Instruction F:51 (defining “child”); Instruction F:185 (defining “with intent”).
3. If the defendant is not separately charged with a sexual offense, give the jury the elemental instruction for the referenced offense without the

two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. Note that the statute does not require that the sexual offense be one that applies exclusively to child-victims.

4. *See* § 18-1-503.5(3), C.R.S. 2020 (affirmative defense based on a reasonable misbelief as to the child’s age is unavailable where “the criminality of conduct depends on a child being younger than fifteen years of age”).

5. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

### **3-3:16.SP ATTEMPTED ENTICEMENT OF A CHILD – SPECIAL INSTRUCTION**

In a prosecution for enticement of a child based on an alleged attempt, it is not necessary that the prosecution prove that the child perceived the defendant's act of enticement.

#### COMMENT

1. *See* § 18-3-305(1), C.R.S. 2020.
2. *See* Instruction F:51 (defining “child”).

### 3-3:17.INT ENTICEMENT OF A CHILD – INTERROGATORY

If you find the defendant not guilty of enticement of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of enticement of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the enticement result in bodily injury? (Answer “Yes” or “No”)

The enticement resulted in bodily injury only if:

1. the victim suffered bodily injury,
2. as the result of the defendant’s commission of the crime of enticement of a child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-305(2), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); see, e.g., Instruction E:28 (special verdict form).

### 3-3:18 INTERNET LURING OF A CHILD

The elements of the crime of internet luring of a child are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. communicated by computer or computer network, telephone network, data network, text message or instant message,
  5. to a person whom the defendant knew or believed to be under fifteen years of age and,
  6. in that communication, or in any subsequent communication by computer, computer network, telephone network, data network, text message, or instant message,
  7. described explicit sexual conduct, and
  8. in connection with that description, made a statement persuading or inviting the person to meet the defendant for any purpose, and
  9. the defendant was more than four years older than the person or the age the defendant believed the person to be.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet luring of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet luring of a child.

## COMMENT

1. *See* § 18-3-306(1), C.R.S. 2020.
2. *See* Instruction F:181 (defining “in connection with”); Instruction F:195 (defining “knowingly”); *see also* Instructions F:61, F:62 (defining “computer,” and “computer network,” for purposes of the offense of cybercrime in violation of section 18-5.5-102, C.R.S. 2020); Instruction F:132 (defining “explicit sexual conduct” for purposes of sexual exploitation of a child).
3. *See* § 18-1-503.5(3), C.R.S. 2020 (affirmative defense based on a reasonable misbelief as to the child’s age is unavailable where “the criminality of conduct depends on a child being younger than fifteen years of age”).
4. In 2018, the Committee changed the term “computer crime” to “cybercrime” in Comment 2 pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

### **3-3:19.SP INTERNET LURING OF A CHILD – SPECIAL INSTRUCTION**

In a prosecution for internet luring of a child, it is not a defense that a meeting did not occur.

#### COMMENT

1. *See* § 18-3-306(2), C.R.S. 2020.

### 3-3:20.INT INTERNET LURING OF A CHILD – INTERROGATORY

If you find the defendant not guilty of internet luring of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of internet luring of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant lure the victim for the specific purpose of sexual exploitation or sexual contact? (Answer “Yes” or “No”)

The defendant lured the victim for the specific purpose of sexual exploitation or sexual contact only if:

1. the defendant committed the offense with the intent to meet,
2. for the purpose of engaging in sexual contact or the crime of sexual exploitation of a child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3-306(3), C.R.S.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with sexual exploitation of a child, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 6-4:17 to 6-4:21. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.



## CHAPTER 3-4

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## CHAPTER COMMENTS

1. See Instruction E:11 (series of acts in a single count).

### **3-4:01 SEXUAL ASSAULT (SUBMISSION AGAINST WILL)**

The elements of the crime of sexual assault (submission against will) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. inflicted sexual intrusion or penetration on a person, and
  5. caused submission of the person by means of sufficient consequence reasonably calculated to cause submission against the person's will.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (submission against will).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (submission against will).

#### COMMENT

1. See § 18-3-402(1)(a) C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").
3. See Instruction E:01 (bracketed admonition against gender bias).

4. See *People v. Smith*, 638 P.2d 1, 5 n.7 (Colo. 1981) (“[T]he phrase ‘of sufficient consequence reasonably calculated’ clearly implies that the actor must be aware that his or her conduct is sufficient in character and degree to be likely to cause nonconsensual submission.”).
5. See *Schneider v. People*, 2016 CO 70, ¶¶ 16–17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
6. In 2017, the Committee added Comment 5.

### **3-4:02 SEXUAL ASSAULT (INCAPABLE OF APPRAISING THE NATURE OF CONDUCT)**

The elements of the crime of sexual assault (incapable of appraising the nature of conduct) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person,
5. knowing that the person was incapable of appraising the nature of his [her] own conduct.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (incapable of appraising the nature of conduct).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (incapable of appraising the nature of conduct).

#### COMMENT

1. See § 18-3-402(1)(b) C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. See Instruction E:01 (bracketed admonition against gender bias).
4. In *Platt v. People*, 201 P.3d 545, 548 (Colo. 2009), the supreme court analyzed two subsections of section 18-3-402(1) and explained: “The fact that [section 18-3-401(3)] lists a sleeping victim as an example of a victim who is physically helpless under subsection (h) [of section 18-3-402(1)] does not mean that same victim cannot be cognitively unable to understand her conduct under subsection (b) [of section 18-3-402(1)].” Reviewing the record, the court held “that there was sufficient evidence to support Platt’s conviction under section 18-3-402(1)(b) because the victim was sleeping and therefore unable to understand the nature of her conduct [at the time defendant inflicted sexual intrusion or penetration].” *Id.* at 547.
5. See *People v. Bertrand*, 2014 COA 142, ¶¶ 17–21, 342 P.3d 582, 585–86 (noting that COLJI-Crim. (2014) does not include an instruction quoting from *Platt v. People*, 201 P.3d 545, 548 (Colo. 2009), and holding that the trial court committed reversible error by misquoting from that opinion).
6. See *Schneider v. People*, 2016 CO 70, ¶¶ 16–17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
7. In 2015, the Committee added Comment 5, citing to *People v. Bertrand*, *supra*.
8. In 2017, the Committee added Comment 6.

### **3-4:03 SEXUAL ASSAULT (ERRONEOUS BELIEF OF MARRIAGE)**

The elements of the crime of sexual assault (erroneous belief of marriage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person,
5. knowing that the person submitted erroneously, believing the defendant to be his [her] spouse.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (erroneous belief of marriage).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (erroneous belief of marriage).

#### **COMMENT**

1. *See* § 18-3-402(1)(c) C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. *See* Instruction E:01 (bracketed admonition against gender bias).

4. *See Schneider v. People*, 2016 CO 70, ¶¶ 16-17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
5. In 2017, the Committee added Comment 4.

### 3-4:04 SEXUAL ASSAULT (UNDER FIFTEEN)

The elements of the crime of sexual assault (under fifteen) are:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person, and
5. the person was less than fifteen years of age, and
6. the defendant was at least four years older than the person, and
7. the defendant was not the spouse of the person.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (under fifteen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (under fifteen).

#### COMMENT

1. See § 18-3-402(1)(d) C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. See Instruction E:01 (bracketed admonition against gender bias).
4. See *Schneider v. People*, 2016 CO 70, ¶¶ 16–17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
5. In 2017, the Committee added Comment 4.

**3-4:05.SP SEXUAL ASSAULT (UNDER FIFTEEN) – SPECIAL  
INSTRUCTION (IGNORANCE OF THE CHILD’S AGE IS  
NOT A DEFENSE)**

If a child is younger than fifteen, a person charged with sexual assault (under fifteen) cannot assert a defense based on the fact that the person did not know the child’s age or reasonably believed the child to be fifteen years of age or older.

COMMENT

1. *See* § 18-1-503.5(3), C.R.S. 2020.

### **3-4:06 SEXUAL ASSAULT (AT LEAST FIFTEEN, BUT LESS THAN SEVENTEEN)**

The elements of the crime of sexual assault (at least fifteen, but less than seventeen) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person, and
5. at the time of the commission of the act,
6. the person was at least fifteen years of age, but less than seventeen years of age, and
7. the defendant was at least ten years older than the person, and
8. the defendant was not the spouse of the person.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (at least fifteen, but less than seventeen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (at least fifteen, but less than seventeen).

## COMMENT

1. *See* § 18-3-402(1)(e) C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. *See* Instruction E:01 (bracketed admonition against gender bias).
4. *See* Instruction H:36 (affirmative defense of “mistake as to age”).
5. *See Schneider v. People*, 2016 CO 70, ¶¶ 16–17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
6. In 2017, the Committee added Comment 5.

### **3-4:07 SEXUAL ASSAULT (IN CUSTODY OR DETAINED)**

The elements of the crime of sexual assault (in custody or detained) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person, and
5. the person was in custody of law or detained in a hospital or other institution, and
6. the defendant had supervisory or disciplinary authority over the person, and
7. used that position of authority to coerce the person to submit, and
8. the act was not incident to a lawful search.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (in custody or detained).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (in custody or detained).

## COMMENT

1. See § 18-3-402(1)(f) C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction E:01 (bracketed admonition against gender bias).
4. In cases where there is a dispute concerning whether the act was “incident to a lawful search,” it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.
5. See *Schneider v. People*, 2016 CO 70, ¶¶ 16-17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
6. In 2017, the Committee added Comment 5.

### 3-4:08 SEXUAL ASSAULT (TREATMENT OR EXAMINATION)

The elements of the crime of sexual assault (treatment or examination) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person,
5. while purporting to offer a medical service, and
6. engaging in treatment or examination of the person for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (treatment or examination).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (treatment or examination).

#### COMMENT

1. See § 18-3-402(1)(g) C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction E:01 (bracketed admonition against gender bias).
4. See *Schneider v. People*, 2016 CO 70, ¶¶ 16–17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
5. In 2017, the Committee added Comment 4.

### **3-4:09 SEXUAL ASSAULT (PHYSICALLY HELPLESS)**

The elements of the crime of sexual assault (physically helpless) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual intrusion or penetration on a person,
5. who was physically helpless, and
6. the defendant knew the person was physically helpless and had not consented.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (physically helpless).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (physically helpless).

#### COMMENT

1. *See* § 18-3-402(1)(h) C.R.S. 2020.
2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:278 (defining "physically helpless"); Instruction F:340 (defining "sexual intrusion"); Instruction F:343 (defining "sexual penetration").

3. See Instruction E:01 (bracketed admonition against gender bias).
4. See *Schneider v. People*, 2016 CO 70, ¶¶ 16-17, 382 P.3d 835, 840 (holding that the eight enumerated alternatives in section 18-3-402(1) represent different means of committing the same crime of “sexual assault,” rather than separately defined crimes of sexual assault).
5. In 2017, the Committee added Comment 4.

### **3-4:10.INT SEXUAL ASSAULT – INTERROGATORY (FORCE OR VIOLENCE)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through force or violence?  
(Answer “Yes” or “No”)

The defendant caused submission through force or violence only if:

1. the defendant caused submission of the victim through the actual application of physical force or physical violence.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3-402(4)(a), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. See *People v. Powell*, 716 P.2d 1096, 1100 (Colo. 1986) (because the word “force” is commonly used, there is no reason to provide the jury with a definitional instruction).

4. See *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted “knowingly,” this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

### **3-4:11.INT SEXUAL ASSAULT – INTERROGATORY (THREAT OF HARM)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of harm?  
(Answer “Yes” or “No”)

The defendant caused submission through threat of harm only if:

1. the defendant caused submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or the crime of kidnapping, to be inflicted on anyone, and
2. the victim believed that the defendant had the present ability to execute the threats.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-3-402(4)(b), C.R.S. 2020.

2. See Instruction F:332 (defining “serious bodily injury”); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); see, e.g., Instruction E:28 (special verdict form).

3. See *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted “knowingly,” this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

### **3-4:12.INT SEXUAL ASSAULT – INTERROGATORY (RETALIATION)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of retaliation?  
(Answer “Yes” or “No”)

The defendant caused submission through threat of retaliation only if:

1. the defendant caused submission of the victim by threatening to retaliate in the future against the victim, or any other person, and
2. the victim reasonably believed that the defendant would execute this threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-3-402(4)(c), C.R.S. 2020.
2. See Instruction F:323 (defining “retaliate”); *see, e.g.*, Instruction E:28 (special verdict form).
3. See *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted “knowingly,” this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

### **3-4:13.INT SEXUAL ASSAULT – INTERROGATORY (SUBSTANTIAL IMPAIRMENT)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through substantial impairment? (Answer “Yes” or “No”)

The defendant caused submission through substantial impairment only if:

1. the defendant substantially impaired the victim’s power to appraise or control the victim’s conduct by employing,
2. without the victim’s consent,
3. any drug, intoxicant, or other means for the purpose of causing submission.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-3-402(4)(d), C.R.S. 2020.
2. See Instruction F:68 (defining “consent”); see, e.g., Instruction E:28 (special verdict form).
3. See *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted “knowingly,” this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

### **3-4:14.INT SEXUAL ASSAULT – INTERROGATORY (AIDED BY ANOTHER)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the defendant aided by another? (Answer “Yes” or “No”)

The defendant was aided by another only if:

1. in the commission of the sexual assault,
2. the defendant was physically aided or abetted by one or more other persons.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-402(5)(a)(I), C.R.S. 2020.
2. *See* Instruction F:14 (defining “aid”); *see, e.g.*, Instruction E:28 (special verdict form).

3. See *Tumentsereg v. People*, 247 P.3d 1015, 1019 (Colo. 2011) (“Physically aiding or abetting therefore necessarily implies physical action in assisting with the commission of the sexual assault, but nothing in the statutory language limits that physical aiding or abetting to physical action directed against the victim, as distinguished from physical action directed against a rescue attempt.”).

### **3-4:15.INT SEXUAL ASSAULT – INTERROGATORY (SERIOUS BODILY INJURY)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the victim suffer serious bodily injury? (Answer “Yes” or “No”)

The victim suffered serious bodily injury only if:

1. in the commission of the sexual assault,
2. the victim suffered serious bodily injury.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-402(5)(a)(II), C.R.S. 2020.
2. *See* Instruction F:332 (defining “serious bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:16.INT SEXUAL ASSAULT – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the sexual assault involve the use, or suggested use, of a deadly weapon? (Answer “Yes” or “No”)

The sexual assault involved the use, or suggested use, of a deadly weapon only if:

1. in the commission of the sexual assault,
2. the defendant was armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon or represented verbally or otherwise that he [she] was armed with a deadly weapon, and
3. he [she] used the deadly weapon, article, or representation to cause submission of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-402(5)(a)(III), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:17.INT SEXUAL ASSAULT – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault with notice of a positive test for HIV? (Answer “Yes” or “No”)

The defendant committed the sexual assault with notice of a positive test for HIV only if:

1. the sexual assault committed by the defendant involved sexual intercourse or anal intercourse, and
2. prior to committing the sexual assault, the defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) and HIV infection, and
3. the infectious agent of the HIV infection was in fact transmitted.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2016, the Committee modified the second element and added the third element pursuant to a legislative amendment. The Committee also removed the prior Comment 3, as it had pointed out an inconsistency that has since been corrected. *See* Ch. 230, sec. 8, § 18-1.3-1004(1)(d), 2016 Colo. Sess. Laws 895, 915.

### **3-4:18.INT SEXUAL ASSAULT – INTERROGATORY (SEXUAL INTRUSION OR PENETRATION; CHILD UNDER TWELVE)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer “Yes” or “No”)

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault committed by the defendant included sexual intrusion or sexual penetration;
2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and
3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A)-(C), C.R.S. 2020 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).
2. *See* Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:19.INT SEXUAL ASSAULT – INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of sexual assault, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-6.5-103(7)(a), C.R.S. 2020 (at-risk persons).

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).

3. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(7)(a), 2016 Colo. Sess. Laws 545, 549.

### 3-4:20 UNLAWFUL SEXUAL CONTACT (LACK OF CONSENT)

The elements of the crime of unlawful sexual contact (lack of consent) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact,
5. knowing that the person did not consent.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (lack of consent).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (lack of consent).

#### COMMENT

1. *See* § 18-3-404(1)(a) C.R.S. 2020.
2. *See* Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").
3. *See* Instruction E:01 (bracketed admonition against gender bias).

### **3-4:21 UNLAWFUL SEXUAL CONTACT (INCAPABLE OF APPRAISING NATURE OF CONDUCT)**

The elements of the crime of unlawful sexual contact (incapable of appraising nature of conduct) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact,
5. knowing that the person was incapable of appraising the nature of his [her] own conduct.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (incapable of appraising nature of conduct).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (incapable of appraising nature of conduct).

#### COMMENT

1. *See* § 18-3-404(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”).
3. *See* Instruction E:01 (bracketed admonition against gender bias).

### 3-4:22 UNLAWFUL SEXUAL CONTACT (PHYSICALLY HELPLESS)

The elements of the crime of unlawful sexual contact (physically helpless) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. subjected a person to any sexual contact, and
  5. the person was physically helpless, and
  6. the defendant knew the person was physically helpless and had not consented.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (physically helpless).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (physically helpless).

#### COMMENT

1. See § 18-3-404(1)(c) C.R.S. 2020.
2. See Instruction F:68 (defining "consent"); Instruction F:195 (defining "knowingly"); Instruction F:278 (defining "physically helpless"); Instruction F:337 (defining "sexual contact").

3. *See* Instruction E:01 (bracketed admonition against gender bias).

### **3-4:23 UNLAWFUL SEXUAL CONTACT (SUBSTANTIAL IMPAIRMENT)**

The elements of the crime of unlawful sexual contact (substantial impairment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact, and
5. substantially impaired the person's power to appraise or control his [her] own conduct,
6. by employing, without the person's consent, any drug, intoxicant, or other means for the purpose of causing submission.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (substantial impairment).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (substantial impairment).

#### COMMENT

1. See § 18-3-404(1)(d) C.R.S. 2020.

2. *See* Instruction F:68 (defining “consent”); Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”).
3. *See* Instruction E:01 (bracketed admonition against gender bias).

### **3-4:24 UNLAWFUL SEXUAL CONTACT (IN CUSTODY OR DETAINED)**

The elements of the crime of unlawful sexual contact (in custody or detained) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact, and
5. the person was in custody of law or detained in a hospital or other institution, and
6. the defendant had supervisory or disciplinary authority over the person, and
7. used that position of authority to coerce the person to submit, and
8. the act was not incident to a lawful search.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (in custody or detained).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (in custody or detained).

## COMMENT

1. *See* § 18-3-404(1)(f) C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”).
3. *See* Instruction E:01 (bracketed admonition against gender bias).
4. In a case where there is a dispute concerning whether the act was “incident to a lawful search,” it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.

### **3-4:25 UNLAWFUL SEXUAL CONTACT (TREATMENT OR EXAMINATION)**

The elements of the crime of unlawful sexual contact (treatment or examination) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact,
5. while engaging in treatment or examination of the person for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault (treatment or examination).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault (treatment or examination).

#### COMMENT

1. See § 18-3-404(1)(g) C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”).
3. See Instruction E:01 (bracketed admonition against gender bias).

4. Unlike the corollary sexual assault provision, *see* § 18-3-402(1)(g), C.R.S. 2020, section 18-3-404(1)(g) does not include the following clause: “while purporting to offer a medical service.” Although this variance is reflected in the above model instruction, it is unclear whether the General Assembly intentionally omitted this language from section 18-3-404(1)(g).
5. *See People v. McCoy*, 2019 CO 44, ¶ 48, 442 P.3d 379, 390 (holding that section 18-3-404(1)(g) “cover[s] not only doctors and physician-patient relationships but also others who are, or hold themselves out to be, health treatment providers of any kind”).
6. In 2019, the Committee added Comment 5.

### **3-4:26 UNLAWFUL SEXUAL CONTACT (UNDER EIGHTEEN)**

The elements of the crime of unlawful sexual contact (under eighteen) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. with or without sexual contact,
5. induced or coerced a person under the age of eighteen, by [any of] the following means: [insert relevant provision(s) of section 18-3-402, using language from Instructions 3-4:01 to 3-4:09],
6. to expose intimate parts or engage in any sexual contact, intrusion, or penetration with another person,
7. for the purpose of the defendant's own sexual gratification.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual contact (under eighteen).

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual contact (under eighteen).

#### COMMENT

1. See § 18-3-404(1.5), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction E:01 (bracketed admonition against gender bias).
4. See Instruction H:36 (affirmative defense of “mistake as to age”).
5. + See *People v. McEntee*, 2019 COA 139, ¶ 24, 461 P.3d 602, 606 (holding that the phrase “another person” in section 18-3-404(1.5) “is to be viewed from the perspective of the victim,” meaning that the statute “does not require the participation of an additional person beyond the victim and the defendant”).
6. + In 2020, the Committee added Comment 5.

### **3-4:27.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (FORCE OR VIOLENCE)**

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through force or violence?  
(Answer “Yes” or “No”)

The defendant caused submission through force or violence only if:

1. the defendant caused submission of the victim through the actual application of physical force or physical violence.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-404(2)(b), C.R.S. 2020. Because section 18-3-404(2)(b) states that “unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c),” the three model interrogatories for the offense of unlawful sexual contact use the same language that appears

in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.

2. *See, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Powell*, 716 P.2d 1096, 1100 (Colo. 1986) (because the word “force” is commonly used, there is no reason to provide the jury with a definitional instruction).

### **3-4:28.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (THREAT OF HARM)**

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of harm?  
(Answer “Yes” or “No”)

The defendant caused submission through threat of harm only if:

1. the defendant caused submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or the crime of kidnapping to be inflicted on anyone, and
2. the victim believed that the defendant had the present ability to execute the threats.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-404(2)(b), C.R.S. 2020. Because section 18-3-404(2)(b) states that “unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c),” the three model interrogatories for the offense of unlawful sexual contact use the same language that appears in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.
2. *See* Instruction F:332 (defining “serious bodily injury”); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:29.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (RETALIATION)**

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant cause submission through threat of retaliation?  
(Answer “Yes” or “No”)

The defendant caused submission through threat of retaliation only if:

1. the defendant caused submission of the victim by threatening to retaliate in the future against him [her], or any other person, and
2. the victim reasonably believed that the defendant would execute this threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-404(2)(b), C.R.S. 2020. Because section 18-3-404(2)(b) states that “unlawful sexual contact is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402(4)(a), (4)(b), or (4)(c),” the three model interrogatories for the offense of unlawful sexual contact use the same language that appears in the corresponding model interrogatories for the offense of sexual assault in violation of section 18-3-402. *See* Instructions 3-4:10.INT, 3-4:11.INT, 3-4:12.INT.
2. *See* Instruction F:323 (defining “retaliate”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:30.INT UNLAWFUL SEXUAL CONTACT – INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of unlawful sexual contact, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual contact, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-6.5-103(7)(c), C.R.S. 2020 (at-risk persons).

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).

3. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(7)(c), 2016 Colo. Sess. Laws 545, 549.

### 3-4:31 SEXUAL ASSAULT ON A CHILD

The elements of the crime of sexual assault on a child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected another person who was not his [her] spouse to any sexual contact, and
5. that person was less than fifteen years of age, and
6. the defendant was at least four years older than the person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a child.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a child.

#### COMMENT

1. See § 18-3-405(1), C.R.S. 2020.
2. See Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); Instruction F:337 (defining "sexual contact").
3. See *People v. Vigil*, 127 P.3d 916, 931 (Colo. 2006) (sexual assault on a child is a general intent offense, to which the defense of voluntary

intoxication does not apply, notwithstanding the fact that the definition of “sexual contact,” in section 18-3-401(4), includes a requirement that the sexual touching be “for the purposes of sexual arousal, gratification, or abuse”).

4. See *Woellhaf v. People*, 105 P.3d 209, 216 (Colo. 2005) (because the statutes defining sexual assault on a child and sexual assault on a child by one in a position of trust prescribe “any sexual contact” as the unit of prosecution, for purposes of double jeopardy, multiple convictions must be supported by factually distinct offenses).

5. See *Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005) (applying *Woellhaf* and holding that “[t]hrough the record does not disclose specifically how long each incident lasted, the facts prove that the defendant’s conduct was separate in temporal proximity and constituted a new volitional departure in his course of conduct”; further, the due process requirement for jury unanimity was satisfied because the court instructed the jury that: “In order to find the defendant guilty of sexual assault on a child, the jury must unanimously agree that the defendant committed the same act of sexual contact for each separate count, or that the defendant committed all of the acts of sexual contact.”).

6. See *People v. Sparks*, 2018 COA 1, ¶ 9, 434 P.3d 713, 717 (holding that the phrase “subjects another” does not mean “causing another to become subservient or subordinate,” but instead “encompasses an adult defendant allowing a child to touch the defendant’s intimate parts”).

7. In 2019, the Committee added Comment 6.

**3-4:32.SP SEXUAL ASSAULT ON A CHILD – SPECIAL  
INSTRUCTION (IGNORANCE OF THE CHILD’S AGE IS  
NOT A DEFENSE)**

If a child is younger than fifteen, a person charged with sexual assault on a child cannot assert a defense based on the fact that the person did not know the child’s age or reasonably believed the child to be fifteen years of age or older.

COMMENT

1. *See* § 18-1-503.5(3), C.R.S. 2020.

### **3-4:33.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (FORCE)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant apply force against the victim? (Answer “Yes” or “No”)

The defendant applied force against the victim only if:

1. in order to accomplish or facilitate sexual contact,
2. the defendant applied force against the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-405(2)(a), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. *See People v. Hodge*, 2018 COA 155, ¶¶ 2, 16, \_\_ P.3d \_\_ (holding that a defendant may not raise the defense of consent to the use of force in a charge of sexual assault on a child).
4. + *See People v. Market*, 2020 COA 90, ¶ 52, 475 P.3d 607, 616 (“[F]orce in the sexual assault context need not be distinct from the sexual contact.”).
5. In 2019, the Committee added Comment 3.
6. + In 2020, the Committee added Comment 4.

### **3-4:34.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (THREATS)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant threaten harm in order to accomplish or facilitate the sexual contact? (Answer “Yes” or “No”)

The defendant threatened harm in order to accomplish or facilitate the sexual contact only if:

1. in order to accomplish or facilitate sexual contact,
2. the defendant threatened imminent death, serious bodily injury, extreme pain, or the crime of kidnapping against the victim or another person, and
3. the victim believed that the defendant had the present ability to execute the threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-405(2)(b), C.R.S. 2020.
2. *See* Instruction F:332 (defining “serious bodily injury”); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:35.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (RETALIATION)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant threaten retaliation in order to accomplish or facilitate the sexual contact? (Answer “Yes” or “No”)

The defendant threatened retaliation in order to accomplish or facilitate the sexual contact only if:

1. in order to accomplish or facilitate sexual contact,
2. the defendant threatened retaliation by causing in the future death, serious bodily injury, extreme pain, or the crime of kidnapping against the victim or another person, and
3. the victim believed that the defendant would execute the threat.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-405(2)(c), C.R.S. 2020.
2. *See* Instruction F:332 (defining “serious bodily injury”); Instructions 3-3:01, 3-3:02, 3-3:03, 3-3:05, and 3-3:06 (defining the offense of kidnapping); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:36.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (PATTERN)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault on a child as part of a pattern of sexual abuse? (Answer “Yes” or “No”)

The defendant committed the sexual assault on a child as part of a pattern of sexual abuse only if:

1. he [she] committed one or more incidents of sexual contact upon the same victim in addition to committing the sexual contact forming the basis for your guilty verdict on the charge of sexual assault on a child.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-3-405(2)(d), C.R.S. 2020.

2. See Instruction F:262 (defining “pattern of sexual abuse”); see, e.g., Instruction E:28 (special verdict form).

3. Although section 18-3-405(2)(d) states that a “specific date or time” need not be alleged, this section does not prohibit a court from using an interrogatory that describes the other incident(s) by referring to the date, location, or other identifying evidence. See, e.g., *People v. Melillo*, 25 P.3d 769, 779 (Colo. 2001) (other incidents of sexual contact for pattern of abuse count identified by date).

4. Section 18-3-405(2)(d), states that “the acts constituting the pattern of sexual abuse, whether charged in the information or indictment or committed prior to or at any time after the offense charged in the information or indictment, shall be subject to the provisions of section 16-5-401(1)(a).” However, section 16-5-401(1)(a) states that there is no limitations period applicable to “any sex offense against a child,” and section 16-5-401(1)(b)(IV) provides that “[s]ex offense against a child’ means any ‘unlawful sexual offense,’ as defined in section 18-3-411(1), C.R.S., that is a felony.” Thus, it will be the rare case in which there is a dispute concerning the limitations period applicable to the second alleged incident of sexual contact. But if such a case should arise, the court should determine the expiration date of the limitations period and modify the interrogatory in a manner that requires the jury to make a finding indicating whether the other incident of sexual contact occurred on or before that date.

5. See *People v. Simon*, 266 P.3d 1099, 1101 (Colo. 2011) (“each separately charged incident of sexual assault (i.e., sexual assault on a child, or sexual assault on a child by one in a position of trust) [is] elevated to a class 3 felony, where each incident is committed as part of a pattern of sexual abuse”).

### **3-4:37.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault on a child with notice of a positive test for HIV? (Answer “Yes” or “No”)

The defendant committed the sexual assault on a child with notice of a positive test for HIV only if:

1. the sexual assault on a child committed by the defendant involved sexual intercourse or anal intercourse, and
2. prior to committing the sexual assault on a child, the defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) and HIV infection, and
3. the infectious agent of the HIV infection was in fact transmitted.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2016, the Committee modified the second element and added the third element pursuant to a legislative amendment. The Committee also removed the prior Comment 3, as it had pointed out an inconsistency that has since been corrected. *See* Ch. 230, sec. 8, § 18-1.3-1004(1)(d), 2016 Colo. Sess. Laws 895, 915.

**3-4:38.INT SEXUAL ASSAULT ON A CHILD –  
INTERROGATORY (SEXUAL PENETRATION OR  
INTRUSION; CHILD UNDER TWELVE)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer “Yes” or “No”)

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault on a child committed by the defendant included sexual intrusion or sexual penetration;
2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and
3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A)-(C), C.R.S. 2020 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).
2. *See* Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:39.INT SEXUAL ASSAULT ON A CHILD – INTERROGATORY (AT-RISK VICTIM)**

If you find the defendant not guilty of sexual assault on a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a juvenile with protected status? (Answer “Yes” or “No”)

The victim was a juvenile with protected status only if:

1. the victim was under the age of eighteen years, and
2. was a person with a disability.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-6.5-103(7)(d), C.R.S. 2020.
2. *See* Instruction F:26 (defining “at-risk juvenile”); Instruction F:273 (defining “person with a disability”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:40 SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST**

The elements of the crime of sexual assault on a child by one in a position of trust are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. subjected a child, under eighteen years of age, who was not his [her] spouse to any sexual contact, and
  5. the defendant was in a position of trust with respect to the child.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a child by one in a position of trust.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a child by one in a position of trust.

#### **COMMENT**

1. See § 18-3-405.3, C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:280 (defining "position of trust"); Instruction F:337 (defining "sexual contact").

3. Although section 18-3-408 states that the gender bias instruction applies to offenses defined in “sections 18-3-402 to 18-3-405,” it is unclear whether the General Assembly intended for the instruction to be given in prosecutions for the three offenses that are separated from section 18-3-405 by decimal point numeration. *See* § 18-3-405.3, C.R.S. 2020 (sexual assault on a child by one in a position of trust); § 18-3-405.4, C.R.S. 2020 (internet sexual exploitation of a child); § 18-3-405.5, C.R.S. 2020 (sexual assault on a client by a psychotherapist). It seems unlikely that the General Assembly would have mandated such an instruction in prosecutions for sexual assault on a child and, at the same time, excluded prosecutions for sexual assault on a child by one in a position of trust. Thus, it is reasonable to read section 18-3-408’s reference to “18-3-405” as encompassing the three offenses that are separated by means of decimal point numeration. Irrespective of whether this is a correct construction, because these three offenses proscribe conduct that is so similar to the conduct prohibited by sections 18-3-402 to 18-3-405, the Committee recommends that trial courts give a gender bias instruction as a matter of discretion.

4. *See* Instruction H:36 (affirmative defense of “mistake as to age”).

5. *See Pellman v. People*, 252 P.3d 1122, 1125 (Colo. 2011) (“[A] defendant need not be performing a specific supervisory task at the time of the unlawful act in order to occupy a position of trust. Instead, a defendant may assume a position of trust through an ongoing and continuous supervisory relationship with the victim.”).

6. *See People v. Johnson*, 2016 COA 15, ¶¶ 18, 23, 381 P.3d 348, 352–53 (holding that, because the crime of unlawful sexual contact requires that the defendant act “knowingly,” such contact cannot occur if the defendant is asleep and unaware of his conduct).

7. In 2017, the Committee added Comment 6.

**3-4:41.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (UNDER FIFTEEN)**

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status due to his [her] age?  
(Answer “Yes” or “No”)

The victim was a person with protected status due to his [her] age only if:

1. the victim was less than fifteen years of age.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**COMMENT**

1. *See* § 18-3-405.3(2)(a), C.R.S. 2020; *see also* § 18-1-503.5(3), C.R.S. 2020 (“If the criminality of conduct depends on a child’s being younger than eighteen years of age and the child was in fact younger than fifteen years of

age, there shall be no defense that the defendant reasonably believed the child was eighteen years of age or older.”).

2. *See, e.g.,* Instruction E:28 (special verdict form).

### **3-4:42.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (PATTERN)**

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault on a child by one in a position of trust as part of a pattern of sexual abuse? (Answer “Yes” or “No”)

The defendant committed the sexual assault on a child by one in a position of trust as part of a pattern of sexual abuse only if:

1. the defendant committed one or more incidents of sexual contact upon the same victim in addition to committing the sexual contact forming the basis for your guilty verdict on the charge of sexual assault on a child by one in a position of trust.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-405.3(2)(b), C.R.S. 2020.
2. *See* Instruction F:262 (defining “pattern of sexual abuse”); *see, e.g.*, Instruction E:28 (special verdict form).
3. *See* Instruction 3-4:36.INT, Comment 4 (discussing the statute of limitations provision that applies to the act forming the basis for the pattern enhancement).
4. In 2015, the Committee revised Comment 2 by adding a citation to Instruction F:262.

### **3-4:43.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)**

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the sexual assault on a child by one in a position of trust with notice of a positive test for HIV? (Answer “Yes” or “No”)

The defendant committed the sexual assault on a child by one in a position of trust with notice of a positive test for HIV only if:

1. the sexual assault on a child by one in a position of trust committed by the defendant involved sexual intercourse or anal intercourse, and
2. prior to committing the sexual assault on a child by one in a position of trust, the defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) and HIV infection, and
3. the infectious agent of the HIV infection was in fact transmitted.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2016, the Committee modified the second element and added the third element pursuant to a legislative amendment. The Committee also removed the prior Comment 3, as it had pointed out an inconsistency that has since been corrected. *See* Ch. 230, sec. 8, § 18-1.3-1004(1)(d), 2016 Colo. Sess. Laws 895, 915.

**3-4:44.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (SEXUAL INTRUSION OR PENETRATION; CHILD UNDER TWELVE)**

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit sexual penetration or sexual intrusion of a child under twelve years of age? (Answer “Yes” or “No”)

The defendant committed sexual penetration or sexual intrusion of a child under twelve years of age only if:

1. the act of sexual assault on a child by one in a position of trust committed by the defendant included sexual intrusion or sexual penetration;
2. defendant committed the act against a child who was under twelve years of age at the time of the offense; and
3. the defendant was at least eighteen years of age and at least ten years older than the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place,

and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-1.3-1004(1)(e)(I)(A)-(C), C.R.S. 2020 (sentence enhancement factor applies to enumerated sex offenses only if committed as a class 2, 3, or 4 felony).

2. *See* Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:45.INT SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST – INTERROGATORY (AT-RISK VICTIM)**

If you find the defendant not guilty of sexual assault on a child by one in a position of trust, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual assault on a child by one in a position of trust, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a juvenile with protected status? (Answer “Yes” or “No”)

The victim was a juvenile with protected status only if:

1. the victim was under the age of eighteen years, and
2. was a person with a disability.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-6.5-103(7)(e), C.R.S. 2020.

2. See Instruction F:26 (defining “at-risk juvenile”); Instruction F:273 (defining “person with a disability”); *see, e.g.*, Instruction E:28 (special verdict form).

### **3-4:46 INTERNET SEXUAL EXPLOITATION OF A CHILD (EXPOSE OR TOUCH)**

The elements of the crime of internet sexual exploitation of a child (expose or touch) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. importuned, invited, or enticed,
5. through communication via a computer network or system, telephone network, data network, text message, or instant message,
6. a person whom the defendant knew or believed to be under fifteen years of age, and at least four years younger than the defendant,
7. to expose or touch the person's own or another person's intimate parts while communicating with the actor via a computer network or system, telephone network, data network, text message, or instant message.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet sexual exploitation of a child (expose or touch).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet sexual exploitation of a child (expose or touch).

## COMMENT

1. See § 18-3-405.4(1)(a), C.R.S. 2020.
2. See Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); see also Instruction F:62 (defining “computer network,” for purposes of cybercrimes).
3. Under section 18-3-405.4(1), the criminality of conduct does not depend on the actual age of the person with whom the defendant communicates. Therefore, this provision is not subject to section 18-1-503.5(3), C.R.S. 2020 (“If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child’s age or that the defendant reasonably believed the child to be fifteen years of age or older.”).
4. See *People v. Heywood*, 2014 COA 99, ¶¶ 25–28, 357 P.3d 201, 207 (noting that the undefined terms “importune,” “invite,” and “entice” are “common terms,” and attributing to them specific dictionary definitions), *overruled on other grounds by McCoy v. People*, 2019 CO 44, 442 P.3d 379.
5. In 2018, the Committee changed the term “computer crimes” to “cybercrimes” in Comment 2 pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.
6. In 2019, the Committee added Comment 4, and it removed a cross-reference to a dictionary definition in Comment 2.

### **3-4:47 INTERNET SEXUAL EXPLOITATION OF A CHILD (OBSERVE)**

The elements of the crime of internet sexual exploitation of a child (observe) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. importuned, invited, or enticed,
5. through communication via a computer network or system, telephone network, data network, text message, or instant message,
6. a person whom the defendant knew or believed to be under fifteen years of age, and at least four years younger than the defendant,
7. to observe the defendant's intimate parts via a computer network or system, telephone network, data network, text message, or instant message.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of internet sexual exploitation of a child (observe).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of internet sexual exploitation of a child (observe).

## COMMENT

1. See § 18-3-405.4(1)(b), C.R.S. 2020.
2. See Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); see also Instruction F:62 (defining “computer network,” for purposes of cybercrimes).
3. Under section 18-3-405.4(1), the criminality of conduct does not depend on the actual age of the person with whom the defendant communicates. Therefore, this provision is not subject to section 18-1-503.5(3), C.R.S. 2020 (“If the criminality of conduct depends on a child being younger than fifteen years of age, it shall be no defense that the defendant did not know the child’s age or that the defendant reasonably believed the child to be fifteen years of age or older.”).
4. See *People v. Heywood*, 2014 COA 99, ¶¶ 25–28, 357 P.3d 201, 207 (noting that the undefined terms “importune,” “invite,” and “entice” are “common terms,” and attributing to them specific dictionary definitions), *overruled on other grounds by McCoy v. People*, 2019 CO 44, 442 P.3d 379.
5. In 2017, the Committee added Comment 4, and it removed a prior citation to a dictionary definition of “importune” in Comment 2.
6. In 2018, the Committee changed the term “computer crimes” to “cybercrimes” in Comment 2 pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

### **3-4:48 AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST**

The elements of aggravated sexual assault on a client by a psychotherapist are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. inflicted sexual intrusion or penetration on another person,
  5. when the defendant was a psychotherapist, and
  6. when the person was a client of the defendant.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated sexual assault on a client by a psychotherapist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist.

#### COMMENT

1. See § 18-3-405.5(1)(a)(I), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:295 (defining “psychotherapist”); Instruction F:296 (defining “psychotherapy”);

Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).

### **3-4:49 AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (THERAPEUTIC DECEPTION)**

The elements of aggravated sexual assault on a client by a psychotherapist (therapeutic deception) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual penetration or intrusion on another person,
5. when the defendant was a psychotherapist, and
6. the person was a client of the defendant, and
7. the sexual penetration or intrusion occurred by means of therapeutic deception.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated sexual assault on a client by a psychotherapist (therapeutic deception).

After considering all the evidence, if you decide the prosecution has not proven any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist (therapeutic deception).

#### COMMENT

1. See § 18-3-405.5(1)(a)(II), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:295 (defining “psychotherapist”); Instruction F:296 (defining “psychotherapy”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”); Instruction F:370 (defining “therapeutic deception”).

3. A note to COLJI-Crim. 3-4:34 (2008) stated that there was “no separate instruction for the offense when committed by means of therapeutic deception, set forth in subsections 1(a)(II) and (2)(a)(II); the committee deems the element to be superfluous.” However, this is no longer the view of the Committee. See *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (courts should avoid statutory interpretations that would render any words or phrases superfluous).

### **3-4:50.INT AGGRAVATED SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST – INTERROGATORY (NOTICE OF POSITIVE TEST FOR HIV)**

If you find the defendant not guilty of aggravated sexual assault on a client by a psychotherapist, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated sexual assault on a client by a psychotherapist, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the aggravated sexual assault on a client by a psychotherapist with notice of a positive test for HIV? (Answer “Yes” or “No”)

The defendant committed the aggravated sexual assault on a client by a psychotherapist with notice of a positive test for HIV only if:

1. the act of aggravated sexual assault on a client by a psychotherapist committed by the defendant involved sexual intercourse or anal intercourse, and
2. prior to committing the aggravated sexual assault on a client by a psychotherapist, the defendant had notice that he [she] had tested positive for the human immunodeficiency virus (HIV) and HIV infection, and
3. the infectious agent of the HIV infection was in fact transmitted.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-1.3-1004(1)(d), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2016, the Committee modified the second element and added the third element pursuant to a legislative amendment. The Committee also removed the prior Comment 3, as it had pointed out an inconsistency that has since been corrected. *See* Ch. 230, sec. 8, § 18-1.3-1004(1)(d), 2016 Colo. Sess. Laws 895, 915.

### **3-4:51 SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST**

The elements of sexual assault on a client by a psychotherapist are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. subjected a person to any sexual contact,
  5. when the defendant was a psychotherapist, and
  6. the person was a client of the defendant.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a client by a psychotherapist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a client by a psychotherapist.

#### **COMMENT**

1. See § 18-3-405.5(2)(a)(I), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:295 (defining “psychotherapist”); Instruction F:296 (defining “psychotherapy”); Instruction F:337 (defining “sexual contact”).

### **3-4:52 SEXUAL ASSAULT ON A CLIENT BY A PSYCHOTHERAPIST (THERAPEUTIC DECEPTION)**

The elements of sexual assault on a client by a psychotherapist (therapeutic deception) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. subjected a person to any sexual contact,
5. when the defendant was a psychotherapist, and
6. the person was a client of the defendant, and
7. the sexual contact occurred by means of therapeutic deception.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual assault on a client by a psychotherapist (therapeutic deception).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual assault on a client by a psychotherapist (therapeutic deception).

#### COMMENT

1. See § 18-3-405.5(2)(a)(II), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:295 (defining “psychotherapist”); Instruction F:296 (defining “psychotherapy”); Instruction F:337 (defining “sexual contact”); Instruction F:370 (defining “therapeutic deception”).

3. A note to COLJI-Crim. 3-4:34 (2008) stated that there was “no separate instruction for the offense when committed by means of therapeutic deception, set forth in subsections (1)(a)(II) and (2)(a)(II); the committee deems the element to be superfluous.” However, this is no longer the view of the Committee. See *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (courts should avoid statutory interpretations that would render any words or phrases superfluous).

**3-4:53.SP SEXUAL ASSAULT ON A CLIENT BY A  
PSYCHOTHERAPIST (INCLUDING AGGRAVATED) –  
SPECIAL INSTRUCTION (CONSENT IS NOT A DEFENSE)**

Consent by a client to sexual penetration, intrusion, or contact is not a defense to [aggravated] sexual assault on a client by a psychotherapist.

COMMENT

1. *See* § 18-3-405.5(3), C.R.S. 2020.
2. *See* Instruction F:68 (defining “consent”).

**3-4:54.INT SEXUAL ASSAULT ON A CLIENT BY A  
PSYCHOTHERAPIST (INCLUDING AGGRAVATED) –  
INTERROGATORY (AT-RISK PERSON)**

If you find the defendant not guilty of [aggravated] sexual assault on a client by a psychotherapist, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [aggravated] sexual assault on a client by a psychotherapist, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-6.5-103(7)(f), C.R.S. 2020.
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).
3. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(7)(f), 2016 Colo. Sess. Laws 545, 549.

### 3-4:55 INVASION OF PRIVACY FOR SEXUAL GRATIFICATION

The elements of invasion of privacy for sexual gratification are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. observed or took a photograph of another person's intimate parts,
5. without the person's consent,
6. in a situation where the person observed or photographed had a reasonable expectation of privacy,
7. for the purpose of the observer's own sexual gratification.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of invasion of privacy for sexual gratification.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of invasion of privacy for sexual gratification.

#### COMMENT

1. See § 18-3-405.6(1), C.R.S. 2020.

2. See Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); Instruction F:276 (defining “photograph”).

3. In a case where there is a dispute concerning whether the person observed had “a reasonable expectation of privacy,” it may be appropriate to draft an instruction explaining relevant Fourth Amendment principles.

### **3-4:56.INT INVASION OF PRIVACY FOR SEXUAL GRATIFICATION – INTERROGATORY (AGE)**

If you find the defendant not guilty of invasion of privacy for sexual gratification, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of invasion of privacy for sexual gratification, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim a person with protected status due to his [her] age?  
(Answer “Yes” or “No”)

The victim was a person with protected status due to his [her] age only if:

1. the victim was under fifteen years of age when the defendant [observed] [photographed] his [her] intimate parts, and
2. the defendant was, at the time of the offense, at least four years older than the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-3-405.6(2)(b)(II), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

### **3-4:56.3 UNLAWFUL SEXUAL CONDUCT BY A PEACE OFFICER (DURING DUTIES)**

The elements of unlawful sexual conduct by a peace officer (during duties) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a peace officer, and
5. contacted the victim for the purpose of law enforcement or contacted the victim in the exercise of the defendant's employment activities or duties, and
6. in the same encounter, engaged in sexual contact, sexual intrusion, or sexual penetration.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual conduct by a peace officer (during duties).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual conduct by a peace officer (during duties).

#### **COMMENT**

1. See § 18-3-405.7(1)(a), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction 3-4:56.6.SP (consent not a defense).
4. Section 18-3-405.7(5), C.R.S. 2020, provides that this crime “does not apply to sexual contact or intrusion that occurs incident to a lawful search.” However, the Committee has not drafted an affirmative defense instruction. See *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant’s burden to claim it as an affirmative defense.”).
5. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 287, sec. 1, § 18-3-405.7(1)(a), 2019 Colo. Sess. Laws 2662, 2662.

### **3-4:56.4 UNLAWFUL SEXUAL CONDUCT BY A PEACE OFFICER (ACTIVE INVESTIGATION)**

The elements of unlawful sexual conduct by a peace officer (active investigation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a peace officer, and
5. engaged in sexual contact, sexual intrusion, or sexual penetration, and
6. the defendant knew that the victim was, or caused the victim to believe that he or she was, the subject of an active investigation, and
7. the defendant used that knowledge to further the sexual contact, intrusion, or penetration.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual conduct by a peace officer (active investigation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual conduct by a peace officer (active investigation).

## COMMENT

1. See § 18-3-405.7(1)(b), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction 3-4:56.6.SP (consent not a defense).
4. Section 18-3-405.7(5), C.R.S. 2020, provides that this crime “does not apply to sexual contact or intrusion that occurs incident to a lawful search.” However, the Committee has not drafted an affirmative defense instruction. See *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant’s burden to claim it as an affirmative defense.”).
5. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 287, sec. 1, § 18-3-405.7(1)(b), 2019 Colo. Sess. Laws 2662, 2662.

### **3-4:56.5 UNLAWFUL SEXUAL CONDUCT BY A PEACE OFFICER (SHOW OF AUTHORITY)**

The elements of unlawful sexual conduct by a peace officer (show of authority) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a peace officer, and
5. engaged in sexual contact, sexual intrusion, or sexual penetration, and
6. made a show of real or apparent authority,
7. in furtherance of the sexual contact, intrusion, or penetration.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sexual conduct by a peace officer (show of authority).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sexual conduct by a peace officer (show of authority).

#### COMMENT

1. See § 18-3-405.7(1)(c), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. See Instruction 3-4:56.6.SP (consent not a defense).
4. Section 18-3-405.7(5), C.R.S. 2020, provides that this crime “does not apply to sexual contact or intrusion that occurs incident to a lawful search.” However, the Committee has not drafted an affirmative defense instruction. See *People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant’s burden to claim it as an affirmative defense.”).
5. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 287, sec. 1, § 18-3-405.7(1)(c), 2019 Colo. Sess. Laws 2662, 2662.

### **3-4:56.6.SP UNLAWFUL SEXUAL CONDUCT BY A PEACE OFFICER – SPECIAL INSTRUCTION**

In a prosecution for unlawful sexual conduct by a peace officer, it is not a defense that the victim consented to the sexual contact, intrusion, or penetration.

#### COMMENT

1. *See* § 18-3-405.7(4), C.R.S. 2020.
2. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 287, sec. 1, § 18-3-405.7(4), 2019 Colo. Sess. Laws 2662, 2663.

### **3-4:56.7.INT UNLAWFUL SEXUAL CONDUCT BY A PEACE OFFICER – INTERROGATORY (AGGRAVATED CONDUCT)**

If you find the defendant not guilty of unlawful sexual conduct by a peace officer, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful sexual conduct by a peace officer, you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Was sexual intrusion or penetration inflicted on the victim? (Answer “Yes” or “No”)

The prosecution has the burden to prove the infliction of sexual intrusion or penetration beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3-405.7(2), C.R.S. 2020.
2. *See* Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 287, sec. 1, § 18-3-405.7(2), 2019 Colo. Sess. Laws 2662, 2662–63.

### 3-4:57 FAILURE TO REGISTER AS A SEX OFFENDER (GENERAL)

The elements of the crime of failure to register as a sex offender (general) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. knowingly,
5. failed to register with [insert relevant provision from Article 22 of Title 16] or comply with the requirement that a registrant [insert relevant provision from Article 22 of Title 16].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (general).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (general).

#### COMMENT

1. See § 18-3-412.5(1)(a), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts

that provide examples of a registrant's failure to register and do not create or define crimes.").

2. See Instruction F:195 (defining "knowingly").

3. In *People v. Lopez*, 140 P.3d 106, 113 (Colo. App. 2005), a divided division of the Court of Appeals held that "failure to register as a sex offender is not a strict liability offense but includes the mental state of 'knowingly.'" The Committee has drafted a model instruction that reflects a narrow reading of *Lopez*, with the imputed mens rea added only to section 18-3-412.5(1)(a), which is the sole provision that the defendant in *Lopez* was convicted of violating. See *People v. Lopez*, 140 P.3d at 114 (Russel, J., concurring in part and dissenting in part) (noting the inclusion of a mens rea in sections 18-3-412.5(1)(c) and (e), and observing that "the legislature chose to require proof of culpability for certain acts and to dispense with this requirement for other types of violations").

4. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. See § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

5. See Instruction H:45 (affirmative defense of "uncontrollable circumstances").

6. See *People v. Allman*, 2012 COA 212, ¶¶ 21-29, 321 P.3d 557, 564-66 (for purposes of the offense of failure to register as a sex offender in violation of section 18-3-412.5(1)(a), a motor vehicle may qualify as "residence," within the meaning of § 16-22-102(5.7), because that definition does not require that there be an address).

### **3-4:58 FAILURE TO REGISTER AS A SEX OFFENDER (SUBMISSION OF FORM)**

The elements of the crime of failure to register as a sex offender (submission of form) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was required to register as a sex offender, and
  4. submitted a registration form containing false information or an incomplete registration form.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (submission of form).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (submission of form).

#### COMMENT

1. See § 18-3-412.5(1)(b), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) ("When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People's contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant's failure to register and do not create or define crimes.").

2. *See* Instruction F:195 (defining “knowingly”).
3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.
4. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:59 FAILURE TO REGISTER AS A SEX OFFENDER (INFORMATION)**

The elements of the crime of failure to register as a sex offender (information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. failed to provide information or knowingly provided false information,
5. to a probation department employee, a community corrections administrator or his [her] designee, or to a judge or magistrate when receiving notice [insert relevant provision from section 16-22-106(1), (2), or (3), describing the relevant context] of the duty to register].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (information).

#### COMMENT

1. See § 18-3-412.5(1)(c), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under

section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. *See* Instruction F:195 (defining “knowingly”).

3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

4. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:60 FAILURE TO REGISTER AS A SEX OFFENDER (FAILURE TO PROVIDE NOTICE UPON RELEASE)**

The elements of the crime of failure to register as a sex offender (failure to provide notice upon release) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. having been sentenced to a county jail, otherwise incarcerated, or committed due to conviction of or disposition or adjudication for the crime of [insert the relevant offense specified in section 16-22-103],
5. failed to provide notice of the address where he [she] intended to reside upon release as required by [insert either the word "law" (if using a separate instruction to describe the applicable provision), or a brief description of the relevant provision from section 16-22-106 or 16-22-107].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (failure to provide notice upon release).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (failure to provide notice upon release).

## COMMENT

1. See § 18-3-412.5(1)(d), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. See § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. See Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:61 FAILURE TO REGISTER AS A SEX OFFENDER (PROVIDING FALSE INFORMATION UPON RELEASE)**

The elements of the crime of failure to register as a sex offender (providing false information upon release) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. knowingly,
5. provided false information, including but not limited to information about [insert relevant provision from section 16-22-107(4)(b), as incorporated from section 16-22-107(4)(a)],
6. to a sheriff, his [her] designee, department of corrections personnel, or department of human services personnel,
7. concerning the address where he [she] intended to reside upon release from the county jail, the department of corrections, or the department of human services.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (providing false information upon release).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (providing false information upon release).

## COMMENT

1. See § 18-3-412.5(1)(e), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. See Instruction F:195 (defining “knowingly”).

3. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. See § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

4. See Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:62 FAILURE TO REGISTER AS A SEX OFFENDER (NAMES)**

The elements of the crime of failure to register as a sex offender (names) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was required to register as a sex offender, and
  4. when registering, failed to provide his [her] current name and any former names.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (names).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (names).

#### **COMMENT**

1. See § 18-3-412.5(1)(f), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:63 FAILURE TO REGISTER AS A SEX OFFENDER (LOCAL AGENCY)**

The elements of the crime of failure to register as a sex offender (local agency) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was required to register as a sex offender, and
  4. failed to register with the local law enforcement agency in each jurisdiction in which he [she] resided upon changing an address, establishing an additional residence, or legally changing names.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (local agency).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (local agency).

#### **COMMENT**

1. See § 18-3-412.5(1)(g), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts

that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

4. *See People v. Jones*, 2017 COA 116, ¶ 21, 405 P.3d 504, 508 (holding that the phrase "changing an address" means moving from a fixed residence at one place to a fixed residence at another place).

5. In 2017, the Committee added Comment 4.

### **3-4:64 FAILURE TO REGISTER AS A SEX OFFENDER (IDENTIFYING INFORMATION)**

The elements of the crime of failure to register as a sex offender (identifying information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. failed to provide his [her] correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints, or to provide his [her] correct address.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (identifying information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (identifying information).

#### COMMENT

1. See § 18-3-412.5(1)(h), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts

that provide examples of a registrant's failure to register and do not create or define crimes.").

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of "uncontrollable circumstances").

### **3-4:65 FAILURE TO REGISTER AS A SEX OFFENDER (CANCELLATION)**

The elements of the crime of failure to register as a sex offender (cancellation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender, and
4. failed to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which he [she] would no longer reside.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (cancellation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (cancellation).

#### COMMENT

1. See § 18-3-412.5(1)(i), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.
3. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).
4. The statute incorporates section 16-22-108(4)(a)(II), C.R.S. 2020, which details the requirements for completing a “registration cancellation form.” Where appropriate, the court should provide a supplemental instruction detailing the relevant requirements from that statute.
5. In 2018, the Committee added Comment 4 pursuant to a legislative amendment. *See* Ch. 255, sec. 2, § 18-3-412.5(1)(i), 2018 Colo. Sess. Laws 1559, 1559.

### **3-4:66 FAILURE TO REGISTER AS A SEX OFFENDER (MOTOR HOME)**

The elements of the crime of failure to register as a sex offender (motor home) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was required to register as a sex offender,
4. when his [her] place of residence was a trailer or motor home, and
5. failed to register an address at which the trailer or motor home was lawfully located, and the vehicle identification number, license tag number, registration number, and description (including the color scheme) of the trailer or motor home.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (motor home).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (motor home).

#### **COMMENT**

1. See § 18-3-412.5(1)(j), C.R.S. 2020; see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under

section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. *See* § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:67 FAILURE TO REGISTER AS A SEX OFFENDER (E-MAIL)**

The elements of the crime of failure to register as a sex offender (e-mail) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was required to register as a sex offender, and
  4. having been convicted of a child sex crime,
  5. failed to register an e-mail address (other than an e-mail address that the defendant's employer – which was an entity not owned or operated by the defendant – provided for use primarily in the course of the defendant's employment, which identified the employer by name, initials, or other commonly recognized identifier), instant-messaging identity, or chat room identity prior to using the address or identity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to register as a sex offender (e-mail).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to register as a sex offender (e-mail).

## COMMENT

1. See § 18-3-412.5(1)(k), C.R.S. 2020 (incorporating the employer e-mail exception of section 16-22-108(2.5)(b)(I)–(III)); see also *People v. Poage*, 272 P.3d 1113, 1116 (Colo. App. 2011) (“When the People elected to proceed under section 18-3-412.5(1)(g) and (i), they abandoned their arguments under section 18-3-412.5(1)(a). . . . [W]e reject the People’s contention that subsections (a) through (k) of section 18-3-412.5(1) merely delineate acts that provide examples of a registrant’s failure to register and do not create or define crimes.”).

2. The Colorado Sex Offender Registration Act (CSRA) includes definitions for numerous terms. See § 16-22-102, C.R.S. 2020. Because those terms do not appear in section 18-3-412.5, the statutory definitions are not included in Chapter F. Accordingly, when necessary, refer to section 16-22-102 and draft definitional instructions for any terms that are relevant to the particular requirement(s) of the CSRA that the defendant is charged with violating.

3. See Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

### **3-4:68.SP FAILURE TO REGISTER AS A SEX OFFENDER – SPECIAL INSTRUCTION (REQUIRED TO REGISTER; CONVICTED OF A “CHILD SEX CRIME”)**

The defendant was required to register as a sex offender on [insert relevant date] if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues].

[Further, the defendant was convicted of a “child sex crime” if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues]].

#### COMMENT

1. Under section 18-3-412.5(1), the question of whether the defendant was required to register may involve issues of law for the court to determine. For example, it seems clear that it is the court’s role to analyze the statutory definition of an offense for which a defendant was previously convicted in order to determine, as a preliminary matter of law, whether, under section 16-22-103(2)(c)(I)(A), C.R.S. 2020, the prior conviction was for “an offense that requires proof of unlawful sexual behavior as an element of the offense.” However, once a court has made that initial determination and concluded that a prior conviction satisfies that statutory definition, the court must submit to the jury the question of whether, in fact, it was the defendant who was convicted as alleged. *See also, e.g., People v. Brooks*, 2012 COA 52, ¶¶ 10–18, 296 P.3d 216, 217–19 (reversing a conviction for failure to register as a sex offender based on a determination that, as a matter of law, defendant’s prior out-of-state conviction for “indecent with a child by exposure” was not a conviction that triggered a requirement to register as a sex offender pursuant to section 16-22-103(1)(b)).

Likewise, the court may need to determine whether a prior conviction was for a “child sex crime” under the definition in section 16-22-108(2.5)(c), which is incorporated into section 18-3-412.5(1)(k), C.R.S. 2020 (registration of an online identity). But, here again, once the court has determined that a prior conviction so qualifies, the court must have the

jury make a factual determination as to whether the defendant was the person who was convicted as alleged.

### **3-4:69 FAILURE TO VERIFY LOCATION AS A SEX OFFENDER**

The elements of the crime of failure to verify location as a sex offender are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was required to register as a sex offender, and
  4. lacked a fixed residence, and
  5. failed to report the location[s] where he [she] remained without a fixed residence, at least every [three] month[s], to each local law enforcement agency in whose jurisdiction he [she] was registered as a sex offender.
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to verify location as a sex offender.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to verify location as a sex offender.

#### **COMMENT**

1. *See* § 18-3-412.6(1), C.R.S. 2020 (incorporating the requirements set forth in section 16-22-109(3.5)(c)(I), (II)).
2. *See* Instruction H:45 (affirmative defense of “uncontrollable circumstances”).

3. It is unclear whether the court or the jury is to determine the date on which the defendant first “lacked a fixed residence.” *See* § 16-22-102(4.3), C.R.S. 2020 (defining “lacks a fixed residence” with reference to the definition of a “residence” in section 16-22-102(5.7)); § 16-22-108(3), C.R.S. 2020 (enumerating events that trigger a requirement to register within five business days).

4. Nor is it apparent whether (or how) the court is to instruct the jury concerning the deadlines for any reporting procedures that had been established by the local jurisdiction(s) to whom the defendant was obligated to report (though it is evident that the initial question of whether the defendant was subject to quarterly or annual reporting is an issue of law for the court to resolve). *See* § 16-22-109(3.5)(c)(I), (II), C.R.S. 2020 (giving local law enforcement agencies latitude to establish reporting schedules, provided that the schedules are within the parameters of the annual or quarterly reporting requirements). Accordingly, in a case that implicates either or both of these issues, the Committee recommends that the trial court draft a special instruction reflecting its ruling(s).

Similarly, it may be necessary to draft a special instruction specifying what information the defendant was obligated to include in the report. *See* § 16-22-109(3.5)(c)(I), (II) (“The person shall be required to verify his or her location or locations and verify any and all information required to be reported pursuant to this section.”).

5. In 2016, the Committee modified the second citation to section 16-22-109(3.5)(c) in Comment 4.

**3-4:70.SP FAILURE TO VERIFY LOCATION AS A SEX  
OFFENDER – SPECIAL INSTRUCTION (REQUIRED TO  
REGISTER)**

The defendant was required to register as a sex offender on [insert relevant date] if: [insert a description of the factual issue(s) that the jury is to determine; use numbered enumeration for multiple issues].

**COMMENT**

1. *See* Instruction 3-4:68.SP, Comment 1 (discussing the legal and factual issues related to the registration requirement).

### **3-4:71 UNLAWFUL ELECTRONIC SEXUAL COMMUNICATION (EXPOSE OR TOUCH)**

The elements of the crime of unlawful electronic sexual communication (expose or touch) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. importuned, invited, or enticed,
5. through communication via a computer network or system, telephone network, or data network or by a text message or instant message,
6. a person whom the defendant knew or believed to be fifteen years of age or older but less than eighteen years of age and at least four years younger than the defendant, and
7. the defendant was in a position of trust with respect to that person,
8. to expose or touch the person's own or another person's intimate parts while communicating with the defendant via a computer network or system, telephone network, or data network or by a text message or instant message.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful electronic sexual communication (expose or touch).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful electronic sexual communication (expose or touch).

#### COMMENT

1. See § 18-3-418(1)(a), C.R.S. 2020.
2. See Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); Instruction F:280 (defining “position of trust”); see also Instruction F:62 (defining “computer network,” for purposes of cybercrimes); Instruction F:65 (defining “computer system,” for purposes of cybercrimes).
3. See *People v. Heywood*, 2014 COA 99, ¶¶ 25–28, 357 P.3d 201, 207 (noting that the undefined terms “importune,” “invite,” and “entice” are “common terms,” and attributing to them specific dictionary definitions), *overruled on other grounds by McCoy v. People*, 2019 CO 44, 442 P.3d 379.
4. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 145, sec. 1, § 18-3-418(1)(a), 2019 Colo. Sess. Laws 1758, 1758.

### **3-4:72 UNLAWFUL ELECTRONIC SEXUAL COMMUNICATION (OBSERVE)**

The elements of the crime of unlawful electronic sexual communication (observe) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. importuned, invited, or enticed,
5. through communication via a computer network or system, telephone network, or data network or by a text message or instant message,
6. a person whom the defendant knew or believed to be fifteen years of age or older but less than eighteen years of age and at least four years younger than the defendant, and
7. the defendant was in a position of trust with respect to that person,
8. to observe the defendant's intimate parts via a computer network or system, telephone network, or data network or by a text message or instant message.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful electronic sexual communication (observe).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of unlawful electronic sexual communication (observe).

#### COMMENT

1. See § 18-3-418(1)(b), C.R.S. 2020.
2. See Instruction F:186 (defining “intimate parts”); Instruction F:195 (defining “knowingly”); Instruction F:280 (defining “position of trust”); *see also* Instruction F:62 (defining “computer network,” for purposes of cybercrimes); Instruction F:65 (defining “computer system,” for purposes of cybercrimes).
3. See *People v. Heywood*, 2014 COA 99, ¶¶ 25–28, 357 P.3d 201, 207 (noting that the undefined terms “importune,” “invite,” and “entice” are “common terms,” and attributing to them specific dictionary definitions), *overruled on other grounds by McCoy v. People*, 2019 CO 44, 442 P.3d 379.
4. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 145, sec. 1, § 18-3-418(1)(b), 2019 Colo. Sess. Laws 1758, 1758.

### **3-4:73 UNLAWFUL ELECTRONIC SEXUAL COMMUNICATION (PERSUADE TO MEET)**

The elements of the crime of unlawful electronic sexual communication (persuade to meet) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. communicated over a computer or computer network, telephone network, or data network or by a text message or instant message,
5. to a person the defendant knew or believed to be fifteen years of age or older but less than eighteen years of age and at least four years younger than the defendant, and
6. in that communication or in any subsequent communication by computer or computer network, telephone network, or data network or by text message or instant message,
7. described explicit sexual conduct, and
8. in connection with that description, made a statement persuading or inviting the person to meet the defendant for any purpose, and
9. the defendant was in a position of trust with respect to that person.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful electronic sexual communication

(persuade to meet).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful electronic sexual communication (persuade to meet).

#### COMMENT

1. *See* § 18-3-418(2), C.R.S. 2020.
2. *See* Instruction F:132 (defining “explicit sexual conduct”); Instruction F:181 (defining “in connection with”); Instruction F:195 (defining “knowingly”); Instruction F:280 (defining “position of trust”); *see also* Instruction F:61 (defining “computer,” for purposes of cybercrimes); Instruction F:62 (defining “computer network,” for purposes of cybercrimes).
3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 145, sec. 1, § 18-3-418(2), 2019 Colo. Sess. Laws 1758, 1759.

### **3-4:74.INT UNLAWFUL ELECTRONIC SEXUAL COMMUNICATION (PERSUADE TO MEET) – INTERROGATORY (SEXUAL INTENT)**

If you find the defendant not guilty of unlawful electronic sexual communication (persuade to meet), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unlawful electronic sexual communication (persuade to meet), you should sign the verdict form to indicate your guilty verdict and then answer the following verdict question on the verdict form:

Did the defendant act with sexual intent? (Answer “Yes” or “No”)

The defendant acted with sexual intent only if:

1. the defendant acted with the intent to meet for the purpose of engaging in sexual exploitation or sexual contact.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should indicate “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should indicate “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3-418(4)(b), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:337 (defining “sexual contact”); *see, e.g.*, Instruction E:28 (special verdict form).

3. The statute provides for a heightened penalty if the defendant had “the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401.” Although section 18-3-401 defines “sexual contact,” *see* Instruction F:337, section 18-6-403 does not define “sexual exploitation” as a term; rather, it criminalizes various forms of such exploitation of a child. Accordingly, assuming that the defendant is not separately charged with sexual exploitation of a child, the court should provide a modified instruction defining the crime. *See* Instructions 6-4:17 to 6-4:21. Specifically, the court should make the following modifications: (1) the first sentence should read, “A person commits the crime of sexual exploitation of a child”; (2) element number 1, “That the defendant,” should be replaced with “The person”; and (3) the two concluding paragraphs explaining the burden of proof should be omitted.

Furthermore, because there are five different forms of sexual exploitation of a child, *see id.*, the court and the parties should determine which modified version(s) to provide to the jury, depending on the facts of the case.

4. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 145, sec. 1, § 18-3-418(4)(b), 2019 Colo. Sess. Laws 1758, 1759.

## CHAPTER 3-5

### HUMAN TRAFFICKING AND SLAVERY

<a href="#"><u>3-5:01</u></a>	HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE
<a href="#"><u>3-5:02.INT</u></a>	HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE – INTERROGATORY (MINOR)
<a href="#"><u>3-5:03</u></a>	HUMAN TRAFFICKING FOR SEXUAL SERVITUDE
<a href="#"><u>3-5:04</u></a>	HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE
<a href="#"><u>3-5:04.5</u></a>	HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE (TRAVEL SERVICES)
<a href="#"><u>3-5:05.SP</u></a>	HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE – SPECIAL INSTRUCTION (UNAVAILABLE DEFENSES)
<a href="#"><u>3-5:06.SP</u></a>	HUMAN TRAFFICKING FOR SEXUAL SERVITUDE (INCLUDING OF A MINOR) – SPECIAL INSTRUCTION (RECEIPT OF PROCEEDS UNNECESSARY)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

### 3-5:01 HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE

The elements of the crime of human trafficking for involuntary servitude are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, or obtained by any means,
5. another person,
6. for the purpose of coercing the other person to perform labor or services.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking for involuntary servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking for involuntary servitude.

#### COMMENT

1. See § 18-3-503(1), C.R.S. 2020.
2. See Instruction F:56.5 (defining “coercing”); Instruction F:195 (defining “knowingly”).

### 3-5:02.INT HUMAN TRAFFICKING FOR INVOLUNTARY SERVITUDE – INTERROGATORY (MINOR)

If you find the defendant not guilty of human trafficking for involuntary servitude, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of human trafficking for involuntary servitude, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the trafficked person a minor? (Answer “Yes” or “No”)

The trafficked person was a minor only if:

1. the trafficked person was less than eighteen years of age.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See §§ 18-3-502(8), 18-3-503(2), C.R.S. 2020.
2. Cf. *People v. Cardenas*, 2014 COA 35, ¶ 39, 338 P.3d 430, 436 (holding, under a version of the trafficking in children statute that was repealed in 2014, that “[i]f the legislature intended for the trafficking in children statute to apply to services, it would have said so”).

### 3-5:03 HUMAN TRAFFICKING FOR SEXUAL SERVITUDE

The elements of the crime of human trafficking for sexual servitude are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, or obtained by any means,
5. another person,
6. for the purpose of coercing the person to engage in commercial sexual activity.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking for sexual servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking for sexual servitude.

#### COMMENT

1. *See* § 18-3-504(1)(a), C.R.S. 2020.
2. *See* Instruction F:57.5 (defining “commercial sexual activity”); Instruction F:195 (defining “knowingly”).

### 3-5:04 HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE

The elements of the crime of human trafficking of a minor for sexual servitude are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, obtained by any means, maintained, or made available,
5. a person less than eighteen years of age,
6. for the purpose of commercial sexual activity.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking of a minor for sexual servitude.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking of a minor for sexual servitude.

#### COMMENT

1. See § 18-3-504(2)(a)(I), C.R.S. 2020.
2. See Instruction F:57.5 (defining “commercial sexual activity”); Instruction F:195 (defining “knowingly”); Instruction F:203.5 (defining

“maintain”); Instruction F:204.5 (defining “makes available”); *see also* § 18-3-502(8), C.R.S. 2020 (defining “minor,” as incorporated in the fifth element above).

3. In 2017, the Committee modified the citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 250, sec. 2, § 18-3-504(2)(a)(I), 2017 Colo. Sess. Laws 1049, 1049.

### **3-5:04.5 HUMAN TRAFFICKING OF A MINOR FOR SEXUAL SERVITUDE (TRAVEL SERVICES)**

The elements of the crime of human trafficking of a minor for sexual servitude (travel services) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. advertised, offered to sell, or sold,
5. travel services that facilitate human trafficking of a minor for sexual servitude.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of human trafficking of a minor for sexual servitude (travel services).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of human trafficking of a minor for sexual servitude (travel services).

#### COMMENT

1. See § 18-3-504(2)(a)(II), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:375.8 (defining “travel services”).

3. Because the statute criminalizes “an activity prohibited pursuant to subsection (2)(a)(I) of this section,” the court should also give Instruction 3-5:04, with the following modifications: (1) the first sentence should read, “A person commits the crime of human trafficking of a minor for sexual servitude if”; (2) the first element should read, “The person”; and (3) the two concluding paragraphs explaining the burden of proof should be omitted.

4. Section 18-3-504(2.5) provides for an affirmative defense if the defendant “can demonstrate by a preponderance of the evidence that, at the time of the offense, he or she was a victim of human trafficking for sexual servitude who was forced or coerced into engaging in the human trafficking of minors for sexual servitude.” However, the Committee has not drafted a model affirmative defense instruction. Furthermore, the Committee expresses no opinion regarding whether the statute unconstitutionally shifts the burden of proof to the defendant to establish the affirmative defense. *See People ex rel. Juhan v. Dist. Court*, 439 P.2d 741, 745 (Colo. 1968) (“[T]he due process clause of the state constitution includes the doctrine that the state must prove guilt beyond a reasonable doubt, and that the accused cannot be required by legislative enactment to prove insanity or any other defense by a preponderance of the evidence.”).

5. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 250, sec. 2, § 18-3-504(2)(a)(II), 2017 Colo. Sess. Laws 1049, 1050.

**3-5:05.SP HUMAN TRAFFICKING OF A MINOR FOR  
SEXUAL SERVITUDE – SPECIAL INSTRUCTION  
(UNAVAILABLE DEFENSES)**

In any prosecution for human trafficking of a minor for sexual servitude, it is not a defense that the person less than eighteen years of age consented to being sold, recruited, harbored, transported, transferred, isolated, enticed, provided, received, obtained, or maintained by the defendant for the purpose of engaging in commercial sexual activity; the minor consented to participating in commercial sexual activity; the defendant did not know the minor's age or reasonably believed the minor to be eighteen years of age or older; or the minor or another person represented the minor to be eighteen years of age or older.

COMMENT

1. *See* § 18-3-504(2)(c), C.R.S. 2020.

**3-5:06.SP HUMAN TRAFFICKING FOR SEXUAL SERVITUDE  
(INCLUDING OF A MINOR) – SPECIAL INSTRUCTION  
(RECEIPT OF PROCEEDS UNNECESSARY)**

A person does not need to receive any of the proceeds of any commercial sexual activity to commit human trafficking [of a minor] for sexual servitude.

COMMENT

1. *See* § 18-3-504(3), C.R.S. 2020.

## CHAPTER 3-6

### STALKING

<a href="#"><u>3-6:01</u></a>	STALKING (CREDIBLE THREAT AND CONDUCT)
<a href="#"><u>3-6:02</u></a>	STALKING (CREDIBLE THREAT AND REPEATED COMMUNICATION)
<a href="#"><u>3-6:03</u></a>	STALKING (SERIOUS EMOTIONAL DISTRESS)
<a href="#"><u>3-6:04.SP</u></a>	STALKING (SERIOUS EMOTIONAL DISTRESS) – SPECIAL INSTRUCTION (EVIDENCE OF TREATMENT NOT REQUIRED)
<a href="#"><u>3-6:05.INT</u></a>	STALKING – INTERROGATORY (VIOLATION OF ORDER OR CONDITION)

### 3-6:01 STALKING (CREDIBLE THREAT AND CONDUCT)

The elements of the crime of stalking (credible threat and conduct) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a credible threat to another person, either directly, or indirectly through a third person, and
5. in connection with the threat, repeatedly followed, approached, contacted, or placed under surveillance that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (credible threat and conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (credible threat and conduct).

#### COMMENT

1. See § 18-3-602(1)(a), C.R.S. 2020.
2. See Instruction F:67 (defining "conduct 'in connection with' a credible threat"); Instruction F:77 (defining "credible threat"); Instruction F:178

(defining “immediate family”); Instruction F:195 (defining “knowingly”);  
Instruction F:312 (defining “repeated” or “repeatedly”).

### 3-6:02 STALKING (CREDIBLE THREAT AND REPEATED COMMUNICATION)

The elements of the crime of stalking (credible threat and repeated communication) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made a credible threat to another person, either directly, or indirectly through a third person, and
  5. in connection with the threat, repeatedly made any form of communication with that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship, regardless of whether a conversation ensued.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (credible threat and repeated communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (credible threat and repeated communication).

#### COMMENT

1. See § 18-3-602(1)(b), C.R.S. 2020.

2. See Instruction F:67 (defining “conduct ‘in connection with’ a credible threat”); Instruction F:77 (defining “credible threat”); Instruction F:178 (defining “immediate family”); Instruction F:195 (defining “knowingly”); Instruction F:312 (defining “repeated” or “repeatedly”).

### 3-6:03 STALKING (SERIOUS EMOTIONAL DISTRESS)

The elements of the crime of stalking (serious emotional distress) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly repeatedly followed, approached, contacted, placed under surveillance, or made any form of communication with another person, either directly, or indirectly through a third person,
  4. in a manner that would cause a reasonable person to suffer serious emotional distress, and
  5. which did cause that person, a member of that person's immediate family, or someone with whom that person was having or previously had a continuing relationship to suffer serious emotional distress.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of stalking (serious emotional distress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of stalking (serious emotional distress).

#### COMMENT

1. See § 18-3-602(1)(c), C.R.S. 2020.

2. See Instruction F:67 (defining “conduct ‘in connection with’ a credible threat”); Instruction F:77 (defining “credible threat”); Instruction F:178 (defining “immediate family”); Instruction F:195 (defining “knowingly”); Instruction F:312 (defining “repeated” or “repeatedly”).

3. Section 18-3-602 does not define “serious emotional distress.” See *People v. Yascavage*, 80 P.3d 899, 901 (Colo. App. 2003) (holding that the provision defining stalking, then codified as section 18-9-111(4)(b)(III), “prohibits contact that inflicts ‘serious emotional distress’ and provides an objective ‘reasonable person’ standard to measure whether the emotional distress inflicted upon the victim was ‘serious’”), *aff’d on other grounds*, 101 P.3d 1090 (Colo. 2004).

4. See *People v. Cross*, 127 P.3d 71, 77 (Colo. 2006) (holding that the mens rea of “knowingly” for stalking – then codified as section 18-9-111(4)(a) – does “not apply to require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress”).

5. Although section 18-3-602(1)(c) twice lists the types of persons to whom the provision applies (once with regard to the defendant’s conduct, and once with regard to the actual effect of that conduct), the Committee is of the view that the meaning of the statute is not altered by using only the term “another person” in the fourth element (because the sixth element makes clear that the infliction of serious emotional distress can be proved either with respect to “that person,” or with respect to any person who has a specified connection to “that person”).

6. See *People v. Folsom*, 2017 COA 146M, ¶ 55, 431 P.3d 652, 661 (“[I]t is not each individual act of stalking that must cause a reasonable person to suffer emotional distress, but the combined acts of the defendant that would cause such a result.”).

7. In 2015, the Committee combined the third and fourth elements and renumbered the subsequent elements. This corrected format does not reflect a change in the Committee’s thinking. Rather, this is the version that the Committee approved in 2014 based on *People v. Cross, supra*. However, due to an oversight, the third and fourth elements were not consolidated in COLJI-Crim. 3-6:03 (2014).

8. In 2019, the Committee added Comment 6.

**3-6:04.SP STALKING (SERIOUS EMOTIONAL DISTRESS) –  
SPECIAL INSTRUCTION (EVIDENCE OF TREATMENT NOT  
REQUIRED)**

For purposes of the crime of stalking (serious emotional distress), the prosecution need not show that a person received professional treatment or counseling to prove that he [she] suffered serious emotional distress.

COMMENT

1. *See* § 18-3-602(1)(c), C.R.S. 2020.

### **3-6:05.INT STALKING – INTERROGATORY (VIOLATION OF ORDER OR CONDITION)**

If you find the defendant not guilty of stalking, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of stalking, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the stalking in violation of an existing order? (Answer “Yes” or “No”)

The stalking was in violation of an existing order only if:

1. a temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order had issued against the defendant, and
2. that temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order was in effect at the time the defendant committed the stalking offense of which you found him [her] guilty, and
3. that temporary or permanent protection order, injunction, or condition of bond, probation, or parole, or any other court order prohibited [insert description of behavior constituting stalking].

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3-602(5), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).



## CHAPTER 3.5

### OFFENSES AGAINST PREGNANT WOMEN

<a href="#"><u>3.5:01</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE
<a href="#"><u>3.5:02.INT</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE – INTERROGATORY (DEATH)
<a href="#"><u>3.5:03</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE
<a href="#"><u>3.5:04.INT</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)
<a href="#"><u>3.5:05</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE THIRD DEGREE
<a href="#"><u>3.5:06</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE
<a href="#"><u>3.5:07.INT</u></a>	UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE – INTERROGATORY (UNLAWFUL TERMINATION OF PREGNANCY DURING SPECIFIED FELONY)
<a href="#"><u>3.5:08</u></a>	VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY
<a href="#"><u>3.5:09</u></a>	AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY
<a href="#"><u>3.5:10.SP</u></a>	AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)
<a href="#"><u>3.5:11</u></a>	CARELESS DRIVING RESULTING IN UNLAWFUL TERMINATION OF PREGNANCY

### CHAPTER COMMENTS

1. Section 18-3.5-110, C.R.S. 2020, provides as follows: “Nothing in this article shall be construed to confer the status of ‘person’ upon a human

embryo, fetus, or unborn child at any stage of development prior to live birth.”

2. The Committee added this chapter in 2015.

### **3.5:01 UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE**

The elements of the crime of unlawful termination of pregnancy in the first degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to terminate unlawfully the pregnancy of a woman,
5. unlawfully terminated the woman's pregnancy.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the first degree.

#### **COMMENT**

1. *See* § 18-3.5-103(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent"); Instruction F:282.5 (defining "pregnancy"); Instruction F:381.5 (defining "unlawful termination of pregnancy").

3. See Instruction H:45.3 (affirmative defense of “medical care or service”); Instruction H:45.5 (affirmative defense of “defendant’s own pregnancy”).

### **3.5:02.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE FIRST DEGREE – INTERROGATORY (DEATH)**

If you find the defendant not guilty of unlawful termination of pregnancy in the first degree, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the unlawful termination cause the woman's death? (Answer "Yes" or "No")

The unlawful termination caused the woman's death only if:

1. the woman died as a result of the defendant's unlawful termination of her pregnancy.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-3.5-103(2), C.R.S. 2020.

### 3.5:03 UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE

The elements of the crime of unlawful termination of pregnancy in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the unlawful termination of the pregnancy of a woman.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the second degree.

#### COMMENT

1. See § 18-3.5-104(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:282.5 (defining “pregnancy”); Instruction F:381.5 (defining “unlawful termination of pregnancy”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”).
3. See Instruction H:45.3 (affirmative defense of “medical care or service”); Instruction H:45.5 (affirmative defense of “defendant’s own pregnancy”).

### **3.5:04.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE SECOND DEGREE – INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)**

If you find the defendant not guilty of unlawful termination of pregnancy in the second degree, you should disregard this instruction and fill out the verdict form indicating your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the defendant acting upon a provoked and sudden heat of passion? (Answer “Yes” or “No”)

The defendant was acting upon a provoked and sudden heat of passion only if:

1. the act causing the unlawful termination of pregnancy was performed upon a sudden heat of passion,
2. caused by a serious and highly provoking act of the intended victim,
3. affecting the defendant sufficiently to excite an irresistible passion in a reasonable person, and
4. between the provocation and the act causing the unlawful termination of pregnancy, there was an insufficient interval of time for the voice of reason and humanity to be heard.

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant was not acting upon a provoked and sudden heat of passion. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the defendant was acting

upon a provoked and sudden heat of passion, mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the defendant was not acting upon a provoked and sudden heat of passion, mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3.5-104(2)(b), C.R.S. 2020.
2. *See* Instruction E:28 (special verdict form).
3. *See* Instruction 3-1:08.INT, Comments 3–4 (evidentiary threshold for giving a heat of passion instruction; jury unanimity and deadlock).

### **3.5:05 UNLAWFUL TERMINATION OF PREGNANCY IN THE THIRD DEGREE**

The elements of the crime of unlawful termination of pregnancy in the third degree are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. under circumstances manifesting extreme indifference to the value of human life,
  5. engaged in conduct which created a grave risk of death to another person, and
  6. thereby caused the unlawful termination of the pregnancy of a woman.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the third degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the third degree.

#### **COMMENT**

1. See § 18-3.5-105(1), C.R.S. 2020.

2. *See* Instruction F:282.5 (defining “pregnancy”); Instruction F:381.5 (defining “unlawful termination of pregnancy”).
3. *See* Instruction H:45.3 (affirmative defense of “medical care or service”); Instruction H:45.5 (affirmative defense of “defendant’s own pregnancy”).

### 3.5:06 UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE

The elements of the crime of unlawful termination of pregnancy in the fourth degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly,
4. caused the unlawful termination of the pregnancy of a woman,
5. when the defendant knew, or reasonably should have known, that the woman was pregnant.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful termination of pregnancy in the fourth degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful termination of pregnancy in the fourth degree.

#### COMMENT

1. *See* § 18-3.5-106(1), C.R.S. 2020.
2. *See* Instruction F:282.5 (defining “pregnancy”); Instruction F:308 (defining “recklessly”); Instruction F:381.5 (defining “unlawful termination of pregnancy”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”).

3. See Instruction H:45.3 (affirmative defense of “medical care or service”); Instruction H:45.5 (affirmative defense of “defendant’s own pregnancy”).

### **3.5:07.INT UNLAWFUL TERMINATION OF PREGNANCY IN THE FOURTH DEGREE – INTERROGATORY (UNLAWFUL TERMINATION OF PREGNANCY DURING SPECIFIED FELONY)**

If you find the defendant not guilty of unlawful termination of pregnancy in the fourth degree, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful termination of pregnancy in the fourth degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the pregnancy of a non-participant unlawfully terminated?  
(Answer “Yes” or “No”)

The pregnancy of a non-participant was unlawfully terminated only if:

1. the pregnancy of [insert name of woman] was unlawfully terminated,
2. during the commission or attempted commission of or flight from the commission or attempted commission of [insert name(s) of qualifying offense(s) enumerated in section 18-3.5-106(2)(b)], and
3. [insert name of woman] was not a participant in [insert name(s) of qualifying offense(s)], and
4. the defendant was a principal in the criminal act or attempted criminal act.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have

the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-3.5-106(2)(b), C.R.S. 2020.
2. *See* Instruction J: 03 (complicity); Instruction G2:01 (criminal attempt); Instruction 3-1:02, Comment 7 (discussing “immediate flight”).
3. Section 18-3.5-106(2)(b) references section 18-1-603 to “describe[]” the term “principal.” However, section 18-1-603 defines complicitor liability. The model instruction uses the language of section 18-3.5-106(2)(b) even though the term “principal” is not defined in section 18-1-603.

### 3.5:08 VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY

The elements of the crime of vehicular unlawful termination of pregnancy are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated or drove a motor vehicle,
4. in a reckless manner, and
5. such conduct was the proximate cause of the unlawful termination of the pregnancy of a woman.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular unlawful termination of pregnancy.

#### COMMENT

1. See § 18-3.5-107(1), C.R.S. 2020.
2. See Instruction F:236 (defining "motor vehicle"); Instruction F:282.5 (defining "pregnancy"); Instruction F:308 (defining "recklessly"); Instruction F:381.5 (defining "unlawful termination of pregnancy"); *see also* CJI-Civ. 9:18 (2014)(defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2014) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has

intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. See Instruction 3-1:13, Comment 3 (discussing how to define the terms "operated" and "drove").

### 3.5:09 AGGRAVATED VEHICULAR UNLAWFUL TERMINATION OF PREGNANCY

The elements of the crime of aggravated vehicular unlawful termination of pregnancy are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated or drove a motor vehicle,
4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and
5. such conduct was the proximate cause of the unlawful termination of the pregnancy of a woman.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated vehicular unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated vehicular unlawful termination of pregnancy.

#### COMMENT

1. See § 18-3.5-108(1)(a), C.R.S. 2020.
2. See Instruction F:109 (defining "driving under the influence" (vehicular homicide and vehicular assault)); Instruction F:236 (defining "motor vehicle"); Instruction F:252.5 (defining "one or more drugs");

Instruction F:282.5 (defining “pregnancy”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2012) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. *See* Instruction 3-1:13, Comment 3 (discussing “operate”).

4. The third Comment to Instruction 3-1:13 notes that there appears to be an internal inconsistency involving the use of the terms “motor vehicle” and “vehicle” in sections 18-3-106(1)(b)(I) and 18-3-106(1)(b)(IV). That inconsistency is replicated in sections 18-3.5-108(1)(a) and 18-3.5-108(1)(b)(I). *See also* Instruction 3-2:27 (vehicular assault (under the influence)), Comment 3.

**3.5:10.SP AGGRAVATED VEHICULAR UNLAWFUL  
TERMINATION OF PREGNANCY – SPECIAL INSTRUCTION  
(BLOOD OR BREATH ALCOHOL LEVEL)**

As to the charge of aggravated vehicular unlawful termination of pregnancy, the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Evidentiary Consideration:

If there was at such time more than 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time more than 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) Permissible inference:

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that an evidentiary consideration or a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. See § 18-3.5-108(3)(a)–(c), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

### **3.5:11 CARELESS DRIVING RESULTING IN UNLAWFUL TERMINATION OF PREGNANCY**

The elements of the crime of careless driving resulting in unlawful termination of pregnancy are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [electric scooter] [low-power scooter],
4. in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances, and
5. caused the unlawful termination of a pregnancy of a woman.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving resulting in unlawful termination of pregnancy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving resulting in unlawful termination of pregnancy.

#### **COMMENT**

1. *See* § 18-3.5-109(1), C.R.S. 2020.
2. *See* Instruction F:32 (defining “bicycle”); Instruction F:114.9 (defining “electric scooter”); Instruction F:115 (defining “electrical assisted bicycle”);

Instruction F:202 (defining “low-power scooter”); Instruction F:236 (defining “motor vehicle”); Instruction F:282.5 (defining “pregnancy”); Instruction F:381.5 (defining “unlawful termination of pregnancy”); *see also* CJI-Civ. 9:18 (2014) (defining “cause”).

3. *See People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 (“Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).

4. In 2019, the Committee added “electric scooter” to the third element, and it added the cross-reference to Instruction F:114.9 in Comment 2. *See* Ch. 271, sec. 18, § 18-3.5-109(1), 2019 Colo. Sess. Laws 2557, 2566.

## CHAPTER 4-1

### ARSON

<a href="#"><u>4-1:01</u></a>	FIRST DEGREE ARSON
<a href="#"><u>4-1:02.INT</u></a>	FIRST DEGREE ARSON – INTERROGATORY (EXPLOSIVE)
<a href="#"><u>4-1:03</u></a>	SECOND DEGREE ARSON
<a href="#"><u>4-1:04.INT</u></a>	SECOND DEGREE ARSON – INTERROGATORY (SUBSTANTIAL PROPERTY DAMAGE)
<a href="#"><u>4-1:05</u></a>	THIRD DEGREE ARSON
<a href="#"><u>4-1:06</u></a>	FOURTH DEGREE ARSON
<a href="#"><u>4-1:07.INT</u></a>	FOURTH DEGREE ARSON – INTERROGATORY (ENDANGERMENT OF A PERSON)
<a href="#"><u>4-1:08.INT</u></a>	FOURTH DEGREE ARSON – INTERROGATORY (ENDANGERMENT OF VALUABLE PROPERTY)

## 4-1:01 FIRST DEGREE ARSON

The elements of the crime of first degree arson are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. set fire to, burned, caused to be burned, or by the use of any explosive damaged or destroyed, or caused to be damaged or destroyed,
5. any building or occupied structure,
6. of another,
7. without that person's consent.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree arson.

### COMMENT

1. See § 18-4-102(1), C.R.S. 2020.
2. See Instruction F:40 (defining "building"); Instruction F:41 (defining "building of another"); Instruction F:248 (defining "occupied structure"); Instruction F:291 (defining property "of another").

3. The term “any explosive” is not defined in Article 4. Previously, a note to COLJI-Crim. 4-1(2) (2008) suggested that the term was synonymous with the term “explosive or incendiary device,” as defined by section 18-12-109(1)(a)(I), C.R.S. 2020. Under that interpretation, a defendant could not be convicted of first degree arson for committing the offense by means of ammunition or ammunition components (e.g., gunpowder, primers, etc.). Cf. § 18-12-109(1)(a)(II), C.R.S. 2020 (excluding such substances from the definition of an “explosive or incendiary device”). However, the Committee is now of the view that the General Assembly may have intended for the term “any explosive” to have a broader meaning. Accordingly, the Committee has concluded that, because the term “any explosive” is one of common understanding, the better practice is not to define it.

4. See *People v. LeFebre*, 546 P.2d 952 (Colo. 1976) (upholding a conviction for conspiracy to commit first degree arson despite the defendant’s claims of legal impossibility and insufficient evidence, and observing that the terms “burn” or “set fire to,” require an “ignition of or an alteration or destruction of the fiber or texture of the materials composing the ‘building’ or ‘structure,’” and not merely “scorching or discoloration”).

5. See *People v. Welborne*, 2018 COA 127, ¶ 21, 457 P.3d 71, 76 (holding that criminal mischief is a lesser included offense of first-degree arson).

6. In 2019, the Committee added Comment 5.

## 4-1:02.INT FIRST DEGREE ARSON – INTERROGATORY (EXPLOSIVE)

If you find the defendant not guilty of first degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense of first degree arson by the use of an explosive? (Answer “Yes” or “No”)

The defendant committed the offense of first degree arson by the use of an explosive only if:

1. the defendant committed the offense of first degree arson of which you found him [her] guilty, by using any explosive.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-102(3), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. See Instruction 4-1:01, Comment 3 (discussing the meaning of the term “any explosive”).
4. Give this interrogatory only if, in the elemental instruction defining the offense, the jury is instructed in the alternative as to the method.

## 4-1:03 SECOND DEGREE ARSON

The elements of the crime of second degree arson are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. set fire to, burned, or caused to be burned, or by the use of any explosive damaged or destroyed, or caused to be damaged or destroyed,
  5. any property of another, other than a building or occupied structure,
  6. without that person's consent.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree arson.

### COMMENT

1. *See* § 18-4-103(1), C.R.S. 2020.
2. *See* Instruction F:40 (defining "building"); Instruction F:41 (defining "building of another"); Instruction F:248 (defining "occupied structure"); Instruction F:291 (defining property "of another").

3. See Instruction 4-1:01, Comment 3 (discussing the meaning of the term “any explosive”).

#### **4-1:04.INT SECOND DEGREE ARSON – INTERROGATORY (SUBSTANTIAL PROPERTY DAMAGE)**

If you find the defendant not guilty of second degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the arson result in substantial property damage? (Answer “Yes” or “No”)

The arson resulted in substantial property damage only if:

1. the damage caused by the defendant’s commission of the offense of second degree arson of which you found him [her] guilty amounted to one hundred dollars or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-4-103(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 4-1:05 THIRD DEGREE ARSON

The elements of the crime of third degree arson are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally,
  4. damaged any property,
  5. by means of fire or explosives,
  6. with intent to defraud.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree arson.

### COMMENT

1. See § 18-4-104(1), C.R.S. 2020.
2. See Instruction F:185 (defining "intentionally" and "with intent").
3. See Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").

## 4-1:06 FOURTH DEGREE ARSON

The elements of the crime of fourth degree arson are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or recklessly started or maintained a fire or caused an explosion, on his [her] own property or that of another, and
4. by so doing, placed another in danger of death or serious bodily injury or placed any building or occupied structure of another in danger of damage.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fourth degree arson.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fourth degree arson.

### COMMENT

1. See § 18-4-105(1), C.R.S. 2020.
2. See Instruction F:41 (defining "building of another"); Instruction F:195 (defining "knowingly"); Instruction F:291 (defining property "of another"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").
3. See *Copeland v. People*, 2 P.3d 1283, 1286–87 (Colo. 2000) (mental state required for fourth-degree arson is that fire be started or maintained knowingly or recklessly, and prosecution need not prove intent to

endanger; a firefighter responding to extinguish a fire falls within the meaning of an endangered person).

4. See Instruction H:46 (affirmative defense of “controlled agricultural burn”).

## 4-1:07.INT FOURTH DEGREE ARSON – INTERROGATORY (ENDANGERMENT OF A PERSON)

If you find the defendant not guilty of fourth degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fourth degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the fourth degree arson committed by endangering a person?  
(Answer “Yes” or “No”)

The fourth degree arson was committed by endangering a person only if:

1. the defendant placed another person in danger of death or serious bodily injury in the commission of the fourth degree arson of which you found him [her] guilty.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-105(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. See Instruction F:332 (defining “serious bodily injury”).
4. Give this interrogatory only if, in the fourth element of the instruction defining the offense, the jury is instructed in the alternative as to the consequences.

#### **4-1:08.INT FOURTH DEGREE ARSON – INTERROGATORY (ENDANGERMENT OF VALUABLE PROPERTY)**

If you find the defendant not guilty of fourth degree arson, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fourth degree arson, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the fourth degree arson committed by endangering valuable property? (Answer “Yes” or “No”)

The fourth degree arson was committed by endangering valuable property only if:

1. the defendant placed any building or occupied structure of another in danger of damage in the commission of the fourth degree arson of which you have found him [her] guilty, and
2. the value of the property was one hundred dollars or more.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-4-105(3), C.R.S. 2020.

2. See, e.g., Instruction E:28 (special verdict form).

3. Section 18-4-105 does not include a sentence enhancement provision for placing another person in danger of bodily injury that does not rise to the level of serious bodily injury. It is unclear whether section 18-4-105(3)'s statement that it applies "if only property is thus endangered" should be understood as meaning that it applies if no person was placed in danger of *serious* bodily injury (or death). Under a contrary construction, a defendant who endangered property worth more than one hundred dollars could avoid application of section 18-4-105(3) by asserting that he or she also placed a person in danger of simple bodily injury.

Likewise, this same issue of statutory construction could arise with respect to section 18-4-105(4), for which no interrogatory is necessary (because the provision describes the base level of the offense, where only property worth less than one hundred dollars was endangered).



## CHAPTER 4-2

### BURGLARY

<a href="#"><u>4-2:01</u></a>	FIRST DEGREE BURGLARY
<a href="#"><u>4-2:02.INT</u></a>	FIRST DEGREE BURGLARY – INTERROGATORY (CONTROLLED SUBSTANCE)
<a href="#"><u>4-2:03</u></a>	SECOND DEGREE BURGLARY
<a href="#"><u>4-2:04.INT</u></a>	SECOND DEGREE BURGLARY – INTERROGATORY (DWELLING)
<a href="#"><u>4-2:05.INT</u></a>	SECOND DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)
<a href="#"><u>4-2:05.5.INT</u></a>	SECOND DEGREE BURGLARY – INTERROGATORY (THEFT OF FIREARM)
<a href="#"><u>4-2:06</u></a>	THIRD DEGREE BURGLARY
<a href="#"><u>4-2:07.INT</u></a>	THIRD DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)
<a href="#"><u>4-2:08</u></a>	POSSESSION OF BURGLARY TOOLS

## 4-2:01 FIRST DEGREE BURGLARY

The elements of the crime of first degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. entered unlawfully, or remained unlawfully after a lawful or unlawful entry,
5. in a building or occupied structure,
6. with intent,
7. to commit therein the crime[s] of [insert name(s) of offense(s)], against another person or property, and
8. in effecting entry or while in the building or occupied structure or in immediate flight from the building or occupied structure,
- [9. the defendant or another participant in the crime committed the crime of assault or the crime of menacing against any person.]
- [9. the defendant or another participant in the crime was armed with explosives.]
- [9. the defendant or another participant in the crime used a deadly weapon or possessed and threatened the use of a deadly weapon.]
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree burglary.

#### COMMENT

1. See § 18-4-202(1), C.R.S. 2020.
2. See Instruction F:40 (defining “building”); Instruction F:88 (defining “deadly weapon”); Instruction F:126 (defining “enters unlawfully” and “remains unlawfully”); Instruction F:195 (defining “knowingly”); Instruction F:248 (defining “occupied structure”); see also Chapter 3-2 (defining assaults and menacing); see also Instruction 4-1:01, Comment 3 (discussing the meaning of the term “any explosive”).
3. See *People v. Palmer*, 87 P.3d 137, 140 (Colo. App. 2003) (although a jury must unanimously agree that a defendant charged with first degree burglary intended to commit a specific underlying crime, it need not unanimously agree on the evidence or theory by which a particular element of the underlying crime is established).
4. In 2013, both the provision of the first degree burglary statute relating to deadly weapons and the definition of a “deadly weapon” were amended, following the supreme court’s decision in *Montez v. People*, 2012 CO 6, ¶¶ 3-22, 269 P.3d 1228, 1229-32 (the General Assembly has not classified firearms as per se deadly weapons for purposes of the first degree burglary statute; the legislature did not intend theft of a firearm from a building to constitute first degree burglary regardless of the manner the burglar used or intended to use the firearm).
5. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

6. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* and holding that “[T]he first degree burglary statute requires that the entry, the assault, and the flight be close in time and that the assault occur while fleeing from the building or occupied structure. A person therefore commits an assault in immediate flight from a building where the assault is part of a continuous integrated attempt to get away from the building.”).

7. See *People v. Denhartog*, 2019 COA 23, ¶¶ 77–79, 452 P.3d 148, 160 (relying on *People v. Garcia*, 940 P.2d 357 (Colo. 1997), to hold that first-degree criminal trespass is not a lesser included offense of second-degree burglary). + *But see People v. Gillis*, 2020 COA 68, ¶ 37, 471 P.3d 1197, 1205 (holding that first-degree criminal trespass *is* a lesser included offense of first-degree burglary).

8. In 2015, the Committee corrected the seventh element by adding the following statutory language which was inadvertently omitted in COLJI-Crim. 4-2:01 (2014): “against another person or property.”

9. In 2019, the Committee added Comment 7.

10. + In 2020, the Committee added the citation to *Gillis* in Comment 7.

## **4-2:02.INT FIRST DEGREE BURGLARY – INTERROGATORY (CONTROLLED SUBSTANCE)**

If you find the defendant not guilty of first degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of first degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the burglary involve a controlled substance? (Answer “Yes” or “No”)

The burglary involved a controlled substance only if:

1. the property involved in the [insert name(s) of property offense(s) from element 7] was a controlled substance,
2. within a pharmacy or other place having lawful possession of it.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-202(3), C.R.S. 2020.

2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:275 (defining “pharmacy”); *see, e.g.*, Instruction E:28 (special verdict form).

## 4-2:03 SECOND DEGREE BURGLARY

The elements of the crime of second degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. broke an entrance into, entered unlawfully in, or remained unlawfully after a lawful or unlawful entry in,
5. a building or occupied structure,
6. with intent to commit therein the crime[s] of [insert name(s) of offense(s)] against another person or property.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree burglary.

### COMMENT

1. See § 18-4-203(1), C.R.S. 2020.
2. See Instruction F:40 (defining "building"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:248 (defining "occupied structure").

3. It may be appropriate to draft a special instruction explaining that: “Intent to commit a crime against another person or property while in the dwelling can be formed either before or after [an] unlawful entry.” *People v. Oram*, 217 P.3d 883, 892 (Colo. App. 2009), *aff’d on other grounds*, *Oram v. People*, 255 P.3d 1032 (Colo. 2011). Likewise, it may be appropriate to draft a special instruction explaining that such an intent also can be formed after entering lawfully and remaining unlawfully. See *People v. Larkins*, 109 P.3d 1003, 1004-05 (Colo. App. 2004 ) (“In *Cooper v. People*, 973 P.2d 1234, 1240 (Colo. 1999), . . . the supreme court held that ‘the intent to commit a crime must coexist with the initial point of unlawful entry or remaining.’ However, *Cooper* was decided under the version of § 18-4-203 applicable to offenses committed before July 1, 1999. Soon after the *Cooper* decision was announced, the General Assembly amended the second degree burglary statute by adding the ‘after a lawful or unlawful entry’ language . . . above, thus removing the requirement that intent to commit a crime exist at the time of entry.”); see also *People v. Wartena*, 2012 COA 12, ¶¶ 20–24, 296 P.3d 136, 140 (explaining that, although “in *People v. Fuentes*, 258 P.3d 320, 323 (Colo. App. 2011), a division of [the Court of Appeals] cited *Cooper* for the proposition that ‘[t]he intent to commit a crime must be present at the very moment that the person trespasses,’ . . . we reject the contention that *Fuentes* somehow revived the *Cooper* court’s holding with respect to intent and implicitly disapproved of the more recent interpretations of section 18-4-203 noted in *Larkins* and [*Oram v. People*, 255 P.3d 1032, 1033 (Colo. 2011)].”).

4. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 4-2:04.INT SECOND DEGREE BURGLARY – INTERROGATORY (DWELLING)

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the burglary of a dwelling? (Answer “Yes” or “No”)

The burglary was of a dwelling only if:

1. the structure burglarized by the defendant was a dwelling.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-4-203(2)(a), C.R.S. 2020.
2. See Instruction F:40 (defining “building”); Instruction F:114 (defining “dwelling”); Instruction F:248 (defining “occupied structure”); see, e.g., Instruction E:28 (special verdict form).
3. In COLJI-Crim. (2008), the Committee stated that, because it was unclear whether a mens rea applied to the sentence enhancement factor

concerning burglary of a dwelling, it had drafted three alternative instructions. See COLJI-Crim. 4-2:04.1, 4-2:04.2, 4-2:04.3 (2008). However, this question has not yet been resolved through appellate litigation. Cf. *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006) (although the substantive offense of sexual assault requires proof that the defendant acted “knowingly,” this mens rea does not also apply to the aggravating circumstances set forth in section 18-3-402(4)).

**4-2:05.INT SECOND DEGREE BURGLARY –  
INTERROGATORY (THEFT OF A CONTROLLED  
SUBSTANCE)**

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the objective of the burglary the theft of a controlled substance?  
(Answer “Yes” or “No”)

The objective of the burglary was the theft of a controlled substance only if:

1. the objective of the burglary was to commit theft of a controlled substance,
2. that was lawfully kept within any building or occupied structure.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-203(2)(b), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction 4-4:01 (theft); *see, e.g.*, Instruction E:28 (special verdict form).
3. If the defendant is not separately charged with theft, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. See Instruction 4-4:01. Place the elemental instruction defining theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the theft offense.

## 4-2:05.5.INT SECOND DEGREE BURGLARY – INTERROGATORY (THEFT OF FIREARM)

If you find the defendant not guilty of second degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the objective of the burglary the theft of a firearm? (Answer “Yes” or “No”)

The objective of the burglary was the theft of a firearm only if:

1. the objective of the burglary was to commit theft of one or more firearms or ammunition.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-203(2)(c), C.R.S. 2020.
2. *See* Instruction F:154 (defining “firearm”); Instruction 4-4:01 (theft); *see, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction defining theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the theft offense.

4. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 376, sec. 1, § 18-4-203(2)(c), 2018 Colo. Sess. Laws 2280, 2280.

## 4-2:06 THIRD DEGREE BURGLARY

The elements of the crime of third degree burglary are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to commit the crime[s] of [insert name of offense(s)],
5. entered or broke into,
6. any vault, safe, cash register, coin vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box, or other apparatus or equipment whether or not coin operated.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree burglary.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree burglary.

### COMMENT

1. See § 18-4-204(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. In *People v. Geyer*, 942 P.2d 1297, 1300 (Colo. App. 1996), a division of the Court of Appeals accepted the People's concession that an instruction

defining third degree burglary should have included the elements of “knowingly” and “unlawful entry” (though the division held that the omissions did not constitute plain error). However, the instruction at issue in *Geyer* was patterned on COLJI-Crim. 14:05 (1983), which, unlike the above model instruction, did not list “with intent” as a separate element modifying all subsequent elements. See § 18-1-503(3), C.R.S. 2020 (“If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.”); *People v. Rivas*, 77 P.3d 882, 889 (Colo. App. 2003) (observing, with respect to a second degree assault instruction, that “the better practice [is] to offset the mens rea requirement [of ‘with intent’] so that it modifies all the conduct elements”).

4. See *Winter v. People*, 126 P.3d 192, 196 (Colo. 2006) (“We find that an unsecured and unlocked locker which does not have the appearance of being employed for the safekeeping of valuables is not within the class of items contemplated by section 18-4-204(1).”).

## **4-2:07.INT THIRD DEGREE BURGLARY – INTERROGATORY (THEFT OF A CONTROLLED SUBSTANCE)**

If you find the defendant not guilty of third degree burglary, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree burglary, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the objective of the burglary to commit theft of a controlled substance? (Answer “Yes” or “No”)

The objective of the burglary was to commit theft of a controlled substance only if:

1. the objective of the burglary was to commit the theft of a controlled substance,
2. that was lawfully kept in or upon the property burglarized.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-4-204(2), C.R.S. 2020.

2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction 4-4:01 (theft); *see, e.g.*, Instruction E:28 (special verdict form).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. See Instruction 4-4:01. Place the elemental instruction defining theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the theft offense.

## 4-2:08 POSSESSION OF BURGLARY TOOLS

The elements of the crime of possession of burglary tools are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking, and
4. intended to use the thing possessed, or knew that some person intended to use the thing possessed, in the commission of such an offense.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of burglary tools.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of burglary tools.

### COMMENT

1. See § 18-4-205(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); see also Instruction 4-1:01, Comment 3 (discussing the meaning of the term "any explosive").
3. See *People v. Ridgeway*, 2013 COA 17, ¶¶ 16-19, 307 P.3d 126, 129-30 (jury instruction on elements of the crime of possession of burglary tools)

violated defendant's constitutional right to have the People prove every element of a charged crime beyond a reasonable doubt; as instructed, the jury was only required to find that defendant had the "intent to use" the tools for some purpose, whether it be for the commission of a burglary or for some other, innocent purpose, and nothing in the instruction required the jury to find that defendant possessed a burglary tool with an intent to use it to commit a burglary or theft by a physical taking).

## CHAPTER 4-3

### ROBBERY

<a href="#"><u>4-3:01</u></a>	ROBBERY
<a href="#"><u>4-3:02.INT</u></a>	ROBBERY – INTERROGATORY (AT-RISK PERSON)
<a href="#"><u>4-3:03</u></a>	AGGRAVATED ROBBERY (KILL, MAIM, OR WOUND)
<a href="#"><u>4-3:04</u></a>	AGGRAVATED ROBBERY (WOUND, STRIKE, OR PUT IN FEAR)
<a href="#"><u>4-3:05</u></a>	AGGRAVATED ROBBERY (CONFEDERATE)
<a href="#"><u>4-3:06</u></a>	AGGRAVATED ROBBERY (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)
<a href="#"><u>4-3:07</u></a>	AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (KILL, MAIM, OR WOUND)
<a href="#"><u>4-3:08</u></a>	AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (WOUND, STRIKE, OR PUT IN FEAR)
<a href="#"><u>4-3:09</u></a>	AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (CONFEDERATE)
<a href="#"><u>4-3:10</u></a>	AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)

## 4-3:01 ROBBERY

The elements of the crime of robbery are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took anything of value,
5. from the person or presence of another,
6. by the use of force, threats, or intimidation.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of robbery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of robbery.

### COMMENT

1. See § 18-4-301(1), C.R.S. 2020.
2. See Instruction F:21 (equating "anything of value" with any "thing of value," as defined in Instruction F:371); Instruction F:195 (defining "knowingly").
3. See *People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term "presence" is not defined by the robbery statutes and approving

an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).

## 4-3:02.INT ROBBERY – INTERROGATORY (AT-RISK PERSON)

If you find the defendant not guilty of robbery, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of robbery, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the victim an at-risk person? (Answer “Yes” or “No”)

The victim was an at-risk person only if:

- [1. the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-6.5-103(4), C.R.S. 2020.

2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).

3. See *People v. Lovato*, 179 P.3d 208, 212 (Colo. App. 2007) (robbery of an at-risk adult is an enhanced form of robbery, and not a separate offense).

4. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(4), 2016 Colo. Sess. Laws 545, 548.

### **4-3:03 AGGRAVATED ROBBERY (KILL, MAIM, OR WOUND)**

The elements of the crime of aggravated robbery (kill, maim, or wound) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took anything of value,
5. from the person or presence of another,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. was armed with a deadly weapon,
9. with intent, if resisted, to kill, maim, or wound any person.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (kill, maim, or wound).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (kill, maim, or wound).

#### COMMENT

1. See § 18-4-302(1)(a), C.R.S. 2020.

2. See Instruction F:21 (equating “anything of value” with any “thing of value,” as defined in Instruction F:371); Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).
3. See *People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term “presence” is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).
4. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

#### **4-3:04 AGGRAVATED ROBBERY (WOUND, STRIKE, OR PUT IN FEAR)**

The elements of the crime of aggravated robbery (wound, strike, or put in fear) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took anything of value,
5. from the person or presence of another,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. knowingly,
- [9. wounded or struck any person,
10. with a deadly weapon.]
- [9. by the use of force, threats, or intimidation,
10. with a deadly weapon,
11. put any person in reasonable fear of death or bodily injury.]
- [\_\_\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (wound, strike, or put in fear).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (wound, strike, or put in fear).

#### COMMENT

1. See § 18-4-302(1)(b), C.R.S. 2020.
2. See Instruction F:21 (equating “anything of value” with any “thing of value,” as defined in Instruction F:371); Instruction F:36 (defining “bodily injury”); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”).
3. See *People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term “presence” is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).
4. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

#### **4-3:05 AGGRAVATED ROBBERY (CONFEDERATE)**

The elements of the crime of aggravated robbery (confederate) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took anything of value,
5. from the person or presence of another,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. had present a confederate, who was aiding or abetting the perpetration of the robbery, and who was armed with a deadly weapon,
9. with the intent, either on the part of the defendant or the confederate, if resistance was offered, to kill, maim, or wound any person, or by the use of force, threats, or intimidation put any person in reasonable fear of death or bodily injury.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (confederate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (confederate).

## COMMENT

1. See § 18-4-302(1)(c), C.R.S. 2020.
2. See Instruction F:21 (equating “anything of value” with any “thing of value,” as defined in Instruction F:371); Instruction F:36 (defining “bodily injury”); Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); see also *People v. Wilford*, 111 P.3d 512, 517 (Colo. App. 2004) (“The term ‘confederate’ is not a highly technical one and is well within the comprehension of the jury.”).
3. See *People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term “presence” is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).
4. The Committee perceives an ambiguity in section 18-4-302(1)(c). Specifically, it is unclear whether the final clause (beginning with “or by the use of force”) refers exclusively to the conduct of the armed confederate, or whether it also encompasses the conduct of the defendant. Accordingly, the model instruction quotes the entire statutory provision.

This should not be understood as the Committee’s recommendation. It will be up to the trial court to determine how to best instruct the jury on this aspect of the offense. Users should exercise care when making any modifications.
5. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).
6. In 2019, the Committee revised the eighth element, whose language had previously been split across three separate elements.

#### **4-3:06 AGGRAVATED ROBBERY (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)**

The elements of the crime of aggravated robbery (suggestion or representation of a deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took anything of value,
5. from the person or presence of another,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. possessed any article used or fashioned in a manner to lead any person who was present reasonably to believe it was a deadly weapon or represented verbally or otherwise that he [she] was then and there armed with a deadly weapon.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery (suggestion or representation of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery (suggestion or representation of a deadly weapon).

## COMMENT

1. See § 18-4-302(1)(d), C.R.S. 2020.
2. See Instruction F:21 (equating “anything of value” with any “thing of value,” as defined in Instruction F:371); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”).
3. See *People v. Benton*, 829 P.2d 451, 452 (Colo. App. 1991) (noting that the term “presence” is not defined by the robbery statutes and approving an instruction using language from *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)).
4. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

### **4-3:07 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (KILL, MAIM, OR WOUND)**

The elements of the crime of aggravated robbery of a controlled substance (kill, maim, or wound) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took any controlled substance,
5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. was armed with a deadly weapon,
9. with intent, if resisted, to kill, maim, or wound any person.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (kill, maim, or wound).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (kill, maim, or wound).

## COMMENT

1. See § 18-4-303(1), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2020); Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:275 (defining “pharmacy”).
3. See *Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).
4. The supreme court has made clear that the mens rea of “knowingly” applies to this offense. See *People v. Mascarenas*, 666 P.2d 101, 107 (Colo. 1983) (“because aggravated robbery of drugs [in violation of section 18-4-303] is merely a variant of the common law crime of aggravated robbery, a culpable mental state is a requisite element of the crime”; the trial court committed reversible error by instructing the jury that the defendant must have “knowingly” placed the victim in reasonable fear of death or bodily injury without also making clear that this culpable mental state applied to the “taking element”).

However, the Committee has identified a significant ambiguity in the language of section 18-4-303(1), which provides, in its entirety, as follows:

A person who takes any controlled substance, as defined in section 18-18-102(5), from any pharmacy or other place having lawful possession thereof or from any pharmacist or other person having lawful possession thereof *under the aggravating circumstances defined in section 18-4-302* is guilty of aggravated robbery of controlled substances.

(Emphasis added.) Specifically, it is unclear whether the reference to “the aggravating circumstances defined in section 18-4-302” was intended to incorporate: (1) all elements of aggravated robbery (which would, by

extension, incorporate all elements of simple robbery); or (2) only those factors set forth in subsections a through d of section 18-4-302(1). Although the above model instruction utilizes the first approach by including all elements of aggravated robbery (and, thus, all elements of simple robbery), the Committee takes no position concerning the correctness of this construction. The Committee adopted this approach because it is mindful of the rule of lenity, “which requires a narrow construction of ambiguous criminal statutes in favor of the accused.” *People v. Dist. Court*, 711 P.2d 666, 671 (Colo. 1985). In drafting an elemental jury instruction based on section 18-4-303(1), the trial judge, in consultation with counsel, will have to determine how to proceed.

5. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

### **4-3:08 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (WOUND, STRIKE, OR PUT IN FEAR)**

The elements of the crime of aggravated robbery of a controlled substance (wound, strike, or put in fear) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took any controlled substance,
5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. knowingly,
- [9. wounded or struck any person,
10. with a deadly weapon.]
- [9. by the use of force, threats, or intimidation,
10. with a deadly weapon,
11. put any person in reasonable fear of death or bodily injury.]
- [\_\_\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (wound, strike, or put in fear).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (wound, strike, or put in fear).

#### COMMENT

1. See § 18-4-303(1), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2020); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:275 (defining “pharmacy”).
3. See *Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).
4. See Instruction 4-3:07, Comment 4 (explaining the Committee’s drafting decision with respect to this offense).
5. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).

## 4-3:09 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (CONFEDERATE)

The elements of the crime of aggravated robbery of a controlled substance (confederate) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took any controlled substance,
5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. had present a confederate, who was aiding or abetting the perpetration of the robbery, and who was armed with a deadly weapon,
9. with the intent, either on the part of the defendant or the confederate, if resistance was offered, to kill, maim, or wound any person, or by the use of force, threats, or intimidation put any person in reasonable fear of death or bodily injury.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (confederate).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (confederate).

## COMMENT

1. See § 18-4-303(1), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2020); Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:275 (defining “pharmacy”); see also *People v. Wilford*, 111 P.3d 512, 517 (Colo. App. 2004) (“The term ‘confederate’ is not a highly technical one and is well within the comprehension of the jury.”).
3. See *Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).
4. See Instruction 4-3:05, Comment 4 (noting an ambiguity in section 18-4-302(1)(c)).
5. See Instruction 4-3:07, Comment 4 (explaining the Committee’s drafting decision with respect to this offense).
6. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).
7. In 2019, the Committee revised the eighth element, whose language had previously been split across three separate elements.

### **4-3:10 AGGRAVATED ROBBERY OF CONTROLLED SUBSTANCES (SUGGESTION OR REPRESENTATION OF A DEADLY WEAPON)**

The elements of the crime of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. took any controlled substance,
5. from the person or presence of any pharmacy, pharmacist, place, or person having lawful possession thereof,
6. by the use of force, threats, or intimidation, and
7. during the act of robbery or immediate flight therefrom,
8. possessed any article used or fashioned in a manner to lead any person who was present reasonably to believe it was a deadly weapon or represented verbally or otherwise that he [she] was then and there armed with a deadly weapon.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated robbery of a controlled substance (suggestion or representation of a deadly weapon).

## COMMENT

1. See § 18-4-303(1), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules in section § 18-18-102(5), C.R.S. 2020); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:275 (defining “pharmacy”).
3. See *Ramirez v. People*, 682 P.2d 1181, 1183 (Colo. 1984) (section 18-4-303 establishes a separate offense; it is not a sentence enhancement provision for aggravated robbery).
4. See Instruction 3-1:02, Comment 7 (discussing the supreme court’s interpretation of the term “immediate flight,” for purposes of the felony-murder statute, in *Auman v. People*, 109 P.3d 647, 650–51 (Colo. 2005)); see also *People v. Fuentes*, 258 P.3d 320, 327 (Colo. App. 2011) (applying the immediate flight standard of *Auman* to the first degree burglary statute).
5. See Instruction 4-3:07, Comment 4 (explaining the Committee’s drafting decision with respect to this offense).

## CHAPTER 4-4

### THEFT

- [4-4:01](#) THEFT (INTENT TO PERMANENTLY DEPRIVE)
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## CHAPTER COMMENTS

1. If the defendant is charged with more than one count of theft, identify the counts in the elemental instructions, interrogatories, and special verdict forms with descriptive parentheticals (e.g., “theft (count 4)” and “theft (count 6),” or “theft (from 7-11)” and “theft (from Target)”).

#### **4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)**

The elements of the crime of theft (intent to permanently deprive) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. intended to deprive the other person permanently of the use or benefit of the thing of value.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (intent to permanently deprive).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (intent to permanently deprive).

## COMMENT

1. See § 18-4-401(1)(a), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:30 (defining “benefit”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. See *Auman v. People*, 109 P.3d 647, 663-64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of “knowingly” was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – “(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another” – and not the fourth numbered element: “without authorization”).
4. See *People v. Rojas*, 2019 CO 86M, ¶ 3, 450 P.3d 719, 720 (holding that section 26-2-305(1)(a), C.R.S. – which provides that a person who steals food stamps “commits the crime of theft” – did not create a separate crime, meaning the defendant could be prosecuted under the general theft statute).
5. In 2019, the Committee added Comment 4.

## 4-4:02 THEFT (KNOWING USE, CONCEALMENT, OR ABANDONMENT)

The elements of the crime of theft (knowing use, concealment, or abandonment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. knowingly,
7. used, concealed, or abandoned the thing of value,
8. in such manner as to deprive the other person permanently of its use or benefit.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (knowing use, concealment, or abandonment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (knowing use,

concealment, or abandonment).

#### COMMENT

1. See § 18-4-401(1)(b), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:30 (defining “benefit”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. See *Auman v. People*, 109 P.3d 647, 663–64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of “knowingly” was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – “(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another” – and not the fourth numbered element: “without authorization”).

#### **4-4:03 THEFT (INTENTIONAL USE, CONCEALMENT, OR ABANDONMENT)**

The elements of the crime of theft (intentional use, concealment, or abandonment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. used, concealed, or abandoned the thing of value,
7. intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (intentional use, concealment, or abandonment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (intentional use, concealment, or abandonment).

## COMMENT

1. See § 18-4-401(1)(c), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:30 (defining “benefit”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. See *Auman v. People*, 109 P.3d 647, 663–64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of “knowingly” was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – “(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another” – and not the fourth numbered element: “without authorization”).

#### **4-4:04 THEFT (DEMANDING CONSIDERATION)**

The elements of the crime of theft (demanding consideration) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. demanded any consideration to which he [she] was not legally entitled,
7. as a condition of restoring the thing of value to the other person.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (demanding consideration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (demanding consideration).

## COMMENT

1. See § 18-4-401(1)(d), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. See *Auman v. People*, 109 P.3d 647, 663–64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of “knowingly” was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – “(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another” – and not the fourth numbered element: “without authorization”).
4. The term “consideration” is not defined in section 18-4-401. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

## 4-4:05 THEFT (RETAINING)

The elements of the crime of theft (retaining) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (retaining).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (retaining).

### COMMENT

1. See § 18-4-401(1)(e), C.R.S. 2020.

2. See Instruction F:18 (defining “another”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).

3. See *Auman v. People*, 109 P.3d 647, 663–64 (Colo. 2005) (theft instruction was erroneous because the culpable mental state of “knowingly” was listed as the third numbered element in a manner that indicated it modified only its lettered sub-elements – “(a) obtained or exercised control over, (b) anything of value, (c) which is the property of another” – and not the fourth numbered element: “without authorization”).

#### **4-4:06.INT THEFT – INTERROGATORY (VALUE)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2) or section 18-6.5-103(5) (at-risk persons)]? (Answer “Yes” or “No”)
- [2. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]
- [3. Was the value of the thing involved in the theft [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-401(2), C.R.S. 2020; § 18-6.5-103(5), C.R.S. 2020 (at-risk persons); see also *People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) (“Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.”); *People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009) (“the value of property taken is . . . a sentence enhancer rather than an element of the crime of theft”).
2. See, e.g., Instruction E:28 (special verdict form).
3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.
4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question.

For example, in a case involving an interrogatory with three valuation questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

- I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], theft.

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FOREPERSON\*

- II. We, the jury, find the defendant, [insert name], GUILTY of

Count No. [    ], theft.

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FOREPERSON\*

We further find, with respect to the verdict question[s] for this count, as follows:

\*\*1. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?

Yes             No

\*\*2. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?

Yes             No

\*\*3. Was the value of the thing involved [insert a description of the amount(s) from section 18-4-401(2)]?

Yes             No

---

FOREPERSON\*

\* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space indicating the answer to the verdict question, and then sign on the line following the verdict question[s].

\*\* Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].

5. In a case involving a theft from an at-risk person, it may be necessary to use separate interrogatories and special verdict forms for the at-risk valuation provisions of section 18-6.5-103(5) (five hundred dollars or more), and the valuation provision of section 18-4-401(2)(d) (three hundred dollars or more, but less than seven hundred fifty dollars). As noted in the parentheticals, the two sections do not dovetail.

6. In 2016, the Committee modified this instruction pursuant to a legislative amendment. *See* Ch. 172, sec. 3, § 18-6.5-103(5), (5.5), 2016 Colo. Sess. Laws 545, 548.

#### **4-4:07.INT THEFT – INTERROGATORY (FROM THE PERSON OF ANOTHER)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the theft from the person of another? (Answer “Yes” or “No”)

The theft was from the person of another only if:

1. the theft was from the person of another,
2. by means other than the use of force, threat, or intimidation.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. See § 18-4-401(5), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. See *People v. Warner*, 801 P.2d 1187, 1191 (Colo. 1990) (“Reading the general theft statute together with the robbery statute, we conclude that

theft from the person of another is intended to cover those thefts involving an invasion of the victim's person of which the victim is unaware, but which are not accomplished through the use of force, threats, or intimidation."); *People v. Smith*, 121 P.3d 243, 247-48 (Colo. App. 2005) ("Case law in Colorado and other jurisdictions is consistent in holding that a taking from a shopping cart is a taking from a person if the victim is holding, pushing, or otherwise in control of the cart at the time of the theft. . . . Therefore, because the victim was a substantial distance from her fanny pack, we conclude that defendant's actions do not constitute theft from the person of another as defined in § 18-4-401(5).").

#### **4-4:08.INT THEFT – INTERROGATORY (MORTGAGE LENDING PROCESS)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the theft involve the mortgage lending process? (Answer “Yes” or “No”)

The theft involved the mortgage lending process only if:

1. the theft was committed by deception, and
2. the underlying factual basis of the case involved the process through which a person seeks or obtains a residential mortgage loan, including, without limitation, solicitation, application, or origination; negotiation of terms; third-party provider services; underwriting; signing and closing; funding of the loan; and perfecting and releasing the mortgage.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-401(9)(a), C.R.S. 2020.
2. See Instruction F:233 (defining “mortgage lending process”); see, e.g., Instruction E:28 (special verdict form).
3. Section 18-4-401(9)(a), C.R.S. 2020, requires the court to impose a “fine of the amount of pecuniary harm resulting from” a deceptive theft involving the mortgage lending process. Therefore, in cases where the amount of the fine under this provision may exceed the maximum fine that could otherwise be imposed pursuant to section 18-1.3-401(1)(a)(III)(A), C.R.S. 2020, use an interrogatory to have the jury determine whether the theft “involved the mortgage lending process.” See *S. Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) (fines implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

#### **4-4:09.INT THEFT – INTERROGATORY (IN THE PRESENCE OF AN AT-RISK PERSON)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft in the presence of an at-risk person? (Answer “Yes” or “No”)

The defendant committed the theft in the presence of an at-risk person only if:

- [1. the victim was an at-risk adult, and]
- [1. the victim was an at-risk adult with IDD, and]
- [1. the victim was an at-risk elder, and]
- [1. the victim was an at-risk juvenile, and]
2. the defendant committed any element or portion of the offense in the presence of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-6.5-103(5), C.R.S. 2020 (at-risk persons); see also *People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) (“Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.”).
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); see, e.g., Instruction E:28 (special verdict form).
3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.
4. See *People v. Lopez*, 2018 COA 119, ¶¶ 32, 39–42, \_\_\_ P.3d \_\_\_ (holding that the phrase “portion of the offense” as used in the at-risk person interrogatory means “conduct taken in furtherance of the crime that occurs in temporal proximity to an element of the offense and is physically close to the victim”; further holding that because “presence” is an ordinary word, the court did not abuse its discretion when it refused to define the word “presence” in the context of the phrase “in the presence of the victim”).
5. + See *People in Interest of B.D.*, 2020 CO 87, ¶¶ 1–2, 477 P.3d 143, 145 (holding that the elevated penalty for theft in the presence of an at-risk victim “is a strict liability sentence enhancer and not an element of the offense,” meaning that “a complicitor need not be aware that an at-risk victim is present” for the sentence enhancer to apply).
6. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(5), (5.5), 2016 Colo. Sess. Laws 545, 548.
7. In 2019, the Committee added Comment 4.

8. + In 2020, the Committee added Comment 5.

#### **4-4:10.INT THEFT – INTERROGATORY (POSITION OF TRUST FOR AN AT-RISK PERSON)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft against an at-risk person for whom he [she] was in a position of trust? (Answer “Yes” or “No”)

The defendant committed the theft against an at-risk person for whom he [she] was in a position of trust only if:

- [1. the victim was an at-risk adult, and]
- [1. the victim was an at-risk adult with IDD, and]
- [1. the victim was an at-risk elder, and]
- [1. the victim was an at-risk juvenile, and]
2. the defendant committed the theft against the victim while acting in a position of trust, whether or not in the presence of the victim.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-6.5-103(5), C.R.S. 2020; see also *People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) (“Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.”).
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); Instruction F:280 (defining “position of trust”); see, e.g., Instruction E:28 (special verdict form).
3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.
4. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(5), (5.5), 2016 Colo. Sess. Laws 545, 548.

#### **4-4:11.INT THEFT – INTERROGATORY (FROM THE PERSON OF AN AT-RISK PERSON)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft from the person of an at-risk person? (Answer “Yes” or “No”)

The defendant committed the theft from the person of an at-risk person only if:

- [1. the victim was an at-risk adult, and]
- [1. the victim was an at-risk adult with IDD, and]
- [1. the victim was an at-risk elder, and]
- [1. the victim was an at-risk juvenile, and]
2. the defendant committed the theft from the victim’s person,
3. by means other than the use of force, threat, or intimidation.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-6.5-103(5), C.R.S. 2020 (at-risk persons); see also *People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) (“Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.”).
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); see, e.g., Instruction E:28 (special verdict form).
3. See *People v. Warner*, 801 P.2d 1187, 1191 (Colo. 1990) (“Reading the general theft statute together with the robbery statute, we conclude that theft from the person of another is intended to cover those thefts involving an invasion of the victim’s person of which the victim is unaware, but which are not accomplished through the use of force, threats, or intimidation.”); *People v. Smith*, 121 P.3d 243, 247–48 (Colo. App. 2005) (“Case law in Colorado and other jurisdictions is consistent in holding that a taking from a shopping cart is a taking from a person if the victim is holding, pushing, or otherwise in control of the cart at the time of the theft. . . . Therefore, because the victim was a substantial distance from her fanny pack, we conclude that defendant’s actions do not constitute theft from the person of another as defined in § 18-4-401(5).”).
4. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.
5. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(5), (5.5), 2016 Colo. Sess. Laws 545, 548.

#### **4-4:12.INT THEFT – INTERROGATORY (KNOWING THE VICTIM IS AN AT-RISK PERSON)**

If you find the defendant not guilty of theft, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the theft knowing that the victim was an at-risk person? (Answer “Yes” or “No”)

The defendant committed the theft knowing that the victim was an at-risk person only if:

- [1. the victim was an at-risk adult, and
2. the defendant knew that the victim was an at-risk adult.]
- [1. the victim was an at-risk adult with IDD, and
2. the defendant knew that the victim was an at-risk adult with IDD.]
- [1. the victim was an at-risk elder, and
2. the defendant knew that the victim was an at-risk elder.]
- [1. the victim was an at-risk juvenile, and
2. the defendant knew that the victim was an at-risk juvenile.]

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have

the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-6.5-103(5), C.R.S. 2020 (at-risk persons); *see also People v. McKinney*, 99 P.3d 1038, 1043 (Colo. 2004) (“Section 18-6.5-103(5) enhances the penalties for general theft when the theft is committed against an at-risk adult; it does not create a separate offense.”).
2. See Instruction F:24 (defining “at-risk adult”); Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:26 (defining “at-risk juvenile”); Instruction F:26.5 (defining “at-risk person”); *see, e.g.*, Instruction E:28 (special verdict form).
3. In cases where it is alleged that the value of the thing involved was more than five hundred dollars, also use the valuation interrogatory: Instruction 4-4:06.INT.
4. In 2016, the Committee modified this instruction pursuant to a legislative amendment. See Ch. 172, sec. 3, § 18-6.5-103(5), (5.5), 2016 Colo. Sess. Laws 545, 548.

#### 4-4:13.SP THEFT – SPECIAL INSTRUCTION (CONCEALMENT)

If any person willfully conceals unpurchased goods, wares, or merchandise owned or held by and offered or displayed for sale by any store or other mercantile establishment, whether the concealment be on his [her] own person or otherwise and whether on or off the premises of said store or mercantile establishment, such concealment gives rise to a permissible inference that the person intended to commit the crime of theft.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. See § 18-4-406, C.R.S. 2020.
2. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the “prima facie” proof provision of section 18-4-406 as establishing a permissible inference); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

#### **4-4:14 THEFT (MULTIPLE THEFTS; AGGREGATED AND CHARGED IN THE SAME COUNT)**

The elements of the crime of theft (multiple thefts) are:

1. That the defendant,
2. in the State of Colorado, at or about the dates and places charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. intended to deprive the other person permanently of the use or benefit of the thing of value; or knowingly used, concealed, or abandoned the thing of value in such manner as to deprive the other person permanently of its use or benefit; or used, concealed, or abandoned the thing of value intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit; or demanded any consideration to which he [she] was not legally entitled as a condition of restoring the thing of value to the other person; or knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement, and
7. committed within a period of six months those thefts charged in the same count.
- [8. and that the defendant's conduct was not legally authorized by

the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (multiple thefts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (multiple thefts).

### COMMENT

1. See § 18-4-401(4)(a), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:30 (defining “benefit”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. See also Ch. 244, sec. 1, Legislative Declaration, 2009 Colo. Sess. Laws 1099 (“It is the general assembly’s intent in adopting this act to clarify that: (a) The general assembly’s intent in previously adopting the aggregation provisions of section[] 18-4-401(4) . . . Colorado Revised Statutes, and in amending those provisions from time to time, was to allow, but not require, aggregation of multiple violations of those statutes, committed within a period of six months, into a single offense for the purposes of determining the grade of offense.”); *Roberts v. People*, 203 P.3d 513, 516 (Colo. 2009) (holding, approximately two months before the General Assembly amended section 18-4-401(4), that 18-4-401(4) “requires . . . all thefts committed by the same person within a six-month period (except any for which jeopardy had already attached before he committed the others), to be joined and prosecuted as a single felony”); *People v. Gardner*, 250 P.3d 1262, 1267-68 (Colo. App. 2010) (holding, under the pre-amendment version of section 18-4-401(4) that was at issue in *Roberts*, that two charges of theft constituted a single unit of prosecution, but a third theft charge falling outside of the relevant six-month time period did not).

4. See *People v. Ramos*, 2017 COA 100, ¶¶ 18–20, 417 P.3d 902, 906–07 (citing the Committee’s instruction, and concluding that “if the prosecution fails to prove that the defendant committed all ‘the thefts so aggregated and charged,’ it has not met its burden of proving every element of the ‘single offense’ created by section 18-4-401(4)(a)”). Further, because the aggregated thefts may be committed in different ways, the model instruction lists all methods of committing theft that are set forth in section 18-4-401(1)(a)–(e). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. See *People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) (“permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof”); see also *People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on *Dunaway* and rejecting “defendant’s contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved”).

5. + See *People v. Halaseh*, 2018 COA 111, ¶ 22, 468 P.3d 1, 6 (holding that the court erred when it failed to instruct the jury “as to both the prescribed units of prosecution and the proper values required to be found within those units”), *disapproved of on other grounds*, 2020 CO 35M, 463 P.3d 249.

6. In 2019, the Committee revised Comment 4 by citing to *Ramos*.

7. + In 2020, the Committee added Comment 5.

**4-4:15 THEFT (FROM THE SAME PERSON PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT; AGGREGATED AND CHARGED IN THE SAME COUNT)**

The elements of the crime of theft (same person; one scheme or course of conduct) are:

1. That the defendant,
2. in the State of Colorado, at or about the dates and places charged,
3. knowingly,
- [4. obtained, retained, or exercised control over anything of value of another,
5. without authorization or by threat or deception, and]
- [4. received, loaned money by pawn or pledge on, or disposed of,
5. anything of value or belonging to another that he [she] knew or believed to have been stolen, and]
6. intended to deprive the other person permanently of the use or benefit of the thing of value; or knowingly used, concealed, or abandoned the thing of value in such manner as to deprive the other person permanently of its use or benefit; or used, concealed, or abandoned the thing of value intending that such use, concealment, or abandonment would deprive the other person permanently of its use or benefit; or demanded any consideration to which he [she] was not legally entitled as a condition of restoring the thing of value to the other person; or knowingly retained the thing of value more than seventy-two hours after the agreed-upon time of return in any lease or hire agreement, and
7. committed the thefts charged in the same count against the

same person pursuant to one scheme or course of conduct.

- [8. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft (same person; one scheme or course of conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft (same person; one scheme or course of conduct).

#### COMMENT

1. See § 18-4-401(4)(b), C.R.S. 2020.
2. See Instruction F:18 (defining “another”); Instruction F:30 (defining “benefit”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. In the absence of appellate authority analyzing section 18-4-401(4)(b), the Committee has construed the provision as requiring proof of *all* thefts aggregated in the same count. This determination is reflected in the seventh element of the model instruction. Further, because the aggregated thefts may be committed in different ways, the model instruction lists all methods of committing theft that are set forth in section 18-4-401(1)(a)–(e). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. See *People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) (“permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof”); see also *People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on

*Dunaway* and rejecting “defendant’s contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved”).

**4-4:16.INT THEFT (MULTIPLE THEFTS AGGREGATED AND CHARGED IN THE SAME COUNT; THEFTS FROM THE SAME PERSON PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT AGGREGATED AND CHARGED IN THE SAME COUNT) – INTERROGATORY (AGGREGATE VALUE)**

If you find the defendant not guilty of theft ([multiple thefts] [same person; one scheme or course of conduct]), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft ([multiple thefts] [same person; one scheme or course of conduct]), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)
- [2. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]
- [3. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the aggregate value of the things involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-401(4)(a), (b), C.R.S. 2020; see also *People v. Jamison*, 220 P.3d 992, 995 (Colo. App. 2009) (“the value of property taken is . . . a sentence enhancer rather than an element of the crime of theft”).
2. See, e.g., Instruction E:28 (special verdict form).
3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.
4. Where more than one aggregate value question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one aggregate value question. For example, in a case involving an interrogatory with three aggregate value questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], theft ([multiple thefts] [same person; one scheme or course of conduct]).

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FOREPERSON\*

II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], theft ([multiple thefts] [same person; one

scheme or course of conduct]).

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FOREPERSON\*

We further find, with respect to the verdict questions for this count, as follows:

\*\*1. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

Yes       No

\*\*2. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

Yes       No

\*\*3. Was the aggregate value of the things involved in the thefts [insert a description of the amount(s) from section 18-4-401(2)]?

Yes       No

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FOREPERSON\*

\* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space(s) indicating the answer(s) to the verdict question(s), and then sign on the line following the verdict questions.

\*\* Although you may answer "No" to more than one question asking about the aggregate value, you may not answer "Yes" to more than one such question. Further, if you answer "Yes" to any question, you should not answer the other questions.

## 4-4:17 OBTAINING CONTROL OVER ANY STOLEN THING OF VALUE

The elements of the crime of obtaining control over any stolen thing of value are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. obtained control over any stolen thing of value,
  4. knowing the thing of value to have been stolen by another.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining control over any stolen thing of value.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining control over any stolen thing of value.

### COMMENT

1. Section 18-4-404, C.R.S. 2020, provides, in its entirety, as follows: "Every person who obtains control over any stolen thing of value, knowing the thing of value to have been stolen by another, may be tried, convicted, and punished whether or not the principal is charged, tried, or convicted." This section establishes a distinct offense, *see, e.g., People v. Boileau*, 538 P.2d 484, 488 (Colo. App. 1975), and it predates the 1975 theft by receiving statute (section 18-4-410, which was repealed in 2013 when the general theft statute was amended to include receiving). However, according to one commentator, it is rarely used:

The utility of this statute, from the prosecution's point of view, is that a defendant who purchased items known to be stolen can be convicted of theft (by receiving), without the need for resort to the principles of accomplice liability, which might require proof that the defendant had agreed in advance to purchase stolen goods. . . . Although . . . section 18-4-404 was not repealed by the enactment of section 18-4-410, it appears seldom to be employed now. Of course, in some cases section 18-4-404 cannot be used because the property in question was not actually stolen, but it would seem that if the property were stolen, section 18-4-404 would afford some prosecutorial advantage, in apparently not requiring proof to deprive permanently. Nevertheless, section 18-4-404 has been largely ignored by prosecutors since section 18-4-410 was enacted.

Marianne Wesson, *Crimes and Defenses in Colorado*, 202 (1989).

Earlier editions of COLJI-Crim. did not include a pattern elemental instruction for the offense defined by section 18-4-404. Although this edition does include such an instruction, the Committee has not drafted an interrogatory asking the jury to determine the value of the stolen property because section 18-4-404 does not specify a penalty based on valuation. Indeed, section 18-4-404 does not contain any penalty provision, and cases decided under the pre-1971 version of the statute are inapposite because the predecessor statute had a penalty provision and was governed by two separate valuation-based penalty provisions that also applied to the general theft statute. Moreover, because the offense is not designated as a felony, it is not subject to section 18-1.3-403, C.R.S. 2020 (penalty for felony not fixed by statute).

One could argue that, because section 18-4-404 appears to establish criminal liability equivalent to the offense of theft, section 18-4-404 impliedly incorporates the valuation-based penalty provisions of 18-4-401. However, the Committee expresses no opinion concerning the correctness of that construction.

## 4-4:18 THEFT OF TRADE SECRETS

The elements of the crime of theft of trade secrets are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to deprive or withhold from the owner thereof the control of a trade secret, or to appropriate a trade secret to his [her] own use or the use of another,
5. stole or disclosed a trade secret to an unauthorized person, or, without authority, made or caused to be made a copy of an article representing a trade secret.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of trade secrets.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of trade secrets.

### COMMENT

1. See § 18-4-408(1), C.R.S. 2020.
2. See Instruction F:22 (defining "article"); Instruction F:74 (defining "copy"); Instruction F:185 (defining "with intent"); Instruction F:313 (defining "representing"); Instruction F:374 (defining "trade secret"); see also *Webster's Third New International Dictionary* 106 (2002) (defining "appropriate" as meaning "to take without permission").

3. It is unclear whether it is permissible to replace the word “stole” with the phrase “committed the crime of theft.” See *Black’s Law Dictionary* 1639 (10th ed. 2014) (defining “steal” as “To take (personal property) illegally with the intent to keep it unlawfully.”). If such a substitution is made and the defendant is not separately charged with theft in violation of section 18-4-401, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

#### **4-4:19 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (RETAINED)**

The elements of the crime of aggravated motor vehicle theft in the first degree (retained) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. retained possession or control of the motor vehicle for more than twenty-four hours.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (retained).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (retained).

#### **COMMENT**

1. *See* § 18-4-409(2)(a), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:237 (defining “motor vehicle”); Instruction F:281 (defining “possession”).

3. See *People v. Stellabotte*, 2016 COA 106, ¶¶ 25, 32, 421 P.3d 1164, 1171-72 (holding that the trial court did not abuse its discretion when it provided the jury with a dictionary definition of “authorization”).
4. In 2019, the Committee added Comment 3.

#### **4-4:20 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (ALTERED OR DISGUISED)**

The elements of the crime of aggravated motor vehicle theft in the first degree (altered or disguised) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. attempted to alter or disguise, or altered or disguised, the appearance of the motor vehicle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (altered or disguised).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (altered or disguised).

#### **COMMENT**

1. *See* § 18-4-409(2)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:237 (defining “motor vehicle”).

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee added Comment 3.

#### **4-4:21 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (VEHICLE IDENTIFICATION NUMBER)**

The elements of the crime of aggravated motor vehicle theft in the first degree (vehicle identification number) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. attempted to alter or remove, or altered or removed, the vehicle identification number.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (vehicle identification number).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (vehicle identification number).

#### COMMENT

1. See § 18-4-409(2)(c), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:237 (defining “motor vehicle”); Instruction F:387 (defining “vehicle identification number”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
4. In 2015, the Committee added Comment 3.

#### **4-4:22 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (USE FOR CRIME)**

The elements of the crime of aggravated motor vehicle theft in the first degree (use for crime) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. used the motor vehicle in the commission of a crime other than a traffic offense.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (use for crime).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (use for crime).

#### **COMMENT**

1. See § 18-4-409(2)(d), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

3. See *People v. Marquez*, 107 P.3d 993, 998 (Colo. App. 2004) (“we conclude that the plain language of § 18-4-409(2)(d) evinces a legislative intent to impose liability for aggravated motor vehicle theft in the first degree whenever a person who has knowingly stolen a motor vehicle uses that motor vehicle in the commission of a crime other than a traffic offense, regardless of the mens rea associated with the particular crime committed”).

#### **4-4:23 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (PROPERTY DAMAGE)**

The elements of the crime of aggravated motor vehicle theft in the first degree (property damage) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. caused five hundred dollars or more of property damage, including but not limited to property damage to the motor vehicle involved, in the course of obtaining control over, or in the exercise of control of, the motor vehicle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (property damage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (property damage).

#### COMMENT

1. See § 18-4-409(2)(e), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:237 (defining “motor vehicle”).

#### **4-4:24 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (BODILY INJURY)**

The elements of the crime of aggravated motor vehicle theft in the first degree (bodily injury) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. caused bodily injury to another person while exercising control of the motor vehicle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (bodily injury).

#### **COMMENT**

1. See § 18-4-409(2)(f), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

## **4-4:25 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (REMOVAL)**

The elements of the crime of aggravated motor vehicle theft in the first degree (removal) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. removed the motor vehicle from Colorado for a period of time in excess of twelve hours.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (removal).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (removal).

### COMMENT

1. See § 18-4-409(2)(g), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

#### **4-4:26 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (LICENSE PLATES)**

The elements of the crime of aggravated motor vehicle theft in the first degree (license plates) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception, and
  6. unlawfully attached or otherwise displayed in or upon the motor vehicle license plates other than those officially issued for the motor vehicle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the first degree (license plates).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the first degree (license plates).

#### COMMENT

1. See § 18-4-409(2)(h), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:237 (defining “motor vehicle”).

#### **4-4:27.INT AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE – INTERROGATORY (VALUE)**

If you find the defendant not guilty of aggravated motor vehicle theft in the first degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated motor vehicle theft in the first degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_. Was the value of the motor vehicle or motor vehicles involved in the aggravated motor vehicle theft in the first degree more than one hundred thousand dollars? (Answer “Yes” or “No”)]
  
- [\_. Was the value of the motor vehicle or motor vehicles involved in the aggravated motor vehicle theft in the first degree twenty thousand dollars or more but less than one hundred thousand dollars? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the value of the motor vehicle or motor vehicles involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-409(3)(a)-(c), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question. See Instruction 4-4:06.INT, Comment 4.
4. See also *People v. Hopkins*, 2013 COA 74, ¶ 26, 328 P.3d 253, 258 (proof of defendant’s prior conviction, which elevates aggravated motor vehicle theft in the first degree to a class three felony, see section 18-4-409(3)(b), is not an element of the offense; “unless the General Assembly makes the fact of a prior conviction an essential element of the crime, thereby defining a crime that can be committed only by those who have a prior conviction, due process does not require that an offender’s prior conviction be proved to a jury beyond a reasonable doubt.”).

## 4-4:28 AGGRAVATED MOTOR VEHICLE THEFT IN THE SECOND DEGREE

The elements of the crime of aggravated motor vehicle theft in the second degree are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obtained or exercised control over the motor vehicle of another,
  5. without authorization, or by threat or deception.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated motor vehicle theft in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated motor vehicle theft in the second degree.

### COMMENT

1. See § 18-4-409(4), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:237 (defining "motor vehicle").

## **4-4:29.INT AGGRAVATED MOTOR VEHICLE THEFT IN THE SECOND DEGREE – INTERROGATORY (HIGH VALUE VEHICLE(S))**

If you find the defendant not guilty of aggravated motor vehicle theft in the second degree, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of aggravated motor vehicle theft in the second degree, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to both questions, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to either question, you should not answer the other question.]

[\_. Was the value of the motor vehicle[s] involved twenty thousand dollars or more? (Answer “Yes” or No”)]

[\_. Was the value of the motor vehicle[s] involved one thousand dollars or more, but less than twenty thousand dollars? (Answer “Yes” or No”)]

The prosecution has the burden to prove the value of the motor vehicle or motor vehicles involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. See § 18-4-409(4)(a), (b), C.R.S. 2020.

2. *See, e.g.,* Instruction E:28 (special verdict form).
3. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

## 4-4:30.SP THEFT – SPECIAL INSTRUCTION (ENGAGED IN THE BUSINESS)

If a person obtains control over stolen property knowing or believing the property to have been stolen, and the offense involves two or more separate stolen things of value, each of which is the property of a separate owner, such commission of theft gives rise to a permissible inference that the person was engaged in the business of buying, selling, or otherwise disposing of stolen goods for a profit.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-4-411, C.R.S. 2020.
2. Although the statute speaks in terms of “prima facie evidence,” the concept should be explained to the jury as a permissible inference. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the “prima facie” proof provision of section 18-4-406 as establishing a permissible inference); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).
3. Prior to 2013, section 18-4-411 was limited to the offense of theft by receiving in violation of section 18-4-410. In 2013, section 18-4-410 was repealed and section 18-4-411 was amended to make it applicable to all thefts. However, the effect of this amendment is unclear because section 18-4-410(6) was the only sentence enhancement factor that required a finding that the defendant was “engaged in the business of buying, selling,

or otherwise disposing of stolen goods for a profit," and this factor was not relocated to any other theft statute.

## 4-4:31 THEFT OF MEDICAL RECORDS OR MEDICAL INFORMATION

The elements of the crime of theft of medical records or medical information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. without proper authorization,
5. obtained a medical record or medical information with the intent to appropriate the medical record or medical information to his [her] own use or to the use of another.]
- [4. without proper authorization,
5. stole or disclosed to an unauthorized person a medical record or medical information.]
- [4. without authority,
5. made or caused to be made a copy of a medical record or medical information.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of medical records or medical information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of medical records or medical information.

## COMMENT

1. See § 18-4-412(1), C.R.S. 2020.
2. See Instruction F:75 (defining “copy”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:222 (defining “medical information”); Instruction F:224 (defining “medical record”); Instruction F:288 (defining “proper authorization”); *see also Webster’s Third New International Dictionary* 106 (2002) (defining “appropriate” as meaning “to take without permission”).
3. The statute includes several exemptions from criminal liability. See § 18-4-412(4), (5), C.R.S. 2020 (enumerating purposes related to law enforcement, court proceedings, and the provision of health care services). However, the Committee has not drafted affirmative defense instructions.
4. It is unclear whether it is permissible to replace the word “stole” with the phrase “committed the crime of theft.” See *Black’s Law Dictionary* 1639 (10th ed. 2014) (defining “steal” as “To take (personal property) illegally with the intent to keep it unlawfully.”). If such a substitution is made and the defendant is not separately charged with theft in violation of section 18-4-401, give the jury the elemental instruction defining theft without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 4-4:32 THEFT BY RESALE OF A LIFT TICKET OR COUPON

The elements of the crime of theft by resale of a lift ticket or coupon:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without authorization, and
4. with the intent,
5. to profit therefrom,
6. resold or offered to resell any ticket, pass, badge, pin, coupon, or other device which then entitled the bearer to the use, benefit, or enjoyment of any skiing service or skiing facility.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft by resale of a lift ticket or coupon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft by resale of a lift ticket or coupon.

### COMMENT

1. *See* § 18-4-416, C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:30 (defining “benefit”).

## 4-4:33 MANUFACTURE, DISTRIBUTION, OR SALE OF A THEFT DETECTION SHIELDING OR A THEFT DETECTION DEACTIVATING DEVICE

The elements of the crime of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. manufactured, distributed, or sold a theft detection shielding device or a theft detection deactivating device,
5. with knowledge that some person intended to use the device in the commission of an offense involving theft.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing, distributing, or selling a theft detection shielding device or a theft detection deactivating device.

### COMMENT

1. See § 18-4-417(1)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:367 (defining “theft detection deactivating device”); Instruction F:368 (defining “theft detection device”); Instruction F:369 (defining “theft detection shielding device”); Instruction 4-4:01 (defining the offense of theft).

#### **4-4:34 UNLAWFUL POSSESSION OF A THEFT DETECTION SHIELDING DEVICE OR A THEFT DETECTION DEACTIVATING DEVICE**

The elements of the crime of unlawful possession of a theft detection shielding device or a theft detection deactivating device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed a theft detection shielding device or a theft detection deactivating device,
- [4. with the intent to use the device possessed in the commission of an offense involving theft.]
- [4. with the knowledge that some person intended to use the device possessed in the commission of an offense involving theft.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a theft detection shielding or theft detection deactivating device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a theft detection shielding or theft detection deactivating device.

#### **COMMENT**

1. See § 18-4-417(1)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:367 (defining “theft detection deactivating device”); Instruction F:368 (defining “theft detection device”); Instruction F:369 (defining “theft detection shielding device”); Instruction 4-4:01 (defining the offense of theft).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instruction 4-4:01. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 4-4:35 DEACTIVATION OR REMOVAL OF A THEFT DETECTION DEVICE

The elements of the crime of deactivation or removal of a theft detection device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. deactivated or removed a theft detection device, or any component thereof,
5. in a store or mercantile establishment,
6. without authorization,
7. prior to purchase.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of deactivation or removal of a theft detection device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of deactivation or removal of a theft detection device.

### COMMENT

1. See § 18-4-417(1)(c), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:368 (defining “theft detection device”).

## 4-4:36 OWNERSHIP OR OPERATION OF A CHOP SHOP (OWNER OR CONSPIRATOR)

The elements of the crime of ownership or operation of a chop shop (owner or conspirator) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. owned or operated a chop shop, knowing that it was a chop shop, or conspired with another person to own or operate a chop shop, knowing that it was a chop shop.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (owner or conspirator).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (owner or conspirator).

### COMMENT

1. *See* § 18-4-420(1)(a), C.R.S. 2020.
2. *See* Instruction F:53 (defining “chop shop”); Instruction F:195 (defining “knowingly”); Instruction G2:05 (conspiracy).

## 4-4:37 OWNERSHIP OR OPERATION OF A CHOP SHOP (TRANSPORTING)

The elements of the crime of ownership or operation of a chop shop (transporting) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. transported an unlawfully obtained motor vehicle or major component motor vehicle part to or from a chop shop, knowing that it was a chop shop.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (transporting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (transporting).

### COMMENT

1. See § 18-4-420(1)(b), C.R.S. 2020.
2. See Instruction F:53 (defining "chop shop"); Instruction F:195 (defining "knowingly"); Instruction F:204 (defining "major component motor vehicle part"); Instruction F:238 (defining "motor vehicle"); Instruction F:381 (defining "unlawfully obtained").

#### **4-4:38 OWNERSHIP OR OPERATION OF A CHOP SHOP (SALE, TRANSFER, PURCHASE, RECEIPT)**

The elements of the crime of ownership or operation of a chop shop (sale, transfer, purchase, receipt) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold or transferred to, or purchased or received from, a chop shop, knowing that it was a chop shop,
5. an unlawfully obtained motor vehicle or major component motor vehicle part.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of ownership or operation of a chop shop (sale, transfer, purchase, receipt).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of ownership or operation of a chop shop (sale, transfer, purchase, receipt).

#### COMMENT

1. See § 18-4-420(1)(c), C.R.S. 2020.
2. See Instruction F:53 (defining “chop shop”); Instruction F:195 (defining “knowingly”); Instruction F:204 (defining “major component

motor vehicle part"); Instruction F:238 (defining "motor vehicle");  
Instruction F:381 (defining "unlawfully obtained").

#### **4-4:39 ALTERING OR REMOVING A VEHICLE IDENTIFICATION NUMBER (WITH INTENT)**

The elements of the crime of altering or removing a vehicle identification number (with intent) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated the vehicle identification number, manufacturer's number, or engine number of a motor vehicle or major component motor vehicle part,
  5. with an intent to misrepresent the identity or prevent the identification of a motor vehicle or major component motor vehicle part.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering or removing a vehicle identification number (with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of altering or removing a vehicle identification number (with intent).

## COMMENT

1. See § 18-4-420(3)(a)(I), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:204 (defining “major component motor vehicle part”); Instruction F:238 (defining “motor vehicle”); *see also* Instruction F:387 (defining “vehicle identification number” for aggravated motor vehicle theft).
3. The statute includes an exemption for persons acting with the authorization of law enforcement. See § 18-4-420(3)(b), C.R.S. 2020 (“This subsection (3) does not apply to a private party or to an agent of a private party that is acting with the authorization of a law enforcement agency to lawfully seize, retain, recycle, transport, or otherwise dispose of a motor vehicle or major component motor vehicle part with a vehicle identification number, manufacturer number, or engine number that is removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated.”). However, the Committee has not drafted a model affirmative defense instruction.
4. In 2015, the Committee corrected the statutory citation in Comment 3.

#### **4-4:40 ALTERING OR REMOVING A VEHICLE IDENTIFICATION NUMBER (WITH KNOWLEDGE)**

The elements of the crime of altering or removing a vehicle identification number (with knowledge) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed, purchased, disposed of, sold, or transferred a motor vehicle or a major component motor vehicle part with knowledge that it contained a removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated vehicle identification number, manufacturer's number, or engine number unless such motor vehicle or major component motor vehicle part was [insert factors relevant to establish compliance with the provisions of section 42-5-110].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering or removing a vehicle identification number (with knowledge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of altering or removing a vehicle identification number (with knowledge).

#### COMMENT

1. See § 18-4-420(3)(a)(II), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:204 (defining “major component motor vehicle part”); Instruction F:238 (defining “motor vehicle”).

3. The statute includes an exemption for persons acting with the authorization of law enforcement. See § 18-4-420(3)(b), C.R.S. 2020 (“This subsection (3) does not apply to a private party or to an agent of a private party that is acting with the authorization of a law enforcement agency to lawfully seize, retain, recycle, transport, or otherwise dispose of a motor vehicle or major component motor vehicle part with a vehicle identification number, manufacturer number, or engine number that is removed, changed, altered, counterfeited, defaced, destroyed, disguised, falsified, forged, or obliterated.”). However, the Committee has not drafted a model affirmative defense instruction.

4. In 2015, the Committee corrected the statutory citation in Comment 3.

## CHAPTER 4-5

### TRESPASS, TAMPERING, AND CRIMINAL MISCHIEF

<a href="#"><u>4-5:01</u></a>	CRIMINAL MISCHIEF
<a href="#"><u>4-5:02.INT</u></a>	CRIMINAL MISCHIEF – INTERROGATORY (AGGREGATE DAMAGE)
<a href="#"><u>4-5:03</u></a>	FIRST DEGREE CRIMINAL TRESPASS
<a href="#"><u>4-5:04</u></a>	SECOND DEGREE CRIMINAL TRESPASS (ENCLOSED PREMISES)
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<a href="#"><u>4-5:06</u></a>	SECOND DEGREE CRIMINAL TRESPASS (MOTOR VEHICLE)
<a href="#"><u>4-5:07.INT</u></a>	SECOND DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND)
<a href="#"><u>4-5:08.INT</u></a>	SECOND DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND; INTENT TO COMMIT A FELONY)
<a href="#"><u>4-5:09</u></a>	THIRD DEGREE CRIMINAL TRESPASS
<a href="#"><u>4-5:10.INT</u></a>	THIRD DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND)
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<a href="#"><u>4-5:22</u></a>	DEFACING PROPERTY (HISTORICAL MONUMENT)
<a href="#"><u>4-5:23</u></a>	DEFACING PROPERTY (ANY METHOD)
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<a href="#"><u>4-5:27</u></a>	DEFACING A POSTED NOTICE
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<a href="#"><u>4-5:32</u></a>	CRIMINAL USE OF A NOXIOUS SUBSTANCE
<a href="#"><u>4-5:33</u></a>	CRIMINAL OPERATION OF A DEVICE IN A MOTION PICTURE THEATER

## 4-5:01 CRIMINAL MISCHIEF

The elements of criminal mischief are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. damaged the real or personal property of one or more other persons, including property owned by the defendant jointly with another person or property owned by the defendant in which, at the time of the damage, another person had a possessory or proprietary interest,
5. in the course of a single criminal episode.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proved each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal mischief.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal mischief.

### COMMENT

1. See § 18-4-501(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. In *People v. Thoro Products Co.*, 45 P.3d 737, 745 (Colo. App. 2001), *aff'd on other grounds*, 70 P.3d 1188 (Colo. 2003), a division of the court of appeals analyzed the “single criminal episode” language of section 18-4-501 as

establishing an *element* of the offense. Further, the division concluded that the trial court was not required to define the phrase for the jury. *See id.* (“Based upon the textual analysis in these joinder cases and a review of the structure of the criminal mischief statute, we conclude that ‘single criminal episode’ means essentially the same thing as ‘same criminal episode.’ In our view, that phrase is one with which reasonable persons of common intelligence would be familiar and is not so technical as to create confusion in jurors’ minds as to its meaning. Hence, the trial court was not required to define the phrase for the jury.”).

4. *See People v. Welborne*, 2018 COA 127, ¶ 21, 457 P.3d 71, 76 (holding that criminal mischief is a lesser included offense of first-degree arson).

5. *See People v. Coahran*, 2019 COA 6, ¶ 27, 436 P.3d 617, 623 (holding that the defendant was entitled to a self-defense instruction “[b]ecause the charged criminal mischief arose out of her use of force upon the [victim] (albeit indirectly)”).

6. In 2019, the Committee added Comments 4 and 5.

## 4-5:02.INT CRIMINAL MISCHIEF – INTERROGATORY (AGGREGATE DAMAGE)

If you find the defendant not guilty of criminal mischief, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal mischief, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer “Yes” or No”)
- [2. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer “Yes” or No”)]
- [3. Was the aggregate value of damage to real or personal property [insert a description of the amount(s) from section 18-4-501(4)]? (Answer “Yes” or No”)]

The prosecution has the burden to prove the aggregate value of the damaged property beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place[(s)], and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. See § 18-4-501(1), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. In *People v. Cisneros*, 566 P.2d 703, 705 (Colo. 1977), the supreme court stated that “[v]alue is an essential *element* of felony criminal mischief. Unless the property damaged has an aggregate value of one hundred dollars or more, there is no felony offense.” *Id.* (emphasis added). However, the court’s use of the term “element” appears to be at odds with its more recent decisions, in which it has distinguished elements from sentence enhancement provisions. See *People v. Leske*, 957 P.2d 1030, 1039 (Colo. 1998) (proof of victim’s age was a penalty enhancer, not an element). Accordingly, while it is clear that there is a “*damage* element in criminal mischief,” *People v. Dunoyair*, 660 P.2d 890, 894 (Colo. 1983) (emphasis added), the sentence enhancement factors based on valuation should be determined by means of interrogatories.
4. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one aggregate value question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions. In a case involving more than three questions about valuation, repeat the format of the bracketed questions.
5. Where more than one aggregate value question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question. For an example of how to prepare such a verdict form, refer to Instruction 4-4:06.INT, Comment 4.

## 4-5:03 FIRST DEGREE CRIMINAL TRESPASS

The elements of first degree criminal trespass are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. knowingly, and
4. unlawfully,
5. entered or remained in a dwelling of another.]
- [3. entered any motor vehicle,
4. with intent to commit the crime of [insert name of offense] therein.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree criminal trespass.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree criminal trespass.

### COMMENT

1. See § 18-4-502, C.R.S. 2020.
2. See Instruction F:114 (defining "dwelling"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle").

3. See *People v. Williams*, 984 P.2d 56, 59 (Colo. 1999) (holding, in a case involving a charge of first degree criminal trespass of a motor vehicle, that a count charging first degree criminal trespass should allege the crime that the defendant intended to commit).
4. See *People v. Rodriguez*, 43 P.3d 641, 643 (Colo. App. 2001) (“the ‘intent to commit a crime therein’ language establishes an element of criminal trespass of a motor vehicle and not an element of criminal trespass of a dwelling”); *People v. Anderson*, 991 P.2d 319, 321 (Colo. App. 1999) (“[T]he ‘knowing and unlawful’ element does not apply to the offense of criminal trespass of a motor vehicle.” (quoting *People v. Williams*, 961 P.2d 533, 537 (Colo. App. 1997), *rev’d on other grounds*, 984 P.2d 56 (Colo. 1999))).
5. See *People v. Denhartog*, 2019 COA 23, ¶¶ 77–79, 452 P.3d 148, 160 (relying on *People v. Garcia*, 940 P.2d 357 (Colo. 1997), to hold that first-degree criminal trespass is not a lesser included offense of second-degree burglary). + *But see People v. Gillis*, 2020 COA 68, ¶ 37, 471 P.3d 1197, 1205 (holding that first-degree criminal trespass *is* a lesser included offense of first-degree burglary).
6. In 2016, the Committee placed the elements of “knowingly and unlawfully” within the first bracketed alternative pursuant to *People v. Anderson, supra*, and it modified the second parenthetical in Comment 4.
7. In 2019, the Committee added Comment 5.
8. + In 2020, the Committee added the citation to *Gillis* in Comment 5.

## 4-5:04 SECOND DEGREE CRIMINAL TRESPASS (ENCLOSED PREMISES)

The elements of second degree criminal trespass (enclosed premises) are:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, and
4. unlawfully,
5. entered or remained,
6. in or upon the premises of another,
7. which were enclosed in a manner designed to exclude intruders or were fenced.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (enclosed premises).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (enclosed premises).

### COMMENT

1. See § 18-4-503(1)(a), C.R.S. 2020.

2. See Instruction F:126 (defining “enters unlawfully” and “remains unlawfully”); Instruction F:195 (defining “knowingly”); Instruction F:284 (defining “premises”).

3. See *Bollier v. People*, 635 P.2d 543, 546 (Colo. 1981) (construing the provision of section 18-4-503 relating to enclosed or fenced premises as having an implied mental state of “knowingly”).

## 4-5:05 SECOND DEGREE CRIMINAL TRESPASS (COMMON AREAS)

The elements of second degree criminal trespass (common areas) are:

1. That the defendant
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, and
4. unlawfully,
5. entered or remained,
6. in or upon the common areas of a hotel, motel, condominium, or apartment building.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (common areas).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (common areas).

### COMMENT

1. See § 18-4-503(1)(b), C.R.S. 2020.
2. See Instruction F:40 (defining "building"); Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly").

## 4-5:06 SECOND DEGREE CRIMINAL TRESPASS (MOTOR VEHICLE)

The elements of second degree criminal trespass (motor vehicle) are:

1. That the defendant
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly, and
  4. unlawfully,
  5. entered or remained,
  6. in a motor vehicle of another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal trespass (motor vehicle).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal trespass (motor vehicle).

### COMMENT

1. See § 18-4-503(1)(c), C.R.S. 2020.
2. See Instruction F:126 (defining "enters unlawfully" and "remains unlawfully"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle").

## **4-5:07.INT SECOND DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND)**

If you find the defendant not guilty of second degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land? (Answer  
“Yes” or “No”)

The defendant trespassed on agricultural land only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-503(2)(a), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. Although the statute specifies that the assessor must have classified the land as “agricultural” pursuant to section § 39-1-102(1.6), C.R.S. 2020, it

is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as “agricultural” pursuant to some other authority, there is no need to refer to the method of classification.

**4-5:08.INT SECOND DEGREE CRIMINAL TRESPASS –  
INTERROGATORY (AGRICULTURAL LAND; INTENT TO  
COMMIT A FELONY)**

If you find the defendant not guilty of second degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of second degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land to commit a crime?  
(Answer “Yes” or “No”)

The defendant trespassed on agricultural land to commit a crime only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated, and
2. the defendant committed the trespass with the intent to commit the crime[s] of [insert name(s) of felony offense(s)] thereon.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-4-503(2)(b), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Although the statute specifies that the assessor must have classified the land as “agricultural” pursuant to section § 39-1-102(1.6), C.R.S. 2020, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as “agricultural” pursuant to some other authority, there is no need to refer to the method of classification.

## 4-5:09 THIRD DEGREE CRIMINAL TRESPASS

The elements of third degree criminal trespass are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. unlawfully,
  4. entered or remained,
  5. in or upon any premises of another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of third degree criminal trespass.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of third degree criminal trespass.

### COMMENT

1. *See* § 18-4-504(1), C.R.S. 2020.
2. *See* Instruction F:126 (defining “enters unlawfully” and “remains unlawfully”); Instruction F:284 (defining “premises”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-4-515, C.R.S. 2020, establishes an exemption from criminal liability for professional land surveyors who comply with the enumerated notice requirements. However, the Committee has not drafted a model affirmative defense instruction.

## **4-5:10.INT THIRD DEGREE CRIMINAL TRESPASS – INTERROGATORY (AGRICULTURAL LAND)**

If you find the defendant not guilty of third degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land? (Answer  
“Yes” or “No”)

The defendant trespassed on agricultural land only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-4-504(2)(a), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. Although the statute specifies that the assessor must have classified the land as “agricultural” pursuant to section § 39-1-102(1.6), C.R.S. 2020, it

is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as “agricultural” pursuant to some other authority, there is no need to refer to the method of classification.

**4-5:11.INT THIRD DEGREE CRIMINAL TRESPASS –  
INTERROGATORY (AGRICULTURAL LAND; INTENT TO  
COMMIT A FELONY)**

If you find the defendant not guilty of third degree criminal trespass, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of third degree criminal trespass, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant trespass on agricultural land to commit a crime?  
(Answer “Yes” or “No”)

The defendant trespassed on agricultural land to commit a crime only if:

1. the premises had been classified as agricultural land by the county assessor for the county in which the land was situated, and
2. the defendant committed the trespass with the intent to commit the crime[s] of [insert name(s) of felony offense(s)].

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-4-504(2)(b), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Although the statute specifies that the assessor must have classified the land as “agricultural” pursuant to section § 39-1-102(1.6), C.R.S. 2020, it is the existence of the classification, and not its legal correctness, that the jury is to determine. Accordingly, absent evidence that the assessor classified the land as “agricultural” pursuant to some other authority, there is no need to refer to the method of classification.

## 4-5:12 FIRST DEGREE CRIMINAL TAMPERING

The elements of first degree criminal tampering are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to cause interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection,
5. tampered with property of a utility or institution, and
6. his [her] conduct did not constitute the crime of tampering with equipment associated with oil or gas gathering operations, or the crime of tampering with a utility meter.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree criminal tampering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree criminal tampering.

### COMMENT

1. See § 18-4-505, C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:360 (defining “tamper”); Instruction F:384 (defining “utility”); Instructions 4-

5:15, 4-5:16 (defining the offense of tampering with equipment associated with oil or gas gathering operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

## 4-5:13 SECOND DEGREE CRIMINAL TAMPERING (PROPERTY OF ANOTHER)

The elements of second degree criminal tampering (property of another) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to cause injury, inconvenience, or annoyance to any person,
5. tampered with property of another, and
6. his [her] conduct did not constitute the offense of tampering with equipment associated with oil or gas gathering operations, or the crime of tampering with a utility meter.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal tampering (property of another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal tampering (property of another).

### COMMENT

1. See § 18-4-506, C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:360 (defining “tamper”); Instruction F:384 (defining “utility”); Instructions 4-5:15, 4-5:16 (defining the offense of tampering with equipment associated with oil or gas gathering operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

## 4-5:14 SECOND DEGREE CRIMINAL TAMPERING (UNAUTHORIZED CONNECTION)

The elements of second degree criminal tampering are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made an unauthorized connection with property of a utility,  
and
5. his [her] conduct did not constitute the crime of tampering with equipment associated with oil or gas gathering operations or the crime of tampering with a utility meter.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree criminal tampering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree criminal tampering.

### COMMENT

1. See § 18-4-506, C.R.S. 2020.
2. See Instruction F:384 (defining "utility"); Instructions 4-5:15, 4-5:16 (defining the offense of tampering with equipment associated with oil or gas gathering operations); Instructions 4-5:17, 4-5:18 (defining the offense of tampering with a utility meter).

3. Give the jury elemental instructions for the two offenses referenced in the sixth element (if those offenses are not charged, remove the two concluding paragraphs that explain the burden of proof). Place the elemental instructions for the referenced offenses immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offenses.

## 4-5:15 TAMPERING WITH EQUIPMENT ASSOCIATED WITH OIL OR GAS GATHERING OPERATIONS

The elements of the crime of tampering with equipment associated with oil or gas gathering operations are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in any manner,
4. knowingly,
5. destroyed, broke, removed, or otherwise tampered with, or attempted to destroy, break, remove, or otherwise tamper with,
6. any equipment associated with oil or gas gathering operations.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with equipment associated with oil or gas gathering operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with equipment associated with oil or gas gathering operations.

### COMMENT

1. See § 18-4-506.3(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:360 (defining “tamper”).

3. The term “oil or gas gathering operations” is not defined by statute.
4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 4-5:16 TAMPERING WITH EQUIPMENT ASSOCIATED WITH OIL OR GAS GATHERING OPERATIONS (ACTION OF EQUIPMENT)

The elements of the crime of tampering with the action of equipment associated with oil or gas gathering operations are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in any manner,
4. knowingly,
5. without the consent of the owner or operator,
6. altered, obstructed, interrupted, interfered with, or attempted to alter, obstruct, interrupt, or interfere with, the action of any equipment used or associated with oil or gas gathering operations.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with the action of equipment associated with oil or gas gathering operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with the action of equipment associated with oil or gas gathering operations.

### COMMENT

1. See § 18-4-506.3(2), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).
3. The term “oil or gas gathering operations” is not defined by statute.
4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 4-5:17 TAMPERING WITH A UTILITY METER (CONNECTION)

The elements of the crime of tampering with a utility meter (connection) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. connected any pipe, tube, stopcock, wire, cord, socket, motor, or other instrument or contrivance,
4. with any main, service pipe, or other medium supplying or conducting gas, water, or electricity to any building,
5. without the knowledge and consent of the person supplying such gas, water, or electricity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a utility meter (connection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a utility meter (connection).

### COMMENT

1. See § 18-4-506.5(1), C.R.S. 2020.
2. See Instruction F:384 (defining “utility”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes an exemption from criminal liability. *See* § 18-4-506.5(3), C.R.S. 2020 (“Nothing in this section shall be construed to apply to any licensed electrical or plumbing contractor while performing usual and ordinary services in accordance with recognized customs and standards.”). However, the Committee has not drafted a model affirmative defense instruction.

## 4-5:18 TAMPERING WITH A UTILITY METER (ACTION)

The elements of the crime of tampering with a utility meter (action) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in any manner altered, obstructed, or interfered with the action of any meter provided for measuring or registering the quantity of gas, water, or electricity passing through said meter,
4. without the knowledge and consent of the person owning said meter.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a utility meter (action).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a utility meter (action).

### COMMENT

1. See § 18-4-506.5(2), C.R.S. 2020.
2. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes an exemption from criminal liability. See § 18-4-506.5(3), C.R.S. 2020 (“Nothing in this section shall be construed to apply to any licensed electrical or plumbing contractor while performing usual and ordinary services in accordance with recognized customs and standards.”). However, the Committee has not drafted a model affirmative defense instruction.

## 4-5:19 DEFACING OR DESTRUCTION OF A WRITTEN INSTRUMENT

The elements of the crime of defacing or destruction of a written instrument are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to defraud,
  5. defaced or destroyed,
  6. any written instrument evidencing a property right, whether vested or contingent.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing or destruction of a written instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing or destruction of a written instrument.

### COMMENT

1. See § 18-4-507, C.R.S. 2020.
2. See Instruction F:90 (defining "deface"); Instruction F:185 (defining "with intent"); see also Instruction F:394 (defining "written instrument")

pursuant to section 18-5-101(9), C.R.S. 2020, which applies to forgery and impersonation offenses in sections 18-5-101 to 18-5-110).

**4-5:20 KNOWINGLY DEFACING, DESTROYING, OR  
REMOVING A BOUNDARY TREE; INTENTIONALLY  
DEFACING, DESTROYING OR REMOVING A LANDMARK,  
MONUMENT OR ACCESSORY**

The elements of the crime of [knowingly defacing, destroying, or removing a boundary tree] [intentionally defacing, destroying, or removing a landmark, monument or accessory] are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. knowingly,
4. cut, felled, altered, or removed,
5. any certain boundary tree,
6. knowing such was a boundary tree, monument, or other allowed landmark,
7. to the damage of any person.]
- [3. intentionally,
4. defaced, removed, pulled down, injured, or destroyed any location stake, side post, corner post, landmark, monument, or any other legal land boundary monument, designating, or which was intended to designate, the location, boundary, or name of any mining claim, lode, or vein of mineral, or the name of the discoverer, or the date of discovery, thereof.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of [knowingly defacing, destroying, or removing a

boundary tree] [intentionally defacing, destroying, or removing a landmark, monument or accessory].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of [knowingly defacing, destroying or removing a boundary tree] [intentionally defacing, destroying or removing a landmark, monument or accessory].

#### COMMENT

1. *See* § 18-4-508(1), C.R.S. 2020.
2. *See* Instruction F:05 (defining “accessory”); Instruction F:90 (defining “deface”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:302 (defining “public land survey monument”).
3. The term “boundary tree” is not defined by statute.

## 4-5:21 REMOVING A LANDMARK, MONUMENT, OR ACCESSORY

The elements of the crime of removing a landmark, monument, or accessory are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. removed, or caused to removed,
5. any public land survey monument, control corner, or restoration of any such monument, or bearing tree, knowing such was a bearing tree or other accessory, even if said person had title to the land on which said monument or accessory was located.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removing a landmark, monument, or accessory.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removing a landmark, monument, or accessory.

### COMMENT

1. See § 18-4-508(2), C.R.S. 2020.

2. See F:05 (defining “accessory”); Instruction F:71 (defining “control corner”); Instruction F:195 (defining “knowingly”); Instruction F:302 (defining “public land survey monument”).
3. The statute includes an exemption from criminal liability. See § 18-4-508(2), C.R.S. 2020 (no criminal liability if, “prior to such removal, said person has caused a Colorado professional land surveyor to establish at least two witness corners or reference marks for each such monument or accessory removed and has filed or caused to be filed a monument record pursuant to article 53 of title 38, C.R.S.”). However, the Committee has not drafted a model affirmative defense instruction.
4. The term “bearing tree” is not defined by statute.

## **4-5:22 DEFACING PROPERTY (HISTORICAL MONUMENT)**

The elements of the crime of defacing property (historical monument) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. destroyed, defaced, removed, or damaged,
  4. any historical monument.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (historical monument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (historical monument).

### COMMENT

1. *See* § 18-4-509(1)(a), C.R.S. 2020.
2. *See* Instruction F:90 (defining “deface”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 4-5:23 DEFACING PROPERTY (ANY METHOD)

The elements of the crime of defacing property (any method) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. defaced, or caused, aided in, or permitted the defacing of,
4. public or private property,
5. without the consent of the owner,
6. by any method of defacement, including but not limited to painting, drawing, writing, or otherwise marring the surface of the property by use of paint, spray paint, ink, or any other substance or object.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (any method).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (any method).

### COMMENT

1. See § 18-4-509(1)(b), C.R.S. 2020.
2. See Instruction F:90 (defining “deface”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 4-5:24 DEFACING PROPERTY (CAVES)

The elements of the crime of defacing property (caves) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. with regard to a cave that was public property or the property of another,
5. without the consent of the owner,
6. broke or damaged any lock, fastening, door, or structure designed to enclose or protect the cave, or defaced or damaged any cave resource, or broke any cave resource from any part of the cave, or removed any cave resource from the cave.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (caves).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (caves).

### COMMENT

1. See § 18-4-509(1)(c), C.R.S. 2020.
2. See Instruction F:46 (defining "cave"); Instruction F:47 (defining "cave resource"); Instruction F:90 (defining "deface").

**4-5:25 DEFACING PROPERTY (MULTIPLE ACTS OF  
DEFACEMENT; AGGREGATED AND CHARGED IN THE  
SAME COUNT)**

The elements of the crime of defacing property (multiple acts) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. defaced, or caused, aided in, or permitted the defacing of,
  4. public or private property,
  5. without the consent of the owner,
  6. by any method of defacement, including but not limited to painting, drawing, writing, or otherwise marring the surface of the property by use of paint, spray paint, ink, or any other substance or object, and
  7. committed within a period of six months those acts of defacement charged in the same count.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing property (multiple acts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing property (multiple acts).

## COMMENT

1. See § 18-4-509(2)(a)(I)(B), C.R.S. 2020.
2. See Instruction F:90 (defining “deface”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. In the absence of appellate authority analyzing section 18-4-509(2)(a)(I)(B), the Committee has construed the provision as requiring proof of *all* acts of defacement aggregated in the same count. This determination is reflected in the seventh element of the model instruction. Further, because the aggregated acts of defacement may be committed in different ways, the model instruction lists all methods of defacement set forth in section 18-4-509(1)(b). Accordingly, it will be incumbent upon counsel to object to the inclusion of any surplusage that is without evidentiary support. See *People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004) (“permitting an instruction on an alternative theory of liability for the same charged offense not supported by sufficient evidence does not rise to the level of a constitutional error where the conviction for that offense is otherwise supported by sufficient proof”); see also *People v. Dunlap*, 124 P.3d 780, 813 (Colo. App. 2004) (relying on *Dunaway* and rejecting “defendant’s contention that the trial court committed plain error by not requiring the jury to decide unanimously which of the alternative methods of committing [the offense] was proved”).

**4-5:26.INT DEFACING PROPERTY (MULTIPLE ACTS OF DEFACEMENT; AGGREGATED AND CHARGED IN THE SAME COUNT) – INTERROGATORY (AGGREGATE VALUE)**

If you find the defendant not guilty of defacing property (multiple acts), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defacing property (multiple acts), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Were the aggregate damages five hundred dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the aggregate value of the damages beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-4-509(2)(a)(I)(B), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 4-5:27 DEFACING A POSTED NOTICE

The elements of the crime of defacing a posted notice are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. marred, destroyed, or removed any posted notice authorized by law.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing a posted notice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing a posted notice.

### COMMENT

1. *See* § 18-4-510, C.R.S. 2020.
2. *See* Instruction F:90 (defining “deface”); Instruction F:195 (defining “knowingly”).
3. If the legal authorization for a posted notice is at issue, the court may be able to resolve the issue as a matter of law. Where that is the case, the court should so advise the jury. But if the court determines that the question of whether the notice was authorized depends on the existence of one or more predicate facts, the court should draft a supplemental instruction advising the jury that it should find the notice was authorized

by law if, and only if, it finds that the prosecution has carried its burden with respect to the specified fact(s).

## 4-5:28 LITTERING

The elements of the crime of littering are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. deposited, threw, or left any litter,
4. on any public or private property, or in any waters.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of littering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of littering.

### COMMENT

1. *See* § 18-4-511(1), C.R.S. 2020.
2. *See* Instruction F:197 (defining “litter”); Instruction F:301 (defining “public or private property”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The statute includes affirmative defenses. *See* § 18-4-511(2), C.R.S. 2020 (enumerating exceptions for authorized disposal of litter). However, the Committee has not drafted model affirmative defense instructions.

4. + *See People v. Kern*, 2020 COA 96, ¶ 35, 474 P.3d 197, 204 (holding that littering is not a lesser included offense of projecting a missile at a vehicle).

5. + In 2020, the Committee added Comment 4.

## **4-5:29.SP LITTERING – SPECIAL INSTRUCTION (OPERATOR OF A MOTOR VEHICLE)**

If litter is unlawfully thrown, deposited, dropped, or dumped from any motor vehicle, such evidence gives rise to a permissible inference that the operator of the motor vehicle caused or permitted the litter to be so thrown, deposited, dropped, or dumped.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-4-511(6), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 4-5:30 ABANDONMENT OF A MOTOR VEHICLE

The elements of the crime of abandonment of a motor vehicle are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. abandoned any motor vehicle,
  4. upon a street, highway, or right-of-way, or any other public property, or upon any private property, without the express consent of the owner or person in lawful charge of that private property.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abandonment of a motor vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abandonment of a motor vehicle.

### COMMENT

1. See § 18-4-512(1), C.R.S. 2020.
2. See Instruction F:02 (defining "abandon" as including an intentional act); Instruction F:236 (defining "motor vehicle").
3. Be aware the elemental instruction does not expressly contain a mens rea. The court should consider whether one needs to be imputed, see § 18-1-503(2), C.R.S. 2020, or whether the definition of "abandon" contains a mens rea. See Instruction F:02 ("Abandon" means to leave a thing with the

intention not to retain possession of or assert ownership over it. The intent need not coincide with the act of leaving.”). If the court decides that the definition of “abandon” includes a mens rea, the court should define “intentionally.” *See* Instruction F:185 (defining “with intent”).

## 4-5:31.SP ABANDONMENT OF A MOTOR VEHICLE – SPECIAL INSTRUCTION (INDICIA OF INTENT TO ABANDON)

Evidence of [any of] the following gives rise to a permissible inference of an intention not to retain possession of, or assert ownership over, a motor vehicle:

[The motor vehicle had been left for more than seven days unattended and unmoved.]

[License plates or other identifying marks were removed from the motor vehicle.]

[The motor vehicle had been damaged or was deteriorated so extensively that it had value only for junk or salvage.]

[The owner had been notified by a law enforcement agency to remove the motor vehicle, and had not removed it within three days after notification.]

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-4-512(3), C.R.S. 2020.
2. Although the statute speaks in terms of “prima facie evidence,” the concept should be explained as a permissible inference. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing a “prima facie” proof

provision as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 4-5:32 CRIMINAL USE OF A NOXIOUS SUBSTANCE

The elements of criminal use of a noxious substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to interfere with another's use or enjoyment of land, a building, or a vehicle,
5. deposited on the land, or in the building or vehicle of another,
6. without his [her] consent,
7. any stink bomb or device, irritant, or offensive-smelling substance.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal use of a noxious substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal use of a noxious substance.

### COMMENT

1. See § 18-4-513(1), C.R.S. 2020.
2. See Instruction F:41 (defining "building of another"); Instruction F:185 (defining "with intent").

3. The statute includes an exemption from criminal liability for a peace officer who is performing his or her duties. *See* § 18-4-513(2), C.R.S. 2020. However, the Committee has not drafted a model affirmative defense instruction.

## **4-5:33 CRIMINAL OPERATION OF A DEVICE IN A MOTION PICTURE THEATER**

The elements of criminal operation of a device in a motion picture theater are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  - 4 while within a motion picture theater,
  5. operated an audiovisual recording function of a device,
  6. for the purpose of recording a motion picture,
  7. while a motion picture was being exhibited,
  8. without the consent of the owner or lessee of the motion picture theater.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal operation of a device in a motion picture theater.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty criminal operation of a device in a motion picture theater.

## COMMENT

1. *See* § 18-4-516(1), C.R.S. 2020.
2. *See* Instruction F:27 (defining “audiovisual recording function”); Instruction F:195 (defining “knowingly”); Instruction F:235 (defining “motion picture theater”).
3. The statute includes an exemption from criminal liability for lawful investigative activities. *See* § 18-4-516(4), C.R.S. 2020. However, the Committee has not drafted a model affirmative defense instruction.
4. In 2015, the Committee corrected Comment 3 by replacing the citation to section 18-4-601(4) with a citation to section 18-4-516(4).

## CHAPTER 4-6

### THEFT OF SOUND RECORDINGS

<a href="#"><u>4-6:01</u></a>	UNLAWFUL TRANSFER FOR SALE
<a href="#"><u>4-6:02</u></a>	UNLAWFUL TRAFFICKING IN UNLAWFULLY TRANSFERRED ARTICLES
<a href="#"><u>4-6:03</u></a>	DEALING IN UNLAWFULLY PACKAGED RECORDED ARTICLES
<a href="#"><u>4-6:04.INT</u></a>	DEALING IN UNLAWFULLY PACKAGED RECORDED ARTICLES – INTERROGATORY
<a href="#"><u>4-6:05</u></a>	UNLAWFUL RECORDING OF A LIVE PERFORMANCE
<a href="#"><u>4-6:06.SP</u></a>	UNLAWFUL RECORDING OF A LIVE PERFORMANCE – SPECIAL INSTRUCTION (OWNERSHIP)
<a href="#"><u>4-6:07</u></a>	TRAFFICKING IN AN UNLAWFULLY RECORDED LIVE PERFORMANCE

### CHAPTER COMMENTS

1. Section 18-4-605(1), C.R.S. 2020, provides that the offenses defined in this chapter “shall not apply to”:

(a) Any broadcaster who, in connection with or as part of a radio, television, or cable broadcast transmission or for the purpose of archival preservation, transfers any copyrighted sounds recorded on a sound recording;

(b) Any person who transfers copyrighted sounds in the home for personal use and without compensation for such transfer.

However, the Committee has not drafted model affirmative defense instructions.

2. The Committee added this chapter in 2016.

## 4-6:01 UNLAWFUL TRANSFER FOR SALE

The elements of the crime of unlawful transfer for sale are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, and
4. without the consent of the owner,
5. transferred any copyrighted sounds recorded on a phonograph record, video disc, wire, tape, film, or other article on which sounds are recorded,
6. with the intent,
7. to sell such article on which such sounds are so transferred or to cause the same to be sold for profit or to be used to promote the sale of any product.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful transfer for sale.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful transfer for sale.

### COMMENT

1. *See* § 18-4-602(1), C.R.S. 2020.

2. See Instruction F:21.8 (defining “article” (theft of sound recordings)); Instruction F:75.2 (defining “copyright”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:255.5 (defining “owner” (theft of sound recordings)).

## 4-6:02 UNLAWFUL TRAFFICKING IN UNLAWFULLY TRANSFERRED ARTICLES

The elements of the crime of unlawful trafficking in unlawfully transferred articles are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, or when he [she] reasonably should have had such knowledge,
4. advertised, offered for sale or resale, sold or resold, distributed, or possessed for the purpose of advertising, offering for sale or resale, selling or reselling, or distributing,
5. any article that had been unlawfully transferred for sale, as defined in these instructions.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful trafficking in unlawfully transferred articles.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful trafficking in unlawfully transferred articles.

### COMMENT

1. *See* § 18-4-603(1), C.R.S. 2020.

2. See Instruction F:21.8 (defining “article” (theft of sound recordings)); Instruction F:195 (defining “knowingly”); Instruction F:255.5 (defining “owner” (theft of sound recordings)).

3. The statute requires the article to have been “transferred without consent of the owner as provided in section 18-4-602.” § 18-4-603(1). Section 18-4-602(1), in turn, defines the crime of unlawful transfer for sale, which requires lack of the owner’s consent. See Instruction 4-6:01. Therefore, the Committee has phrased the fifth element of this instruction to involve articles that were “unlawfully transferred for sale.” To assist the jury in making this determination, the court should also give Instruction 4-6:01 with the following modifications: (1) the first sentence, “The elements of the crime of unlawful transfer for sale are,” should be replaced with, “A person commits the crime of unlawful transfer for sale if”; (2) element number 1, “That the defendant,” should be replaced with “The person”; and (3) the two concluding paragraphs explaining the burden of proof should be omitted.

## 4-6:03 DEALING IN UNLAWFULLY PACKAGED RECORDED ARTICLES

The elements of the crime of dealing in unlawfully packaged recorded articles are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly, and
  4. for commercial advantage or private financial gain,
  5. advertised, offered for sale or resale, sold or resold, transported, or possessed for the purpose of advertising, offering for sale or resale, selling or reselling, or distributing,
  6. any article on which sounds were recorded, and
  7. the cover, box, jacket, or label of the article did not clearly and conspicuously disclose the actual name and address of the manufacturer.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dealing in unlawfully packaged recorded articles.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of dealing in unlawfully packaged recorded articles.

## COMMENT

1. *See* § 18-4-604(1), C.R.S. 2020.
2. *See* Instruction F:21.8 (defining “article” (theft of sound recordings)); Instruction F:195 (defining “knowingly”); Instruction F:207.5 (defining “manufacturer”).

#### **4-6:04.INT DEALING IN UNLAWFULLY PACKAGED RECORDED ARTICLES – INTERROGATORY**

If you find the defendant not guilty of dealing in unlawfully packaged recorded articles, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of dealing in unlawfully packaged recorded articles, you should sign the verdict form to indicate your guilty verdict, and answer the following verdict question:

Did the offense involve more than one hundred unlawfully packaged recorded articles? (Answer “Yes” or “No”)

The prosecution has the burden to prove beyond a reasonable doubt that the offense involved more than one hundred unlawfully packaged recorded articles.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place(s), and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-4-604(2), C.R.S. 2020.
2. *See* E:28 (special verdict form).

## 4-6:05 UNLAWFUL RECORDING OF A LIVE PERFORMANCE

The elements of the crime of unlawful recording of a live performance are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with the intent,
  4. to sell a phonograph record, compact disc, video disc, wire, tape, film, or other article on which a live performance was recorded or to cause the same to be sold for profit or to be used to promote the sale of any product,
  5. recorded or caused to be recorded the live performance on such an article,
  6. without the consent of the owner of the right to record the live performance.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful recording of a live performance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful recording of a live performance.

### COMMENT

1. See § 18-4-604.3(1), C.R.S. 2020.

2. See Instruction F:21.8 (defining “article” (theft of sound recordings)); Instruction F:185 (defining “with intent”); Instruction F:197.5 (defining “live performance”); Instruction F:255.5 (defining “owner” (theft of sound recordings)).

## 4-6:06.SP UNLAWFUL RECORDING OF A LIVE PERFORMANCE – SPECIAL INSTRUCTION (OWNERSHIP)

In the absence of a written agreement to the contrary, there is a permissible inference that the performer[s] of a live performance own[s] the rights to record the live performance.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is warranted by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-4-604.3(2), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).
3. The statute refers to “the absence of a written agreement *or law* to the contrary.” § 18-4-604.3(2) (emphasis added). However, the Committee has omitted the phrase “or law” from its instruction. Should a party argue that a law contradicts the permissible inference, that will raise a question of law for the court to determine; thus, the court need not instruct the jury on the possibility of a contrary law.

## 4-6:07 TRAFFICKING IN AN UNLAWFULLY RECORDED LIVE PERFORMANCE

The elements of the crime of trafficking in unlawfully recorded live performance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knew or reasonably should have known,
4. that a live performance had been unlawfully recorded, as defined in these instructions, and
5. advertised, offered for sale or resale, sold or resold, or distributed the article on which the live performance was recorded, or possessed the article for the purpose of advertising, offering for sale or resale, selling or reselling, or distributing.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trafficking in unlawfully recorded live performance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trafficking in unlawfully recorded live performance.

### COMMENT

1. See § 18-4-604.7(1), C.R.S. 2020.

2. See Instruction F:21.8 (defining “article” (theft of sound recordings)); Instruction F:195 (defining “knowingly”); Instruction F:197.5 (defining “live performance”).

3. Because the statute requires that the article was recorded “in violation of section 18-4-604.3,” the court should also give Instruction 4-6:05 (outlining the offense of unlawful recording of a live performance, as defined in section 18-4-604.3(1), C.R.S. 2020), with the following modifications: (1) the first sentence, “The elements of the crime of unlawful recording of a live performance are,” should be replaced with, “A person commits the crime of unlawful recording of a live performance if”; (2) element number 1, “That the defendant,” should be replaced with “The person”; and (3) the two concluding paragraphs explaining the burden of proof should be omitted.



## CHAPTER 4-7

### THEFT OF CABLE TELEVISION SERVICE

<a href="#"><u>4-7:01</u></a>	THEFT OF CABLE SERVICE (OBTAINING)
<a href="#"><u>4-7:02</u></a>	THEFT OF CABLE SERVICE (CONNECTION)
<a href="#"><u>4-7:03</u></a>	THEFT OF CABLE SERVICE (MODIFICATION OR ALTERATION)
<a href="#"><u>4-7:04</u></a>	THEFT OF CABLE SERVICE (POSSESSION)
<a href="#"><u>4-7:05</u></a>	THEFT OF CABLE SERVICE (RECEIVE OR PROMOTE)
<a href="#"><u>4-7:06</u></a>	THEFT OF CABLE SERVICE (FAILURE TO RETURN OR SURRENDER EQUIPMENT)

### CHAPTER COMMENTS

1. Section 18-4-702(1)(a), C.R.S. 2020, provides that a “licensed or duly permitted cable operator may bring a civil action for damages against any person who commits *civil theft* of cable service” (emphasis added). The statute then provides a number of rebuttable presumptions regarding violations of section 18-4-701(2), C.R.S. 2020, which involves the *crime* of theft of cable service. See § 18-4-702(1)(d)–(i). Because these presumptions are located within section 18-4-702 (which is titled “Civil action--damages”) rather than section 18-4-701, the Committee views these presumptions as applicable to civil actions only. Accordingly, the Committee has not drafted special instructions pertaining to these presumptions.
2. The offenses defined in this chapter do not apply to satellite dishes. § 18-4-701(3), C.R.S. 2020. However, the Committee has not drafted a model affirmative defense instruction.
3. The Committee added this chapter in 2016.

## 4-7:01 THEFT OF CABLE SERVICE (OBTAINING)

The elements of the crime of theft of cable service (obtaining) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. obtained cable service from a cable operator by trick, artifice, deception, use of an unauthorized device or decoder, or other means,
5. without authorization or with the intent to deprive such cable operator of lawful compensation for the services rendered.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (obtaining).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (obtaining).

### COMMENT

1. See § 18-4-701(2)(a), C.R.S. 2020.
2. See Instruction F:42.2 (defining "cable operator"); Instruction F:42.5 (defining "cable service"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

## **4-7:02 THEFT OF CABLE SERVICE (CONNECTION)**

The elements of the crime of theft of cable service (connection) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made or maintained a connection or connections, whether physical, electrical, mechanical, acoustical, or otherwise,
5. with any cable, wire, component, or other device used for the distribution of cable services,
6. without authority from or payment to a cable operator.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (connection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (connection).

### COMMENT

1. *See* § 18-4-701(2)(b)(I), C.R.S. 2020.
2. *See* Instruction F:42.2 (defining “cable operator”); Instruction F:42.5 (defining “cable service”); Instruction F:195 (defining “knowingly”).

3. Section 18-4-701(2)(b)(II), C.R.S. 2020, establishes exemptions from criminal liability for “circumstances where a person has attached a wire or cable to extend service that the person has paid for or that has been authorized to an additional outlet, or where the cable operator has failed to disconnect a previously authorized cable service.” However, the Committee has not drafted model affirmative defense instructions.

## 4-7:03 THEFT OF CABLE SERVICE (MODIFICATION OR ALTERATION)

The elements of the crime of theft of cable service (modification or alteration) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. modified, altered, or maintained a modification or alteration to a device installed or capable of being installed with the authorization of a cable operator, and
5. the modification or alteration was for the purpose of intercepting or receiving cable service carried by such cable operator,
6. without authority from or payment to such cable operator.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (modification or alteration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (modification or alteration).

### COMMENT

1. See § 18-4-701(2)(c), C.R.S. 2020.

2. See Instruction F:42.2 (defining “cable operator”); Instruction F:42.5 (defining “cable service”); Instruction F:195 (defining “knowingly”).

#### **4-7:04 THEFT OF CABLE SERVICE (POSSESSION)**

The elements of the crime of theft of cable service (possession) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed without authority,
5. a device or printed circuit board designed in whole or in part to facilitate [the receipt of cable services offered for sale over a cable system] [the performance of [insert a description of the act(s) prohibited by section 18-4-701(2)(a)–(c), C.R.S. 2020]],
6. with the intent,
7. to receive cable operator services without authorization from or payment to a cable operator.
- [8. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (possession).

#### COMMENT

1. See § 18-4-701(2)(d), C.R.S. 2020.

2. See Instruction F:42.2 (defining “cable operator”); Instruction F:42.5 (defining “cable service”); Instruction F:42.8 (defining “cable system”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).

#### **4-7:05 THEFT OF CABLE SERVICE (RECEIVE OR PROMOTE)**

The elements of the crime of theft of cable service (receive or promote) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. manufactured, imported into this state, distributed, sold, leased, or offered or advertised for sale or lease,
5. any device, printed circuit board, or plan or kit for a device or printed circuit board designed in whole or in part to [receive any cable services offered for sale over a cable system] [perform or facilitate the performance of [insert a description of the act(s) prohibited by section 18-4-701(2)(a)–(c), C.R.S. 2020]],
6. with the intent to receive cable services or with the intent to promote the reception of cable services without payment or authorization from a cable operator.
- [7. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (receive or promote).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (receive or promote).

## COMMENT

1. *See* § 18-4-701(2)(e), C.R.S. 2020.
2. *See* Instruction F:42.2 (defining “cable operator”); Instruction F:42.5 (defining “cable service”); Instruction F:42.8 (defining “cable system”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).

## 4-7:06 THEFT OF CABLE SERVICE (FAILURE TO RETURN OR SURRENDER EQUIPMENT)

The elements of the crime of theft of cable service (failure to return or surrender equipment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. failed to return or surrender equipment used to receive cable service and provided by a cable operator,
5. after such service had been terminated for any reason.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of cable service (failure to return or surrender equipment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of cable service (failure to return or surrender equipment).

### COMMENT

1. See § 18-4-701(2)(f), C.R.S. 2020.
2. See Instruction F:42.2 (defining "cable operator"); Instruction F:42.5 (defining "cable service"); Instruction F:195 (defining "knowingly").



## CHAPTER 5-1

### FORGERY, SIMULATION, IMPERSONATION, AND RELATED OFFENSES

<a href="#"><u>5-1:01</u></a>	FORGERY (GOVERNMENTAL INSTRUMENTS)
<a href="#"><u>5-1:02</u></a>	FORGERY (INSTRUMENTS RELATING TO A CORPORATION OR ORGANIZATION)
<a href="#"><u>5-1:03</u></a>	FORGERY (LEGAL RIGHT, INTEREST, OBLIGATION, OR STATUS)
<a href="#"><u>5-1:04</u></a>	FORGERY (PUBLIC RECORD OR INSTRUMENT)
<a href="#"><u>5-1:05</u></a>	FORGERY (OFFICIALLY ISSUED OR CREATED)
<a href="#"><u>5-1:06</u></a>	FORGERY (PUBLIC CONVEYANCES OR COMPENSATION)
<a href="#"><u>5-1:07</u></a>	FORGERY (LOTTERY)
<a href="#"><u>5-1:08</u></a>	FORGERY (DOCUMENT-MAKING IMPLEMENT)
<a href="#"><u>5-1:09.SP</u></a>	FORGERY – SPECIAL INSTRUCTION (PEACE OFFICER)
<a href="#"><u>5-1:10</u></a>	SECOND DEGREE FORGERY
<a href="#"><u>5-1:11</u></a>	USE OF A FORGED ACADEMIC RECORD
<a href="#"><u>5-1:12</u></a>	CRIMINAL POSSESSION OF A FORGED INSTRUMENT
<a href="#"><u>5-1:13</u></a>	CRIMINAL POSSESSION OF A SECOND DEGREE FORGED INSTRUMENT
<a href="#"><u>5-1:14</u></a>	CRIMINAL POSSESSION OF A FORGERY DEVICE (KNOWLEDGE)
<a href="#"><u>5-1:15</u></a>	CRIMINAL POSSESSION OF A FORGERY DEVICE (INTENT)
<a href="#"><u>5-1:16</u></a>	CRIMINAL POSSESSION OF A FORGERY DEVICE (GENUINE DEVICE)
<a href="#"><u>5-1:17</u></a>	CRIMINAL POSSESSION OF A FORGERY DEVICE (DOCUMENT-MAKING IMPLEMENT)
<a href="#"><u>5-1:18</u></a>	CRIMINAL SIMULATION (INTENT TO DEFRAUD)
<a href="#"><u>5-1:19</u></a>	CRIMINAL SIMULATION (KNOWLEDGE OF TRUE CHARACTER)
<a href="#"><u>5-1:20</u></a>	TRADEMARK COUNTERFEITING

<a href="#"><u>5-1:21.INT</u></a>	TRADEMARK COUNTERFEITING – INTERROGATORY (LARGE NUMBER OF ITEMS)
<a href="#"><u>5-1:22.INT</u></a>	TRADEMARK COUNTERFEITING – INTERROGATORY (HIGHLY VALUABLE ITEMS)
<a href="#"><u>5-1:23</u></a>	UNLAWFULLY USING SLUGS (INTENT TO DEFRAUD)
<a href="#"><u>5-1:24</u></a>	UNLAWFULLY USING SLUGS (INTENT TO ENABLE)
<a href="#"><u>5-1:25</u></a>	OBTAINING A SIGNATURE BY DECEPTION
<a href="#"><u>5-1:26</u></a>	CRIMINAL IMPERSONATION (MARRIAGE)
<a href="#"><u>5-1:27</u></a>	CRIMINAL IMPERSONATION (BAIL OR SURETY)
<a href="#"><u>5-1:28</u></a>	CRIMINAL IMPERSONATION (JUDGMENT OR INSTRUMENT)
<a href="#"><u>5-1:29</u></a>	CRIMINAL IMPERSONATION (IMPERILING AN IMPERSONATED PERSON)
<a href="#"><u>5-1:30</u></a>	CRIMINAL IMPERSONATION (PERFORMING AN ACT WITH INTENT)
<a href="#"><u>5-1:31.SP</u></a>	CRIMINAL IMPERSONATION – SPECIAL INSTRUCTION (FALSE OR FICTITIOUS PERSONAL IDENTIFYING INFORMATION)
<a href="#"><u>5-1:32</u></a>	OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE FIRST DEGREE
<a href="#"><u>5-1:33</u></a>	OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE SECOND DEGREE
<a href="#"><u>5-1:34</u></a>	INDUCING CONSUMPTION OF CONTROLLED SUBSTANCES BY FRAUDULENT MEANS

## 5-1:01 FORGERY (GOVERNMENTAL INSTRUMENTS)

The elements of the crime of forgery (governmental instruments) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (governmental instruments).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (governmental instruments).

### COMMENT

1. See § 18-5-102(1)(a), C.R.S. 2020.

2. See Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:163 (defining “government”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).

3. The term “defraud” is not defined by statute.

4. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:02 FORGERY (INSTRUMENTS RELATING TO A CORPORATION OR ORGANIZATION)

The elements of the crime of forgery (instruments relating to a corporation or organization) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to defraud,
  5. falsely made, completed, altered, or uttered a written instrument,
  6. which was, or which purported to be, or which was calculated to become or to represent if completed,
  7. part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (instruments relating to a corporation or organization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (instruments relating to a corporation or organization).

## COMMENT

1. *See* § 18-5-102(1)(b), C.R.S. 2020.
2. *See* Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).
3. The term “defraud” is not defined by statute.
4. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:03 FORGERY (LEGAL RIGHT, INTEREST, OBLIGATION, OR STATUS)

The elements of the crime of forgery (legal right, interest, obligation, or status) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which did or might evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (legal right, interest, obligation, or status).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (legal right, interest, obligation, or status).

## COMMENT

1. See § 18-5-102(1)(c), C.R.S. 2020.
2. See Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).
3. See *People v. Cunefare*, 102 P.3d 302, 308 (Colo. 2004) (noting that the “general assembly has not defined legal right, interest, obligation, or status under section 18-5-102,” and holding that the section “is not limited to the objectives of property transfer or monetary gain through the use of false instruments,” and thus “applies to any legal right, interest, obligation or status – including a letter forged with the intent to secure dismissal of pending criminal charges”).
4. The term “defraud” is not defined by statute.
5. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:04 FORGERY (PUBLIC RECORD OR INSTRUMENT)

The elements of the crime of forgery (public record or instrument) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (public record or instrument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (public record or instrument).

### COMMENT

1. See § 18-5-102(1)(d), C.R.S. 2020.

2. See Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).
3. The term “defraud” is not defined by statute.
4. See *People v. Carian*, 2017 COA 106, ¶ 26, 414 P.3d 34, 40 (“[U]nder subsection (1)(d), ‘filed or required by law to be filed or legally fileable in or with a public office or public servant’ refers to those instruments actually delivered to a public office or public servant pursuant to a legal mandate, such as documents that have a specific legal requirement of delivery to a public officer or with a public office for a specific purpose, like income taxes or license applications.”).
5. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.
6. In 2019, the Committee added Comment 4.

## 5-1:05 FORGERY (OFFICIALLY ISSUED OR CREATED)

The elements of the crime of forgery (officially issued or created) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. a written instrument officially issued or created by a public office, public servant, or government agency.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (officially issued or created).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (officially issued or created).

### COMMENT

1. *See* § 18-5-102(1)(e), C.R.S. 2020.

2. See Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:163 (defining “government”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).

3. The term “defraud” is not defined by statute.

4. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:06 FORGERY (PUBLIC CONVEYANCES OR COMPENSATION)

The elements of the crime of forgery (public conveyances or compensation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (public conveyances or compensation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (public conveyances or compensation).

## COMMENT

1. *See* § 18-5-102(1)(f), C.R.S. 2020.
2. *See* Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:185 (defining “with intent”); Instruction F:299 (defining “public conveyance”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).
3. The term “defraud” is not defined by statute.
4. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:07 FORGERY (LOTTERY)

The elements of the crime of forgery (lottery) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. part of an issue of lottery tickets or shares designed for use in the state lottery.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (lottery).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (lottery).

### COMMENT

1. See § 18-5-102(1)(g), C.R.S. 2020.
2. See Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”);

Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).

3. See § 44-40-109, C.R.S. 2020 (defining the Colorado Lottery Commission’s rule-making authority for conducting lotteries).

4. The term “defraud” is not defined by statute.

5. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

6. In 2018, the Committee updated the statutory citation in Comment 3 to reflect a legislative reorganization. See Ch. 31, secs. 2, 9, §§ 44-40-109, 18-5-102(1)(g), 2018 Colo. Sess. Laws 333, 346, 363.

## 5-1:08 FORGERY (DOCUMENT-MAKING IMPLEMENT)

The elements of the crime of forgery (document-making implement) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument,
6. which was, or which purported to be, or which was calculated to become or to represent if completed,
7. a document-making implement that might be used or was used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of forgery (document-making implement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of forgery (document-making implement).

## COMMENT

1. *See* § 18-5-102(1)(h), C.R.S. 2020.
2. *See* Instruction F:105 (defining “document-making implement”); Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:174 (defining “identification document”); Instruction F:185 (defining “with intent”); Instruction F:286 (defining “produce”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).
3. The term “defraud” is not defined by statute.
4. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:09.SP FORGERY – SPECIAL INSTRUCTION (PEACE OFFICER)

Uttering a forged document to a peace officer gives rise to a permissible inference that that the person intended to defraud the peace officer.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-5-102(3), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).
3. Although the term “forged document” is not defined by statute, section 18-5-101(5), C.R.S. 2020, defines a “forged instrument” as “a written instrument which has been falsely made, completed, or altered.” Accordingly, it appears reasonable to infer that a document which has been “falsely made, completed, or altered,” would, similarly, constitute a “forged document.”
4. The term “defraud” is not defined by statute.

## 5-1:10 SECOND DEGREE FORGERY

The elements of the crime of second degree forgery are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument. +
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree forgery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree forgery.

### COMMENT

1. See § 18-5-104(1), C.R.S. 2020.
2. See Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:185 (defining "with intent"); Instruction F:385 (defining "utter"); Instruction F:394 (defining "written instrument").
3. The term "defraud" is not defined by statute.

4. + Section 18-5-104(1) provides that “[a] person commits second degree forgery if, with intent to defraud, such person falsely makes, completes, alters, or utters a written instrument *of a kind not described in section 18-5-102 or 18-5-104.5*” (emphasis added). Section 18-5-102 involves various written instruments whose forgery would constitute a felony, *see* Instructions 5-1:01 to 5-1:08, while section 18-5-104.5 involves forged academic records, a misdemeanor, *see* Instruction 5-1:11. Previously, this instruction directed trial courts to add a sixth element, requiring the prosecution to prove that the written instrument “was not a [list those items enumerated in sections 18-5-102 and 18-5-104.5 that bear a resemblance to the written instrument forming the basis for the charge].”

In *Hoggard v. People*, 2020 CO 54, ¶ 2, 465 P.3d 34, 36–37, the defendant was charged with second-degree forgery, but the trial court erroneously instructed the jury on the elements of *felony* forgery. Specifically, the instruction required the jury to find that the written instrument “was or purported to be” or “was calculated to become or represent if completed an instrument which does or may evidence, create, or otherwise affect a legal right, interest, obligation, or status: namely, an email.” *Id.* at ¶ 8; *cf.* Instruction 5-1:03, element 7 (requiring that the instrument be “a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which did or might evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status”). The supreme court held that no constructive amendment occurred because the instruction “simply placed an additional burden on the prosecution to prove more about that email.” *Hoggard*, ¶ 30. The court further stated that, because “an email is *not* one of the written instruments specifically identified in the felony forgery statute,” the instruction did not conflict with the statutory definition of second-degree forgery. *Id.* at ¶ 32. However, the court explicitly refused to address whether second-degree forgery is a lesser included offense of felony forgery. *Id.* at ¶ 33 n.7. *But see id.* at ¶ 51 (Márquez, J., dissenting) (“Although the majority carefully avoids framing its reasoning as [a] lesser-included-offense analysis . . . the logic it employs is indistinguishable.”).

Following *Hoggard*, the Committee has chosen to remove the sixth element from this instruction. Given the potential complexities identified in

*Hoggard*, the Committee has concluded that simply directing trial courts to “list those items enumerated in sections 18-5-102 and 18-5-104.5 that bear a resemblance to the written instrument forming the basis for the charge” provides insufficient guidance. But because *Hoggard* declined to address whether second-degree forgery is a lesser included offense of felony forgery, the Committee has further concluded that the prosecution must still prove that the written instrument at issue was *not* of a type enumerated in those two statutes (i.e., which could sustain a charge for either felony forgery or use of a forged academic record).

Therefore, the Committee has modified Instruction F:394, which defines the term “written instrument.” Specifically, the Committee has added a bracketed paragraph to that instruction, explaining that, for purposes of the crime of second-degree forgery, the “written instrument” cannot be any of the various types of documents found in either of the two statutes. In this manner, trial courts can continue to require the prosecution to prove all elements of the crime of second-degree forgery, without being forced to decide which types of written instruments found in the other two statutes resemble the instrument at issue in the case.

5. + Section 42-7-301.5, C.R.S. 2020, provides that a person violates section 18-5-104 (i.e., commits second-degree forgery) if the person either (1) “presents an altered or counterfeit letter or altered or counterfeit insurance identification card from an insurer or agent for the purpose of proving financial responsibility” for purposes related to the Motor Vehicle Financial Responsibility Law, or (2) “alters or creates a counterfeit letter or insurance identification card for another.” However, the Committee has not drafted model instructions.

6. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

7. + In 2020, the Committee added Comments 4 and 5, and it removed the sixth element as described in Comment 4.

## 5-1:11 USE OF A FORGED ACADEMIC RECORD

The elements of the crime of use of a forged academic record are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to seek employment, or to seek admission to a public or private institution of higher education in this state, or to secure a scholarship or other form of financial assistance from the institution itself or from other public or private sources of financial assistance,
5. falsely made, completed, altered, or uttered a written instrument which was or purported to be, or was calculated to become or to represent if completed, a bona fide academic record of an institution of secondary or higher education.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of a forged academic record.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of a forged academic record.

### COMMENT

1. See § 18-5-104.5(1), C.R.S. 2020.

2. See Instruction F:04 (defining “academic record”); Instruction F:139 (defining “falsely alter”); Instruction F:141 (defining “falsely complete”); Instruction F:144 (defining “falsely make”); Instruction F:149 (defining “financial assistance”); Instruction F:185 (defining “with intent”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).

3. In 2016, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:12 CRIMINAL POSSESSION OF A FORGED INSTRUMENT

The elements of criminal possession of a forged instrument are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed any forged written instrument,
4. with knowledge that it was forged, and
5. with intent to use it to defraud, and
- [6. the written instrument was part of an issue of money, stamps, securities, or other valuable instruments issued by a government or government agency.]
- [6. the written instrument was part of an issue of stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property.]
- [6. the written instrument was a deed, will, codicil, contract, assignment, commercial instrument, promissory note, check, or other instrument which did or might evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.]
- [6. the written instrument was a public record or an instrument filed or required by law to be filed or legally fileable in or with a public office or public servant.]
- [6. the written instrument was a written instrument officially issued or created by a public office, public servant, or government agency.]
- [6. the written instrument was part of an issue of tokens, transfers, certificates, or other articles manufactured and designed for use

in transportation fees upon public conveyances, or as symbols of value usable in place of money for the purchase of property or services available to the public for compensation.]

[6. the written instrument was part of an issue of lottery tickets or shares designed for use in the state lottery.]

[6. the written instrument was a document-making implement that might be used or was used in the production of a false identification document or in the production of another document-making implement to produce false identification documents.]

[7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forged instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forged instrument.

#### COMMENT

1. See § 18-5-105, C.R.S. 2020.

2. See Instruction F:105 (defining "document-making implement"); Instruction F:139 (defining "falsely alter"); Instruction F:141 (defining "falsely complete"); Instruction F:144 (defining "falsely make"); Instruction F:158 (defining "forged instrument"); Instruction F:163 (defining "government"); Instruction F:174 (defining "identification document"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:286 (defining "produce"); Instruction F:299

(defining “public conveyance”); Instruction F:385 (defining “utter”); Instruction F:394 (defining “written instrument”).

3. See *People v. Miralda*, 981 P.2d 676, 679 (Colo. App. 1999) (mere possession is insufficient to sustain a conviction for criminal possession of a forged instrument; a defendant’s intent to defraud must be proven through evidence of his or her status (e.g., as a fugitive, in possession of a false identification document), other circumstances surrounding the possession, or the manner in which the defendant actually used the document).

4. The term “defraud” is not defined by statute.

## 5-1:13 CRIMINAL POSSESSION OF A SECOND DEGREE FORGED INSTRUMENT

The elements of criminal possession of a second degree forged instrument are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. possessed any forged written instrument,
  4. with knowledge that it was forged, and
  5. with intent to use it to defraud. +
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a second degree forged instrument.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a second degree forged instrument.

### COMMENT

1. *See* § 18-5-107, C.R.S. 2020.
2. *See* Instruction F:158 (defining “forged instrument”); Instruction F:185 (defining “with intent”); Instruction F:281 (defining “possession”); Instruction F:394 (defining “written instrument”).
3. The term “defraud” is not defined by statute.

4. + Section 18-5-107 applies where a person possesses “any forged instrument of a kind covered by section 18-5-104,” i.e., the second-degree forgery statute. In turn, that statute applies to written instruments “of a kind *not* described in section 18-5-102 or 18-5-104.5” (emphasis added). Section 18-5-102 involves various written instruments whose forgery would constitute a felony, *see* Instructions 5-1:01 to 5-1:08, while section 18-5-104.5 involves forged academic records, *see* Instruction 5-1:11. Previously, this instruction directed trial courts to add a sixth element, requiring the prosecution to prove that the written instrument “was not a [list those items enumerated in sections 18-5-102 and 18-5-104.5 that bear a resemblance to the written instrument forming the basis for the charge].”

In 2020, the Committee removed a similar element from the second-degree forgery instruction. *See* Instruction 5-1:10, Comment 4. Instead, the Committee added a bracketed paragraph to Instruction F:394 (defining “written instrument”), which explains to the jury that, for the purposes of second-degree forgery, the “written instrument” cannot be any of the various types of documents found in either of the two statutes; the Committee explained that courts should only provide that bracketed paragraph in prosecutions for second-degree forgery (or this crime). Because section 18-5-107 incorporates written instruments covered by the second-degree forgery statute, the Committee has made the same change to this instruction; the bracketed paragraph in Instruction F:394 will continue to require the prosecution to prove all elements of the crime (i.e., that the written instrument was not of a certain type), without forcing trial courts to ascertain which items “enumerated in sections 18-5-102 and 18-5-104.5 . . . bear a resemblance to the written instrument forming the basis for the charge.”

5. + In 2020, the Committee added Comment 4, and it removed the sixth element as described in that comment.

## 5-1:14 CRIMINAL POSSESSION OF A FORGERY DEVICE (KNOWLEDGE)

The elements of criminal possession of a forgery device (knowledge) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. made or possessed,
4. with knowledge of its character,
5. any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (knowledge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (knowledge).

### COMMENT

1. See § 18-5-109(1)(a), C.R.S. 2020.
2. See Instruction F:76 (defining “counterfeit mark”); Instruction F:281 (defining “possession”); Instruction F:394 (defining “written instrument”).

## 5-1:15 CRIMINAL POSSESSION OF A FORGERY DEVICE (INTENT)

The elements of criminal possession of a forgery device (intent) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. made or possessed any device, apparatus, equipment, or article capable of or adaptable for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments or counterfeit marks,
4. with intent to use it, or to aid or permit another to use it, for purposes of forgery or the production of counterfeit marks.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (intent).

### COMMENT

1. *See* § 18-5-109(1)(b), C.R.S. 2020.
2. *See* Instruction F:76 (defining “counterfeit mark”); Instruction F:185 (defining “with intent”); Instruction F:281 (defining “possession”); Instruction F:394 (defining “written instrument”).

## 5-1:16 CRIMINAL POSSESSION OF A FORGERY DEVICE (GENUINE DEVICE)

The elements of criminal possession of a forgery device (genuine device) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. illegally possessed a genuine plate, die, or other device used in the production of written instruments or counterfeit marks,
  4. with intent to fraudulently use it.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (genuine device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (genuine device).

### COMMENT

1. See § 18-5-109(1)(c), C.R.S. 2020.
2. See Instruction F:76 (defining "counterfeit mark"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession"); Instruction F:394 (defining "written instrument").
3. The third element of the instruction includes the word "illegally" because it appears in the statute. However, it is unclear whether the

illegality is: (1) possessing a device without proper legal authority; or (2) obtaining a device by commission of a separate criminal act (e.g., theft).

## 5-1:17 CRIMINAL POSSESSION OF A FORGERY DEVICE (DOCUMENT-MAKING IMPLEMENT)

The elements of criminal possession of a forgery device (document-making implement) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. unlawfully made, produced, possessed, or uttered a document-making implement,
4. knowing that such document-making implement might be used, or was used, in the production of a false identification document or counterfeit mark or another implement for the production of false identification documents or counterfeit marks.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a forgery device (document-making implement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a forgery device (document-making implement).

### COMMENT

1. *See* § 18-5-109(1)(d), C.R.S.

2. See Instruction F:76 (defining “counterfeit mark”); Instruction F:105 (defining “document-making implement”); Instruction F:174 (defining “identification document”); Instruction F:281 (defining “possession”); Instruction F:385 (defining “utter”).

3. The third element of the instruction includes the word “unlawfully” because it appears in the statute. However, it is unclear whether this unlawfulness requires that the manufacturing, producing, possessing, or uttering of a document-making implement also constitute a separate criminal act (e.g., theft).

## 5-1:18 CRIMINAL SIMULATION (INTENT TO DEFRAUD)

The elements of criminal simulation (intent to defraud) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. made, altered, or represented any object in such fashion that it appeared to have an antiquity, rarity, source or authorship, ingredient, or composition which it did not in fact have.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal simulation (intent to defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal simulation (intent to defraud).

### COMMENT

1. See § 18-5-110(1)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:385 (defining "utter").
3. The term "defraud" is not defined by statute.

## 5-1:19 CRIMINAL SIMULATION (KNOWLEDGE OF TRUE CHARACTER)

The elements of criminal simulation (knowledge of true character) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with knowledge of an object's true character, and
4. with intent,
5. to use to defraud,
6. uttered, misrepresented, or possessed any object that was made or altered in such fashion that it appeared to have an antiquity, rarity, source or authorship, ingredient, or composition which it did not in fact have.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal simulation (knowledge of true character).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal simulation (knowledge of true character).

### COMMENT

1. See § 18-5-110(1)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:281 (defining “possession”); Instruction F:385 (defining “utter”).
3. The term “defraud” is not defined by statute.

## 5-1:20 TRADEMARK COUNTERFEITING

The elements of the crime of trademark counterfeiting are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. manufactured, displayed, advertised, distributed, offered for sale, sold, or possessed with intent to sell or distribute,
5. marks, goods, or services,
6. that the defendant knew were, bore, or were identified by one or more counterfeit marks, and
7. had possession, custody, or control of more than twenty-five items bearing a counterfeit mark.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trademark counterfeiting.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trademark counterfeiting.

### COMMENT

1. See § 18-5-110.5(1), C.R.S. 2020.
2. See Instruction F:76 (defining “counterfeit mark”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”);

Instruction F:281 (defining “possession”); Instruction F:394 (defining “written instrument”).

## 5-1:21.INT TRADEMARK COUNTERFEITING – INTERROGATORY (LARGE NUMBER OF ITEMS)

If you find the defendant not guilty of trademark counterfeiting, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of trademark counterfeiting, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a large number of items? (Answer “Yes” or “No”)

The offense involved a large number of items only if:

1. the aggregate quantity of items that were, bore, or were identified by a counterfeit mark was one hundred or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-5-110.5(2)(a)(II)(B), (3)(b)(III), C.R.S. 2020.
2. See Instruction F:322 (defining “retail value”); see, e.g., Instruction E:28 (special verdict form).

## 5-1:22.INT TRADEMARK COUNTERFEITING – INTERROGATORY (HIGHLY VALUABLE ITEMS)

If you find the defendant not guilty of trademark counterfeiting, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of trademark counterfeiting, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve highly valuable items? (Answer  
“Yes” or “No”)

The offense involved highly valuable items only if:

1. the total retail value of all goods or services that were, bore, or were identified by a counterfeit mark was one thousand dollars or more.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-5-110.5(2)(a)(II)(B), C.R.S. 2020.
2. See Instruction F:322 (defining “retail value”); see, e.g., Instruction E:28 (special verdict form).

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3. In 2016, the Committee corrected the statutory citation in Comment 1.

## 5-1:23 UNLAWFULLY USING SLUGS (INTENT TO DEFRAUD)

The elements of the crime of unlawfully using slugs (intent to defraud) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud the vendor of property or a service sold by means of a coin machine,
5. knowingly,
6. inserted, deposited, or used a slug in such a machine, or caused such a machine to be operated by any unauthorized means.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully using slugs (intent to defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully using slugs (intent to defraud).

### COMMENT

1. *See* § 18-5-111(1)(a), C.R.S. 2020.

2. See Instruction F:57 (defining “coin machine”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:346 (defining “slug”).
3. The term “defraud” is not defined by statute.

## **5-1:24 UNLAWFULLY USING SLUGS (INTENT TO ENABLE)**

The elements of the crime of unlawfully using slugs (intent to enable) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to enable a person to use [a] slug[s] fraudulently in a coin machine,
  5. made, possessed, or disposed of [a] slug[s].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully using slugs (intent to enable).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully using slugs (intent to enable).

### COMMENT

1. See § 18-5-111(1)(b), C.R.S. 2020.
2. See Instruction F:57 (defining "coin machine"); Instruction F:185 (defining "with intent"); Instruction F:346 (defining "slug").

## 5-1:25 OBTAINING A SIGNATURE BY DECEPTION

The elements of the crime of obtaining a signature by deception are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud or to acquire a benefit for himself [herself] or another,
5. caused another to sign or execute a written instrument by,
6. knowingly,
7. creating or confirming another's impression which was false, and which the defendant did not believe to be true; or failing to correct a false impression held by another which the defendant previously had created or confirmed; or preventing another from acquiring information pertinent to any matter material to a proper understanding of any transaction in which the signature of such person was procured.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining a signature by deception.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining a signature by deception.

## COMMENT

1. See § 18-5-112(1), C.R.S. 2020.
2. See Instruction F:30 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:394 (defining “written instrument”).
3. Section 18-5-112(2) states that a person acts “by deception” if he or she acts “knowingly” in one of three ways enumerated in section 18-5-112(2)(a)-(c). Accordingly, this definition is reflected in the sixth and seventh elements of the model instruction.
4. The term “defraud” is not defined by statute.
5. In 2015, the Committee added a cross-reference to Instruction F:185 in Comment 2.

## 5-1:26 CRIMINAL IMPERSONATION (MARRIAGE)

The elements of criminal impersonation (marriage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. assumed a false or fictitious identity or legal capacity,
5. and in such identity or capacity,
6. married, pretended to marry, or sustained the marriage relation toward another without the connivance of the latter.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (marriage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (marriage).

### COMMENT

1. See § 18-5-113(1)(a)(I), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); see also *Webster’s Third New International Dictionary* 481 (2002) (defining “connivance” as “the act of conniving: intentional failure to notice or discover a wrongdoing: passive consent or cooperation”).

## 5-1:27 CRIMINAL IMPERSONATION (BAIL OR SURETY)

The elements of criminal impersonation (bail or surety) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. assumed a false or fictitious identity or legal capacity,
5. and in such identity or capacity,
6. became bail or surety for a party in an action or proceeding, civil or criminal, before a court or officer authorized to take the bail or surety.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (bail or surety).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (bail or surety).

### COMMENT

1. *See* § 18-5-113(1)(a)(II), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

## 5-1:28 CRIMINAL IMPERSONATION (JUDGMENT OR INSTRUMENT)

The elements of criminal impersonation (judgment or instrument) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. assumed a false or fictitious identity or legal capacity,
5. and in such identity or capacity,
6. confessed a judgment, or subscribed, verified, published, acknowledged, or proved a written instrument which by law may be recorded, with the intent that the same might be delivered as true.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (judgment or instrument).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (judgment or instrument).

### COMMENT

1. See § 18-5-113(1)(a)(III), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).

## 5-1:29 CRIMINAL IMPERSONATION (IMPERILING AN IMPERSONATED PERSON)

The elements of criminal impersonation (imperiling an impersonated person) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. assumed a false or fictitious identity or capacity, legal or other,
5. and in such identity or capacity,
6. performed an act that, if done by the person falsely impersonated, might subject that person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (imperiling an impersonated person).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (imperiling an impersonated person).

### COMMENT

1. See § 18-5-113(1)(b)(I), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).

## 5-1:30 CRIMINAL IMPERSONATION (PERFORMING AN ACT WITH INTENT)

The elements of criminal impersonation (performing an act with intent) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. assumed a false or fictitious identity or capacity, legal or other,
5. and in such identity or capacity,
6. performed any other act with intent to unlawfully gain a benefit for himself [herself] or another, or to injure or defraud another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal impersonation (performing an act with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal impersonation (performing an act with intent).

### COMMENT

1. See § 18-5-113(1)(b)(II), C.R.S. 2020.

2. See Instruction F:30 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).
3. Although a 2011 amendment changed the format of section 18-5-113 and added language in 18-5-113(1)(b) distinguishing a “legal” capacity from “other” types of capacities, it does not appear that this amendment disturbed the core of the supreme court’s holding in *Alvarado v. People*, 132 P.3d 1205, 1208 (Colo. 2006) (interpreting the statute as proscribing a single act of criminal impersonation that involves a requirement for the prosecution to prove two culpable mental states, but rejecting the argument that the statute requires proof of an act of impersonation and a separate act from which the defendant intended to receive a benefit).
4. The term “defraud” is not defined by statute.

**5-1:31.SP CRIMINAL IMPERSONATION – SPECIAL  
INSTRUCTION (FALSE OR FICTITIOUS PERSONAL  
IDENTIFYING INFORMATION)**

For purposes of the crime of criminal impersonation, using false or fictitious personal identifying information constitutes the assumption of a false or fictitious identity or capacity.

“Personal identifying information” means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver’s license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number.

COMMENT

1. See § 18-5-113(3), C.R.S. 2020.
2. The enactment of section 18-5-113(3), in 2011, effectively overruled the supreme court’s decision in *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010) (providing a false social security number on an application for car loan did not constitute the assumption of a false or fictitious identity or capacity).
3. See Instruction F:272 (defining “personal identifying information”).

## **5-1:32 OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE FIRST DEGREE**

The elements of the crime of offering a false instrument for recording in the first degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contained a material false statement or material false information, and
4. with intent,
5. to defraud,
6. presented or offered it to a public office or a public employee,
7. with the knowledge or belief that it would be registered, filed, or recorded, or become a part of the records of that public office or public employee.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of offering a false instrument for recording in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption of offering a false instrument for recording in the first degree.

## COMMENT

1. See § 18-5-114(1), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); see also Instruction F:141 (defining “materially false statement” as part of the definition of “falsely complete” (forgery and impersonation offenses)).
3. See *People v. Cohn*, 160 P.3d 336 (Colo. App. 2007) (because “the crime of offering a false instrument for recording is completed when the document containing the materially false statement is presented to the public office with intent to defraud and with knowledge or belief it will be recorded,” it is immaterial whether the victim was actually defrauded).
4. The term “defraud” is not defined by statute.

## 5-1:33 OFFERING A FALSE INSTRUMENT FOR RECORDING IN THE SECOND DEGREE

The elements of the crime of offering a false instrument for recording in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that a written instrument relating to or affecting real or personal property or directly affecting contractual relationships contained a material false statement or material false information,
4. presented or offered it to a public office or public employee,
5. with the knowledge or belief that it would be registered, filed, or recorded or become a part of the records of the public office or public employee.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of offering a false instrument for recording in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of offering a false instrument for recording in the second degree.

### COMMENT

1. See § 18-5-114(3), C.R.S. 2020.

2. *See also* Instruction F:141 (defining “materially false statement” as part of the definition of “falsely complete” (forgery and impersonation offenses)).

## 5-1:34 INDUCING CONSUMPTION OF CONTROLLED SUBSTANCES BY FRAUDULENT MEANS

The elements of the crime of inducing consumption of controlled substances by fraudulent means are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. surreptitiously or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge,
  4. caused another person to unknowingly consume or receive the direct administration of any controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing consumption of controlled substances by fraudulent means.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption of controlled substances by fraudulent means.

### COMMENT

1. *See* § 18-5-116(1), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020).

3. The statute includes an exemption from criminal liability. *See* § 18-5-116(1), C.R.S. 2020 (“nothing in this section shall diminish the scope of health care authorized by law”). However, the Committee has not drafted a model affirmative defense instruction.



## CHAPTER 5-2

### FRAUD IN OBTAINING PROPERTY OR SERVICES

<a href="#"><u>5-2:01</u></a>	FRAUD BY CHECK (INSUFFICIENT FUNDS)
<a href="#"><u>5-2:02.INT</u></a>	FRAUD BY CHECK (INSUFFICIENT FUNDS) – INTERROGATORY (VALUE)
<a href="#"><u>5-2:03.INT</u></a>	FRAUD BY CHECK (INSUFFICIENT FUNDS) – INTERROGATORY (NONEXISTENT OR CLOSED ACCOUNT)
<a href="#"><u>5-2:04.SP</u></a>	FRAUD BY CHECK (INSUFFICIENT FUNDS) – SPECIAL INSTRUCTION (KNOWLEDGE)
<a href="#"><u>5-2:05</u></a>	FRAUD BY CHECK (OPENING AN ACCOUNT)
<a href="#"><u>5-2:06</u></a>	DEFRAUDING A SECURED CREDITOR
<a href="#"><u>5-2:07.INT</u></a>	DEFRAUDING A SECURED CREDITOR – INTERROGATORY (VALUE OF COLLATERAL)
<a href="#"><u>5-2:08</u></a>	DEFRAUDING A DEBTOR
<a href="#"><u>5-2:09.INT</u></a>	DEFRAUDING A DEBTOR – INTERROGATORY (AMOUNT OWING ON NOTE OR CONTRACT)
<a href="#"><u>5-2:10</u></a>	PURCHASE ON CREDIT TO DEFRAUD
<a href="#"><u>5-2:11</u></a>	DUAL CONTRACTS TO INDUCE LOAN
<a href="#"><u>5-2:12</u></a>	ISSUING A FALSE FINANCIAL STATEMENT (MAKING OR UTTERING)
<a href="#"><u>5-2:13</u></a>	ISSUING A FALSE FINANCIAL STATEMENT (REPRESENTING IN WRITING)
<a href="#"><u>5-2:14</u></a>	ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE)
<a href="#"><u>5-2:15.INT</u></a>	ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE) – INTERROGATORY (USE OF TWO OR MORE DEVICES)
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**INSURANCE FRAUD (FALSE INFORMATION)**

## **CHAPTER COMMENTS**

1. The Committee added this chapter in 2015.

## 5-2:01 FRAUD BY CHECK (INSUFFICIENT FUNDS)

The elements of the crime of fraud by check (insufficient funds) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing he [she] had insufficient funds with the drawee,
4. with intent,
5. to defraud,
6. issued one or more checks for the payment of services, wages, salary, commissions, labor, rent, money, property, or other thing of value.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud by check (insufficient funds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraud by check (insufficient funds).

### COMMENT

1. *See* § 18-5-205(2), C.R.S. 2020.
2. *See* Instruction F:48.5 (defining “check”); Instruction F:107.5 (defining “drawee”); Instruction F:183.5 (defining “insufficient funds”); Instruction F:185 (defining “with intent”); Instruction F:371 (defining “thing of value”).

3. See *People v. Gutierrez*, 1 P.3d 241, 242 (Colo. App. 1999) (holding that the issuance of an insufficient funds check in payment, or partial payment, of a pre-existing debt can constitute fraud by check pursuant to section 18-5-205(2)); *People v. Kunzelman*, 649 P.2d 340 (Colo. App. 1982) (issuance of a check with insufficient funds for the purpose of retaining possession of personal property obtained on credit can form the predicate for a conviction under the statute).

## 5-2:02.INT FRAUD BY CHECK (INSUFFICIENT FUNDS) – INTERROGATORY (VALUE)

If you find the defendant not guilty of fraud by check (insufficient funds), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fraud by check (insufficient funds), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of two thousand dollars or more? (Answer “Yes” or “No”)
- [2. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of seven hundred fifty dollars or more but less than two thousand dollars? (Answer “Yes” or “No”)]
- [3. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of three hundred dollars or more but less than seven hundred fifty dollars? (Answer “Yes” or “No”)]
- [4. Did you find the defendant guilty of fraud by check (insufficient funds) for issuing either one fraudulent check, or two or more fraudulent checks within a sixty-day period, for a total sum of fifty dollars or more but less than three hundred dollars? (Answer “Yes” or “No”)]

The prosecution has the burden to prove beyond a reasonable doubt the total sum of the fraudulent check, or checks issued within a sixty-day period. Your calculation of the total sum of the fraudulent check or checks may include only the monetary amount of checks as to which you unanimously agree the prosecution has proved beyond a reasonable doubt both the defendant's guilt and issuance within sixty days of each other.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place[(s)], and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-5-205(3)(a.7)-(d), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-2:03.INT FRAUD BY CHECK (INSUFFICIENT FUNDS) – INTERROGATORY (NONEXISTENT OR CLOSED ACCOUNT)

If you find the defendant not guilty of fraud by check (insufficient funds), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of fraud by check (insufficient funds), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the defendant use a nonexistent or closed account? (Answer “Yes” or “No”)

The defendant used a nonexistent or closed account only if:

1. the fraudulent check was drawn on an account which did not exist or which had been closed for a period of thirty days or more prior to the issuance of the check[s].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-5-205(3)(e), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-2:04.SP FRAUD BY CHECK (INSUFFICIENT FUNDS) – SPECIAL INSTRUCTION (KNOWLEDGE)

Except in the case of a postdated check or order, the following evidence gives rise to a permissible inference that the issuer had knowledge of his [her] insufficient funds:

He [she] had no account upon which the check or order was drawn with the bank or other drawee at the time he [she] issued the check or order; or he [she] had insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-5-205(8), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *People v. Felgar*, 58 P.3d 1122, 1125 (Colo. App. 2002) (construing section 18-5-205(8) as creating a permissible inference, and holding that the trial court committed reversible error by instructing the jury, in the language of the statute, that if certain circumstances existed it could presume that the defendant had knowledge of insufficient funds in his account); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 5-2:05 FRAUD BY CHECK (OPENING AN ACCOUNT)

The elements of the crime of fraud by check (opening an account) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. opened a checking account, negotiable order of withdrawal account, or share draft account,
  4. using false identification or an assumed name,
  5. for the purpose of issuing fraudulent checks.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud by check (opening an account).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraud by check (opening an account).

### COMMENT

1. *See* § 18-5-205(5), C.R.S. 2020.
2. *See* Instruction F:48.5 (defining “check”); Instruction F:241.7 (defining “negotiable order of withdrawal account” and “share draft account”).

## 5-2:06 DEFRAUDING A SECURED CREDITOR

The elements of the crime of defrauding a secured creditor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud a creditor,
5. by defeating, impairing, or rendering worthless or unenforceable any security interest,
6. sold, assigned, transferred, conveyed, pledged, encumbered, concealed, destroyed, or disposed of any collateral subject to a security interest.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defrauding a secured creditor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defrauding a secured creditor.

### COMMENT

1. See § 18-5-206(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); see also *Black's Law Dictionary*, 318 (10th ed. 2014) (defining "collateral" as "Property that is pledged as security against a debt; the property subject to a security interest or agricultural lien."); § 4-9-102(12), C.R.S. 2020 (defining

“collateral,” for purposes of the Uniform Commercial Code, as meaning “the property subject to a security interest or agricultural lien,” including “[p]roceeds to which a security interest attaches,” “[a]ccounts, chattel paper, payment intangibles, and promissory notes that have been sold,” and “[g]oods that are the subject of a consignment.”).

3. The term “security interest” is not defined in section 18-5-206. In *People v. Armijo*, 589 P.2d 935, 938 (Colo. 1979), the supreme court analyzed the meaning of the term, for purposes of section 18-5-206, by referring to the definition in the Uniform Commercial Code. See § 4-1-201(35), C.R.S. 2020 (“‘Security interest’ means an interest in personal property or fixtures that secures payment or performance of an obligation.”).

## **5-2:07.INT DEFRAUDING A SECURED CREDITOR – INTERROGATORY (VALUE OF COLLATERAL)**

If you find the defendant not guilty of defrauding a secured creditor, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defrauding a secured creditor, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form.

[Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]:

1. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c)-(j)]? (Answer “Yes” or No”)
  
- [2. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c)-(j)]? (Answer “Yes” or No”)]
  
- [3. Was the value of the collateral [insert a description of the amount(s) from section 18-5-206(1)(c)-(j)]? (Answer “Yes” or No”)]

The prosecution has the burden to prove the value of the collateral beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-5-206(1)(c)-(j), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-2:08 DEFRAUDING A DEBTOR

The elements of the crime of defrauding a debtor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a creditor, and
4. with intent,
5. to defraud a debtor,
6. sold, assigned, transferred, conveyed, pledged, bought, or encumbered a promissory note or contract signed by the debtor.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defrauding a debtor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defrauding a debtor.

### COMMENT

1. *See* § 18-5-206(2), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent").
3. The terms "promissory note" and "contract" are not defined in section 18-5-206. Although the terms are defined elsewhere, it is unclear whether those definitions should be utilized here. *See, e.g.*, § 4-1-201(11),

C.R.S. 2020 (“‘Contract’ means the total legal obligation that results from the parties’ agreement as determined by this title as supplemented by any other applicable laws.”); § 4-9-102(65), C.R.S. 2020 (“‘Promissory note’ means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.”); § 7-106-202, C.R.S. 2020 (“For the purposes of this subsection (5), [having to do with issuance of shares in a corporation, the term] ‘promissory note’ means a negotiable instrument on which there is an obligation to pay independent of collateral and does not include a nonrecourse note.”); *see also* § 18-5-501, C.R.S. 2020 (“The definitions set forth in the “Uniform Commercial Code”, title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511.”).

4. In 2016, the Committee corrected the statutory citation to “promissory note.”

## 5-2:09.INT DEFRAUDING A DEBTOR – INTERROGATORY (AMOUNT OWING ON NOTE OR CONTRACT)

If you find the defendant not guilty of defrauding a debtor, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of defrauding a debtor, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]:

1. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c)-(j)]? (Answer “Yes” or No”)
- [2. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c)-(j)]? (Answer “Yes” or No”)]
- [3. Was the amount owing on the note or contract [insert a description of the amount(s) from section 18-5-206(2)(c)-(j)]? (Answer “Yes” or No”)]

The prosecution has the burden to prove the amount owing on the note or contract beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-5-206(2)(c)-(j), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-2:10 PURCHASE ON CREDIT TO DEFRAUD

The elements of the crime of purchase on credit to defraud are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud the seller or vendor,
5. purchased any personal property on credit and, thereafter, before paying for it,
6. sold, hypothecated, pledged, or disposed of it,
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of purchase on credit to defraud.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of purchase on credit to defraud.

### COMMENT

1. See § 18-5-207, C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. The word "hypothecate" is not defined by statute. See, e.g., *Black's Law Dictionary* 811 (10th ed. 2014) (defining "hypothecate" as meaning: "To pledge (property) as security or collateral for a debt, without delivery of title or possession.").

## 5-2:11 DUAL CONTRACTS TO INDUCE LOAN

The elements of the crime of dual contracts to induce loan are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made, issued, delivered, or received dual contracts,
  5. for the purchase or sale of real property.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dual contracts to induce loan.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of dual contracts to induce loan.

### COMMENT

1. *See* § 18-5-208, C.R.S. 2020.
2. *See* Instruction F:113.5 (defining “dual contracts”); Instruction F:195 (defining “knowingly”).

## **5-2:12 ISSUING A FALSE FINANCIAL STATEMENT (MAKING OR UTTERING)**

The elements of the crime of issuing a false financial statement (making or uttering) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. knowingly,
6. made or uttered a written instrument which purported to describe the financial condition or ability to pay of himself [herself] or another person, and
7. which was false in some material respect and reasonably relied upon.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (making or uttering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (making or uttering).

## COMMENT

1. *See* § 18-5-209(1)(a), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); *see also* Instruction F:394 (defining “written instrument” for forgery and other offenses in Article 5, Part 1); Instruction F:385 (defining “utter” for purposes of forgery and other offenses in Article 5, Part 1).

## **5-2:13 ISSUING A FALSE FINANCIAL STATEMENT (REPRESENTING IN WRITING)**

The elements of the crime of issuing a false financial statement (representing in writing) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. represented in writing that a written instrument purporting to describe another person's financial condition or ability to pay as of a prior date was accurate with respect to that person's current financial condition or ability to pay,
6. knowing the instrument was materially false in that respect and reasonably relied upon.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (representing in writing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (representing in writing).

### COMMENT

1. See § 18-5-209(1)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); *see also* Instruction F:394 (defining “written instrument” for forgery and other offenses in Article 5, Part 1).

## **5-2:14 ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE)**

The elements of the crime of issuing a false financial statement (obtaining a financial transaction device) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. upon filing one or more applications for a financial transaction device with an issuer,
- [6. knowingly made or caused to be made a false statement or report, which was false in some material respect and reasonably relied upon, relative to his [her] name, occupation, financial condition, assets, or liabilities]
- [6. willfully and substantially overvalued any assets or willfully omitted or substantially undervalued any indebtedness for the purpose of influencing the issuer to issue a financial transaction device], and
7. used one or more financial transaction devices issued in reliance upon such application(s) to obtain property or services or money.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false financial statement (obtaining a financial transaction device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false financial statement (obtaining a financial transaction device).

#### COMMENT

1. *See* § 18-5-209(3), (4), C.R.S. 2020.
2. *See* Instruction F:153 (defining “financial transaction device”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly” or “willfully”).
3. This model instruction reflects the Committee’s view that section 18-5-209(3) does not fully define an offense without inclusion of the additional element (of usage to obtain property or services or money) that appears in section 18-5-209(4). Significantly, section 18-5-209(3) does not contain a penalty provision, and it does not state that a violation constitutes a “felony,” “misdemeanor,” or “petty offense.” Therefore, none of the sentencing provisions for unclassified offenses can be utilized to ascertain the applicable punishment. *See* § 18-1.3-403, C.R.S. 2020 (“In all cases where an offense is denominated by statute as being a felony and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than five years in a correctional facility . . . or a fine of not more than fifteen thousand dollars, or both such imprisonment and fine.”); § 18-1.3-504(1), C.R.S. 2020 (“Any misdemeanor or petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it.”); § 18-1.3-505(1), C.R.S. 2020 (“In all cases where an offense is denominated a misdemeanor and no penalty is fixed in the statute therefor, the punishment shall be imprisonment for not more than three hundred sixty-four days in the county jail, or a fine of not more than one thousand dollars, or both imprisonment and fine.”). Accordingly, the Committee has concluded that the offense is a class 1 misdemeanor, *see* § 18-5-209(4), which can be elevated to a class 6 felony if the prosecution carries its burden of proof with respect to the sentencing enhancement provision in section 18-5-209(5), C.R.S. 2020. *See* Instruction

5-2:15.INT (issuing a false financial statement (obtaining a financial transaction device) – interrogatory (use of two or more devices)).

4. In 2019, the Committee updated a quotation in Comment 3 pursuant to a legislative amendment. *See* Ch. 59, sec. 3, § 18-1.3-505(1), 2019 Colo. Sess. Laws 201, 202.

## **5-2:15.INT ISSUING A FALSE FINANCIAL STATEMENT (OBTAINING A FINANCIAL TRANSACTION DEVICE) – INTERROGATORY (USE OF TWO OR MORE DEVICES)**

If you find the defendant not guilty of issuing a false financial statement (obtaining a financial transaction device), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of issuing a false financial statement (obtaining a financial transaction device), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the defendant use multiple financial transaction devices issued in reliance upon multiple false financial statements to obtain something of value? (Answer “Yes” or “No”)

The defendant used multiple financial transaction devices issued in reliance upon multiple false financial statements to obtain something of value only if:

1. he [she] committed the offense of false financial statement by obtaining two or more financial transaction devices by making two or more false financial statements and using those financial transaction devices to obtain property or services or money.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you unanimously decide the prosecution has met this burden with regard to the same two or more financial transaction devices, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden with regard to the same two or more financial transaction devices, you should mark “No” in the appropriate place, and

have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-5-209(5), C.R.S. 2020.

## 5-2:16 RECEIVING DEPOSITS IN A FAILING FINANCIAL INSTITUTION

The elements of the crime of receiving deposits in a failing financial institution are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was an officer, manager, or other person participating in the direction of a financial institution, and
  5. received or permitted the receipt of a deposit or investment,
  6. knowing that the institution was insolvent.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of receiving deposits in a failing financial institution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of receiving deposits in a failing financial institution.

### COMMENT

1. See § 18-5-210, C.R.S. 2020.
2. See Instruction F:183.3 (defining "insolvent"); Instruction F:195 (defining "knowingly").

3. See Op. Colo. Att’y Gen. File No. ORL8805828/AQX, Dec. 12, 1988, 1988 WL 410731 (“The management of an insolvent federally-chartered savings and loan association may not be prosecuted by the State under section 18-5-210 . . . because Congress has impliedly preempted this type of state regulation of such institutions through a pervasive scheme of legislation. The management of an insolvent state-chartered savings and loan association which is operating (and accepting deposits) under a binding supervisory agreement, entered into with the [Federal Savings and Loan Insurance Corporation (FSLIC)] pursuant to federal law, is also shielded from prosecution by the State under § 18-5-210, due to a conflicting, superseding federal regulatory scheme. However, the management of an insolvent state-chartered savings and loan association which is not operating under a federally authorized supervisory agreement with the FSLIC and continues to accept deposits would be subject to the provisions of § 18-5-210.”).

## 5-2:17 INSURANCE FRAUD (APPLICATION)

The elements of the crime of insurance fraud (application) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with an intent,
4. to defraud,
5. presented or caused to be presented in written, verbal, or digital form an application or request for the issuance, modification, or renewal of an insurance policy, which application or request, or documentation in support of such application or request, contained false material information or withheld material information that was requested by the insurer and resulted in the issuance of an insurance policy or insurance coverage for the applicant or another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (application).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (application).

### COMMENT

1. See § 18-5-211(1)(a), C.R.S. 2020.

2. See Instruction F:183.7 (defining “insurance”); Instruction F:185 (defining “with intent”); Instruction F:219.5 (defining “material information”).
3. In 2017, the Committee modified the fifth element pursuant to a legislative amendment. See Ch. 68, sec. 1, § 18-5-211(1)(a), 2017 Colo. Sess. Laws 214, 214.

## 5-2:18 INSURANCE FRAUD (CLAIM)

The elements of the crime of insurance fraud (claim) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with an intent,
4. to defraud,
5. presented or caused to be presented any insurance claim, which claim contained false material information or withheld material information.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (claim).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (claim).

### COMMENT

1. See § 18-5-211(1)(b), C.R.S. 2020.
2. See Instruction F:54.5 (defining “claim”); Instruction F:185 (defining “with intent”); Instruction F:219.5 (defining “material information”).
3. In 2017, the Committee modified the fifth element pursuant to a legislative amendment. See Ch. 68, sec. 1, § 18-5-211(1)(b), 2017 Colo. Sess. Laws 214, 214.

## 5-2:19 INSURANCE FRAUD (VEHICULAR)

The elements of the crime of insurance fraud (vehicular) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with an intent,
4. to defraud,
5. for the purpose of presenting any false or fraudulent insurance claim,
6. caused or participated, or purported to be involved, in a vehicular collision, or any other vehicular accident.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (vehicular).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (vehicular).

### COMMENT

1. *See* § 18-5-211(1)(c), C.R.S. 2020.
2. *See* Instruction F:54.5 (defining “claim”); Instruction F:183.7 (defining “insurance”); Instruction F:185 (defining “with intent”).

## 5-2:20 INSURANCE FRAUD (PREEXISTING)

The elements of the crime of insurance fraud (preexisting) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with an intent,
  4. to defraud,
  5. presented or caused to be presented an insurance claim where the loss or damage claimed occurred outside of the period of time that coverage was in effect for the applicable contract of insurance or policy, and
  6. doing so was not otherwise permitted under the contract of insurance or policy.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (preexisting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (preexisting).

### COMMENT

1. See § 18-5-211(1)(d), C.R.S. 2020.
2. See Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:185 (defining "with intent").

3. In 2017, pursuant to a legislative amendment, the Committee modified this instruction and split the fifth element into two separate elements. *See* Ch. 68, sec. 1, § 18-5-211(1)(d), 2017 Colo. Sess. Laws 214, 214.

## 5-2:21 INSURANCE FRAUD (CLAIM SUPPORT OR OPPOSITION)

The elements of the crime of insurance fraud (claim support or opposition) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with an intent,
4. to defraud,
5. presented or caused to be presented any written, verbal, or digital material or statement as part of, in support of or in opposition to, a claim for payment or other benefit pursuant to an insurance policy,
6. knowing that the material or statement contained false material information or withheld material information.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (claim support or opposition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (claim support or opposition).

### COMMENT

1. See § 18-5-211(1)(e), C.R.S. 2020.

2. See Instruction F:54.5 (defining “claim”); Instruction F:183.7 (defining “insurance”); Instruction F:185 (defining “with intent”); Instruction F:219.5 (defining “material information”).

3. In 2017, the Committee modified the fifth and sixth elements pursuant to a legislative amendment. See Ch. 68, sec. 1, § 18-5-211(1)(e), 2017 Colo. Sess. Laws 214, 215.

## 5-2:22 INSURANCE FRAUD (PREMIUM FUNDS)

The elements of the crime of insurance fraud (premium funds) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. moved, diverted, or misappropriated premium funds belonging to an insurer or unearned premium funds belonging to an insured or applicant for insurance from a trust or other account without the authorization of the owner of the funds or other lawful justification.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (premium funds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (premium funds).

### COMMENT

1. See § 18-5-211(2), C.R.S. 2020.
2. See Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:183.8 (defining "insurance producer"); Instruction F:195 (defining "knowingly").
3. In 2017, pursuant to a legislative amendment, the Committee removed the fourth element, renumbered the subsequent elements,

changed the phrase “producer’s trust” to “trust,” and removed the phrase “insurance producer or agent” from the instruction’s title. *See* Ch. 68, sec. 1, § 18-5-211(2), 2017 Colo. Sess. Laws 214, 215.

## 5-2:23 INSURANCE FRAUD (FALSE INFORMATION)

The elements of the crime of insurance fraud (false information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with an intent,
4. to defraud,
5. made, altered, presented, or caused to be presented a certificate or other evidence of the existence of insurance in any form that contained false material information or omitted material information.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurance fraud (false information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurance fraud (false information).

### COMMENT

1. See § 18-5-211(3), C.R.S. 2020.
2. See Instruction F:54.5 (defining "claim"); Instruction F:183.7 (defining "insurance"); Instruction F:183.8 (defining "insurance producer"); Instruction F:185 (defining "with intent"); Instruction F:219.5 (defining "material information"); see also Instruction F:385 (defining "utter" for purposes of forgery and other offenses in Article 5, Part 1).

3. In 2017, pursuant to a legislative amendment, the Committee removed the fifth element, renumbered the subsequent elements, modified the new fifth element, removed the phrase “insurance producer or agent” from the instruction’s title , and added a cross-reference to Instruction F:219.5 in Comment 2. *See* Ch. 68, sec. 1, § 18-5-211(3), 2017 Colo. Sess. Laws 214, 215.

## CHAPTER 5-3

### FRAUDULENT AND DECEPTIVE SALES AND BUSINESS PRACTICES

- [5-3:01](#) FRAUD IN EFFECTING SALES (FALSE WEIGHT OR MEASURE)
- [5-3:02](#) FRAUD IN EFFECTING SALES (LESS THAN REPRESENTED QUANTITY)
- [5-3:03](#) FRAUD IN EFFECTING SALES (MORE THAN REPRESENTED QUANTITY)
- [5-3:04](#) FRAUD IN EFFECTING SALES (ADULTERATED OR MISLABELED)
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- [5-3:06](#) SELLING LAND TWICE
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<a href="#"><u>5-3:28</u></a>	MONEY LAUNDERING (PROPERTY)

## CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

## 5-3:01 FRAUD IN EFFECTING SALES (FALSE WEIGHT OR MEASURE)

The elements of the crime of fraud in effecting sales (false weight or measure) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the course of business,
5. used or possessed for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (false weight or measure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (false weight or measure).

### COMMENT

1. See § 18-5-301(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).

## 5-3:02 FRAUD IN EFFECTING SALES (LESS THAN REPRESENTED QUANTITY)

The elements of the crime of fraud in effecting sales (less than represented quantity) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the course of business,
5. sold, offered, or exposed for sale or delivered less than the represented quantity of any commodity or service.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (less than represented quantity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (less than represented quantity).

### COMMENT

1. See § 18-5-301(1)(b), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly").

### **5-3:03 FRAUD IN EFFECTING SALES (MORE THAN REPRESENTED QUANTITY)**

The elements of the crime of fraud in effecting sales (more than represented quantity) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the course of business,
5. took or attempted to take more than the represented quantity of any commodity or service,
6. when as buyer he [she] furnished the weight or measure.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (more than represented quantity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (more than represented quantity).

#### **COMMENT**

1. *See* § 18-5-301(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

### **5-3:04 FRAUD IN EFFECTING SALES (ADULTERATED OR MISLABELED)**

The elements of the crime of fraud in effecting sales (adulterated or mislabeled) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the course of business,
5. sold, offered, or exposed for sale,
6. an adulterated or mislabeled commodity.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (adulterated or mislabeled).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (adulterated or mislabeled).

#### COMMENT

1. See § 18-5-301(1)(d), C.R.S. 2020.
2. See Instruction F:09.5 (defining "adulterated"); Instruction F:195 (defining "knowingly"); Instruction F:229.5 (defining "mislabeled").

## 5-3:05 FRAUD IN EFFECTING SALES (FALSE OR MISLEADING)

The elements of the crime of fraud in effecting sales (false or misleading) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the course of business,
5. made a false or misleading statement,
6. in any advertisement addressed to the public or to a substantial segment thereof,
7. for the purpose of promoting the purchase or sale of property or services.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraud in effecting sales (false or misleading).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of fraud in effecting sales (false or misleading).

### COMMENT

1. See § 18-5-301(1)(e), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).
3. Section 18-5-303(2), C.R.S. 2020, provides as follows:

It shall be an affirmative defense that a television or radio broadcasting station or a publisher or printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301(1)(e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser’s or subscriber’s intent, plan, or purpose.

However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:06 SELLING LAND TWICE

The elements of the crime of selling land twice are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. after once selling, bartering, or disposing of any land, or executing any bond or agreement for sale of any land,
6. again sold, bartered, or disposed of the same tract of land or any part thereof, or executed any bond or agreement to sell or barter or dispose of the same land or any part thereof,
7. to any other person,
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling land twice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling land twice.

### COMMENT

1. See § 18-5-302(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").

3. The term “defraud” is not defined by statute.

## 5-3:07 FALSE REPRESENTATION CONCERNING OWNERSHIP OF LAND

The elements of the crime of false representation concerning ownership of land are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made a false representation concerning the existence of an ownership interest in land which he [she] had as a seller or which his [her] principal had, and
  5. which was relied upon.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false representation concerning ownership of land.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false representation concerning ownership of land.

### COMMENT

1. See § 18-5-302(2), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly").

3. See *People v. Alexander*, 663 P.2d 1024, 1028-30 (Colo. 1983) (section 18-5-302(2) requires proof of actual reliance by the victim, without regard to what a reasonable person would have done).

## 5-3:08 NONCOMPLIANCE WITH A LIEN WAIVER FOR A CONSTRUCTION LOAN

The elements of the crime of noncompliance with a lien waiver for a construction loan are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. signed a lien waiver for a construction loan [that contained a statement, by the defendant, providing in substance that all debts owed to any third party by the defendant, and relating to the goods or services covered by the waiver of lien rights, had been paid or would be timely paid], and
  5. failed to timely pay any debt resulting from a construction agreement covered by the waiver.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of noncompliance with a lien waiver for a construction loan.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of noncompliance with a lien waiver for a construction loan.

### COMMENT

1. See § 18-5-302(3), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).
3. Because section 18-5-302(3) specifies that the lien waiver for a construction loan must have been one “under section 38-22-119,” the requirements of section 38-22-119 are reflected in the fourth element.
4. Section 18-5-302(3) includes the following excepting language after the provision establishing the offense as a class one misdemeanor: “unless there is a bona fide dispute as to the existence or amount of the debt.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:09 BAIT ADVERTISING

The elements of the crime of bait advertising are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent, plan, or purpose,
4. not to sell or provide the advertised property or services at all, or not at the price at which he [she] offered them, or not in a quantity sufficient to meet the reasonable expected public demand, unless the quantity was specifically stated in the advertisement,
5. offered property or services as part of a scheme or plan,
6. in any manner, including advertising or any other means of communication.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bait advertising.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bait advertising.

### COMMENT

1. See § 18-5-303(1), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”).

3. Section 18-5-303(2), C.R.S. 2020, provides as follows:

It shall be an affirmative defense that a television or radio broadcasting station or a publisher or printer of a newspaper, magazine, or other form of printed advertising which broadcasted, published, or printed a false advertisement prohibited by section 18-5-301(1)(e) or a bait advertisement prohibited by subsection (1) of this section or a telephone company which furnished service to a subscriber did so without knowledge of the advertiser's or subscriber's intent, plan, or purpose.

However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:10 FALSE STATEMENTS AS TO CIRCULATION

The elements of the crime of false statements as to circulation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in the publication of any newspaper, magazine, periodical, or other advertising medium published in the state of Colorado [, or was an employee of any such publisher], and
5. made any statement concerning the circulation of the newspaper, magazine, periodical, or other advertising medium which was untrue or misleading,
6. where such publisher fixed his [her] charges for advertising space in the publication on the amount of its circulation.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false statements as to circulation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of false statements as to circulation.

### COMMENT

1. See § 18-5-304, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

## 5-3:11 ALTERING AN IDENTIFICATION NUMBER

The elements of the crime of altering an identification number are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. that identification of an article be hindered or prevented,
5. obscured an identification number or in the course of business sold, offered for sale, leased, or otherwise disposed of an article,
6. knowing that an identification number thereon was obscured.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of altering an identification number.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of altering an identification number.

### COMMENT

1. *See* § 18-5-305(1), C.R.S. 2020.
2. *See* Instruction F:174.7 (defining “identification number”); Instruction F:185 (defining “with intent”); Instruction F:246.5 (defining “obscure”).

### **5-3:12.SP ALTERING AN IDENTIFICATION NUMBER – SPECIAL INSTRUCTION (POSSESSION OF AN ARTICLE WITH AN OBSCURED IDENTIFICATION NUMBER)**

Evidence that the defendant possessed an article on which an identification number was obscured gives rise to a permissible inference that the defendant obscured the number with intent to hinder or prevent identification of the article, and that he [she] knew that the identification number was obscured [, unless, prior to his [her] arrest or the issuance of a warrant for a search of the premises where the article was kept, whichever was earlier, he [she] had reported possession of the article to the police or other appropriate law enforcement agency].

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. See § 18-5-305(4), C.R.S. 2020.
2. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the “prima facie” proof provision of section 18-4-406 as establishing a permissible inference); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## **5-3:13 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FICTITIOUS JOB OR FALSE REPRESENTATION)**

The elements of the crime of prohibited practice by a private employment agency (fictitious job or false representation) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a private employment agency, or an employee of such agency, and
  5. sent an applicant, or caused an applicant to be sent, to any fictitious job or position; or made any false representation, or caused any false representation to be made, concerning the availability of employment.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (fictitious job or false representation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (fictitious job or false representation).

### COMMENT

1. See § 18-5-307(5.5)(a), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

## 5-3:14 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (STRIKE OR LOCKOUT)

The elements of the crime of prohibited practice by a private employment agency (strike or lockout) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. sent an applicant, or caused an applicant to be sent, to any place where a strike or lockout existed or was impending,
6. without notifying the applicant of the circumstances.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (strike or lockout).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (strike or lockout).

### COMMENT

1. See § 18-5-307(5.5)(b), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

## **5-3:15 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (CONDUCT WITH EMPLOYER)**

The elements of the crime of prohibited practice by a private employment agency (conduct with employer) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. conspired or arranged with any employer to secure the discharge of an employee; or gave or received any gratuity or divided or shared with an employer any fee, charge, or remuneration received from any applicant for employment; or caused any of the foregoing acts to be done.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (conduct with employer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (conduct with employer).

### COMMENT

1. See § 18-5-307(5.5)(c), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”); *see also* Instruction G2:05 (conspiracy).

## **5-3:16 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (CIRCULATION OR PUBLICATION)**

The elements of the crime of prohibited practice by a private employment agency (circulation or publication) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. circulated or published, by advertisement or otherwise, any false statements or representations to persons seeking employment or to employers seeking employees; or caused any of the foregoing acts to be done.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (circulation or publication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (circulation or publication).

### COMMENT

1. See § 18-5-307(5.5)(d), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

## **5-3:17 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FAILURE TO REFUND)**

The elements of the crime of prohibited practice by a private employment agency (failure to refund) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. failed to refund, or caused a failure to refund, fees to an applicant where such refund was due pursuant to law.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (failure to refund).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (failure to refund).

### **COMMENT**

1. *See* § 18-5-307(5.5)(e), C.R.S. 2020.
2. *See* Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

3. The court should draft a special instruction explaining the relevant portion(s) of the refund provisions in section 18-5-307(5), C.R.S. 2020.

## **5-3:18 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (FEE-PAID POSITION)**

The elements of the crime of prohibited practice by a private employment agency (fee-paid position) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. advertised or represented the availability of fee-paid positions where no cost would accrue to the applicant if hired in such a manner as to confuse such position with other available positions which were not available on a fee-paid basis; or caused any of the foregoing acts to be done.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (fee-paid position).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (fee-paid position).

### COMMENT

1. See § 18-5-307(5.5)(f), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:146.5 (defining “fee-paid position”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

## **5-3:19 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (NO FEE BASIS)**

The elements of the crime of prohibited practice by a private employment agency (no fee basis) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a private employment agency, or an employee of such agency, and
  5. advertised or represented that an available position was available on a free or no fee basis or otherwise indicated that no charge or cost would accrue to anyone when in fact the employer was obligated to pay a fee contingent upon the acceptance of employment of the applicant; or caused any of the foregoing acts to be done.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (no fee basis).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (no fee basis).

## COMMENT

1. *See* § 18-5-307(5.5)(g), C.R.S. 2020.
2. *See* Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”); *see also* Instruction F:146.5 (defining “fee-paid position”).

## 5-3:20 PROHIBITED PRACTICES BY PRIVATE EMPLOYMENT AGENCIES (ADVERTISING FOR SELF)

The elements of the crime of prohibited practice by a private employment agency (advertising for self) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a private employment agency, or an employee of such agency, and
5. advertised for, or caused the advertising of, any position, including personnel for its own staff,
6. without identifying in the advertisement that it was a private employment agency.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited practice by a private employment agency (advertising for self).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited practice by a private employment agency (advertising for self).

### COMMENT

1. See § 18-5-307(5.5)(h), C.R.S. 2020.

2. See Instruction F:21.5 (defining “applicant”); Instruction F:121.5 (defining “employment”); Instruction F:195 (defining “knowingly”); Instruction F:285.5 (defining “private employment agency”).

## **5-3:21 ELECTRONIC MAIL FRAUD (ACCESSING A PROTECTED COMPUTER WITHOUT AUTHORIZATION)**

The elements of the crime of electronic mail fraud (accessing a protected computer without authorization) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. accessed a protected computer without authorization, and
  5. intentionally initiated the transmission of multiple commercial electronic mail messages from or through such computer [, or conspired to do so].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (accessing a protected computer without authorization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (accessing a protected computer without authorization).

### **COMMENT**

1. This instruction is patterned on 18 U.S.C. § 1037(a)(1), which is incorporated into section 18-5-308(1), C.R.S. 2020 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec.

1037(a).”). However, users should be aware of one deliberate omission from the model instruction.

Although 18 U.S.C. § 1037(a) requires proof that the fraud “affect[ed] interstate or foreign commerce,” the General Assembly declared “that the intent of . . . section 18-5-308, C.R.S., is to exercise state authority in a manner consistent with, and to the maximum extent permissible under, the federal preemption provisions of 15 U.S.C. sec. 7707(b).” § 6-1-702.5(6)(c), C.R.S. 2020. And 15 U.S.C. § 7707(b) states, in relevant part, that it:

supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

Therefore, because 15 U.S.C. § 7707(b) does not purport to preempt state statutes that criminalize false or deceptive electronic mail messages affecting *intrastate* commerce, it appears the General Assembly did not intend to incorporate the interstate and foreign commerce language of 15 U.S.C. § 7707(b) into section 18-5-308(1). Accordingly, this language, which relates to the establishment of federal jurisdiction, is not included in the above instruction.

2. See Instruction F:57.3 (defining “commercial electronic mail message”); Instruction F:195 (defining “knowingly”); Instruction F:239.5 (defining “multiple”); see also 18 U.S.C. § 1037(4) (2014) (“Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].”).

3. Section 18-5-308(2), C.R.S. 2020, establishes an exemption from criminal liability: “This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:22 ELECTRONIC MAIL FRAUD (USING A PROTECTED COMPUTER)

The elements of the crime of electronic mail fraud (using a protected computer) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. used a protected computer to relay or retransmit multiple commercial electronic mail messages,
5. with the intent to deceive or mislead recipients, or any internet access service, as to the origin of such messages.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (using a protected computer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (using a protected computer).

### COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(2), which is incorporated into section 18-5-308(1), C.R.S. 2020 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). See Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. See Instruction F:57.3 (defining “commercial electronic mail message”); Instruction F:239.5 (defining “multiple”); *see also* 18 U.S.C. § 1037(4) (2014) (“Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].”).
3. It is unclear whether the term “knowingly,” which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.
4. Section 18-5-308(2), C.R.S. 2020, establishes an exemption from criminal liability: “This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:23 ELECTRONIC MAIL FRAUD (FALSIFIED HEADER)

The elements of the crime of electronic mail fraud (falsified header) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. materially falsified header information in multiple commercial electronic mail messages, and
  5. intentionally initiated the transmission of such messages.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (falsified header).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (falsified header).

### COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(3), which is incorporated into section 18-5-308(1), C.R.S. 2020 ("A person commits electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a)."). See Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. See Instruction F:57.3 (defining "commercial electronic mail message"); Instruction F:219.7 (defining "materially"); Instruction F:239.5

(defining “multiple”); *see also* 18 U.S.C. § 1037(4) (2014) (“Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].”).

3. It is unclear whether the term “knowingly,” which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.

4. Section 18-5-308(2), C.R.S. 2020, establishes an exemption from criminal liability: “This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-3:24 ELECTRONIC MAIL FRAUD (FALSIFIED REGISTRATION)

The elements of the crime of electronic mail fraud (falsified registration) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. registered, using information that materially falsified the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and
  5. intentionally initiated the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (falsified registration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (falsified registration).

### COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(4), which is incorporated into section 18-5-308(1), C.R.S. 2020 ("A person commits

electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a).”). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining “commercial electronic mail message”); Instruction F:219.7 (defining “materially”); Instruction F:239.5 (defining “multiple”); *see also* 18 U.S.C. § 1037(4) (2014) (“Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].”).

3. It is unclear whether the term “knowingly,” which is incorporated from 18 U.S.C. § 1037(a), is to be defined according to federal or state law.

4. Section 18-5-308(2), C.R.S. 2020, establishes an exemption from criminal liability: “This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.” However, the Committee has not drafted a model affirmative defense instruction.

## **5-3:25 ELECTRONIC MAIL FRAUD (FALSE REPRESENTATION AS TO REGISTRANT)**

The elements of the crime of electronic mail fraud (false representation as to registrant) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. falsely represented himself [herself] to be the registrant or the legitimate successor in interest to the registrant of five or more internet protocol addresses, and
5. intentionally initiated the transmission of multiple commercial electronic mail messages from such addresses [, or conspired to do so].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of electronic mail fraud (false representation as to registrant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of electronic mail fraud (false representation as to registrant).

### COMMENT

1. This instruction is patterned on 18 U.S.C. § 1037(a)(5), which is incorporated into section 18-5-308(1), C.R.S. 2020 ("A person commits

electronic mail fraud if he [she] violates any provision of 18 U.S.C. sec. 1037(a).”). *See* Instruction 5-3:21, Comment 1 (discussing interstate and intrastate commerce).

2. *See* Instruction F:57.3 (defining “commercial electronic mail message”); Instruction F:195 (defining “knowingly”); Instruction F:239.5 (defining “multiple”); *see also* 18 U.S.C. § 1037(4) (2014) (“Any other term has the meaning given that term by [Section 3 of the CAN-SPAM Act of 2003, which is codified as 15 U.S.C. § 7702].”).

3. Section 18-5-308(2), C.R.S. 2020, establishes an exemption from criminal liability: “This section shall not apply to a provider of internet access service, as defined in 47 U.S.C. sec. 231, who does not initiate the commercial electronic mail message.” However, because the applicability of this exemption will rarely depend on the resolution of a disputed factual issue, the Committee has not drafted a model affirmative defense instruction.

## **5-3:26 MONEY LAUNDERING (CONDUCTING OR ATTEMPTING)**

The elements of the crime of money laundering (conducting or attempting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent to promote the commission of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to avoid a transaction reporting requirement under [insert description of relevant federal law],
4. conducted or attempted to conduct a financial transaction that involved money or any other thing of value that he [she] knew or believed to be the proceeds, in any form, of a criminal offense.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (conducting or attempting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (conducting or attempting).

## COMMENT

1. *See* § 18-5-309(1)(a), C.R.S. 2020.
2. *See* Instruction F:67.5 (defining “conducts or attempts to conduct a financial transaction”); Instruction F:152.5 (defining “financial transaction”); Instruction F:185 (defining “with intent”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

### **5-3:27 MONEY LAUNDERING (TRANSPORTED, TRANSMITTED, OR TRANSFERRED)**

The elements of the crime of money laundering (transported, transmitted, or transferred) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent to promote the commission of a criminal offense; or with knowledge or a belief that the monetary instrument or moneys represented the proceeds of a criminal offense and that the transportation, transmission, or transfer was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense; or with knowledge or a belief that the transaction was designed in whole or in part to avoid a transaction reporting requirement under [insert description of relevant federal law],
4. transported, transmitted, or transferred a monetary instrument or moneys.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (transported, transmitted, or transferred).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (transported, transmitted, or transferred).

## COMMENT

1. *See* § 18-5-309(1)(b), C.R.S. 2020.
2. *See* Instruction F:152.5 (defining “financial transaction”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:232.5 (defining “monetary instrument”); Instruction F:312.5 (defining “represent”); Instruction F:374.5 (defining “transaction”).

## 5-3:28 MONEY LAUNDERING (PROPERTY)

The elements of the crime of money laundering (property) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. conducted a financial transaction involving property that was represented to be the proceeds of a criminal offense, or involving property that the defendant knew or believed to have been used to conduct or facilitate a criminal offense, to promote the commission of a criminal offense; conceal or disguise the nature, location, source, ownership, or control of property that the defendant believed to be the proceeds of a criminal offense; or avoid a transaction reporting requirement under [insert description of relevant federal law].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of money laundering (property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of money laundering (property).

### COMMENT

1. See § 18-5-309(1)(c), C.R.S. 2020.
2. See Instruction F:67.5 (defining “conducts or attempts to conduct a financial transaction”); Instruction F:152.5 (defining “financial transaction”); Instruction F:185 (defining “intentionally”); Instruction

F:232.5 (defining “monetary instrument”); Instruction F:312.5 (defining “represent”); Instruction F:374.5 (defining “transaction”).

## CHAPTER 5-4

### BRIBERY AND RIGGING OF CONTESTS

<a href="#"><u>5-4:01</u></a>	COMMERCIAL BRIBERY – BREACH OF A DUTY OF FIDELITY
<a href="#"><u>5-4:02</u></a>	COMMERCIAL BRIBERY – BREACH OF A DUTY TO ACT DISINTERESTEDLY
<a href="#"><u>5-4:03</u></a>	COMMERCIAL BRIBERY – BRIBING ANOTHER AS TO A DUTY OF FIDELITY
<a href="#"><u>5-4:04</u></a>	COMMERCIAL BRIBERY – BRIBING ANOTHER AS TO A DUTY TO ACT DISINTERESTEDLY
<a href="#"><u>5-4:05</u></a>	RIGGING A PUBLICLY EXHIBITED CONTEST (BENEFIT OR THREAT)
<a href="#"><u>5-4:06</u></a>	RIGGING A PUBLICLY EXHIBITED CONTEST (TAMPERING)
<a href="#"><u>5-4:07</u></a>	RIGGING A PUBLICLY EXHIBITED CONTEST (SOLICITING OR ACCEPTING)
<a href="#"><u>5-4:08</u></a>	RIGGING A PUBLICLY EXHIBITED CONTEST (KNOWLEDGE OF RIGGING)
<a href="#"><u>5-4:09</u></a>	BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS PARTICIPANT)
<a href="#"><u>5-4:10</u></a>	BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS OFFICIAL)
<a href="#"><u>5-4:11</u></a>	BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS PARTICIPANT)
<a href="#"><u>5-4:12</u></a>	BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS OFFICIAL)
<a href="#"><u>5-4:13</u></a>	BRIBERY IN SPORTS (TAMPERING)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

## 5-4:01 COMMERCIAL BRIBERY – BREACH OF A DUTY OF FIDELITY

The elements of the crime of commercial bribery (breach of a duty of fidelity) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. solicited, accepted, or agreed to accept any benefit as consideration for,
5. violating or agreeing to violate a duty of fidelity to which he [she] was subject,
6. as agent or employee; or trustee, guardian, or other fiduciary; or lawyer, physician, accountant, appraiser, or other professional adviser; or officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or arbitrator or other purportedly disinterested adjudicator or referee.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (breach of a duty of fidelity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (breach of a duty of fidelity).

## COMMENT

1. See § 18-5-401(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The term “consideration” is not defined in section 18-5-401. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”).
4. See *People v. Lee*, 717 P.2d 493, 496 (Colo. 1986) (the commercial bribery statute does not unconstitutionally delegate legislative power to private persons in violation of the distribution of powers doctrine contained in Article III of the Colorado Constitution, notwithstanding the absence of a definition of the term “duty of fidelity”; because the term is synonymous with the term “duty of loyalty,” which has been “defined through years of common law interpretation,” the statute does not “allow the person to whom the duty is owed unfettered discretion in defining the term”).

## 5-4:02 COMMERCIAL BRIBERY – BREACH OF A DUTY TO ACT DISINTERESTEDLY

The elements of the crime of commercial bribery (breach of a duty to act disinterestedly) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. held himself [herself] out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services, and
5. solicited, accepted, or agreed to accept any benefit to alter, modify, or change his [her] selection, appraisal, or criticism.
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (breach of a duty to act disinterestedly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (breach of a duty to act disinterestedly).

### COMMENT

1. See § 18-5-401(2), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

## 5-4:03 COMMERCIAL BRIBERY – BRIBING ANOTHER AS TO A DUTY OF FIDELITY

The elements of the crime of commercial bribery (bribing another as to a duty of fidelity) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. conferred or offered or agreed to confer any benefit the acceptance of which would have been consideration for another person knowingly violating or agreeing to violate a duty of fidelity to which he [she] was subject,
4. as agent or employee; or trustee, guardian, or other fiduciary; or lawyer, physician, accountant, appraiser, or other professional adviser; or officer, director, partner, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or duly elected or appointed representative or trustee of a labor organization or employee welfare trust fund; or arbitrator or other purportedly disinterested adjudicator or referee.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (bribing another as to a duty of fidelity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (bribing another as to a duty of fidelity).

## COMMENT

1. See § 18-5-401(1), (3), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The term “consideration” is not defined in section 18-13-125. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”).

## 5-4:04 COMMERCIAL BRIBERY – BRIBING ANOTHER AS TO A DUTY TO ACT DISINTERESTEDLY

The elements of the crime of commercial bribery (bribing another as to a duty to act disinterestedly) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. conferred or offered agreed to confer any benefit,
4. to a person who held himself [herself] out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services to knowingly alter, modify, or change his [her] selection, appraisal, or criticism.
- [5. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of commercial bribery (bribing another as to a duty to act disinterestedly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of commercial bribery (bribing another as to a duty to act disinterestedly).

### COMMENT

1. See § 18-5-401(2), (3), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in

a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The term “consideration” is not defined in section 18-13-125. *See, e.g., Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”).

## 5-4:05 RIGGING A PUBLICLY EXHIBITED CONTEST (BENEFIT OR THREAT)

The elements of the crime of rigging a publicly exhibited contest (benefit or threat) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,
4. conferred or offered or agreed to confer any benefit upon, or threatened any detriment to,
5. a participant, official, or other person associated with the contest or exhibition.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (benefit or threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (benefit or threat).

### COMMENT

1. See § 18-5-402(1)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").

## 5-4:06 RIGGING A PUBLICLY EXHIBITED CONTEST (TAMPERING)

The elements of the crime of rigging a publicly exhibited contest (tampering) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,
4. tampered with any person, animal, or thing.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (tampering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (tampering).

### COMMENT

1. See § 18-5-402(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:360 (defining “tamper”).

## **5-4:07 RIGGING A PUBLICLY EXHIBITED CONTEST (SOLICITING OR ACCEPTING)**

The elements of the crime of rigging a publicly exhibited contest (soliciting or accepting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to prevent a publicly exhibited or advertised contest from being conducted in accordance with the rules and usages purporting to govern it,
5. knowingly,
6. solicited, accepted, or agreed to accept any benefit,
7. the conferring of which would have constituted the offense of rigging a publicly exhibited contest (benefit).
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (soliciting or accepting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (soliciting or accepting).

## COMMENT

1. *See* § 18-5-402(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).
3. When using this model instruction, provide the jury with a copy of Instruction 5-4:05 (rigging a publicly exhibited contest (benefit)) that does not include the two final paragraphs describing the prosecution’s burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 5-4:08 RIGGING A PUBLICLY EXHIBITED CONTEST (KNOWLEDGE OF RIGGING)

The elements of the crime of rigging a publicly exhibited contest (knowledge of rigging) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in, sponsored, produced, judged, or otherwise participated in a publicly exhibited or advertised contest,
5. knowing that the contest was not being conducted in compliance with the rules and usages purporting to govern it, by reason of any person committing the offense of rigging a publicly exhibited contest ([benefit or threat] [tampering] [soliciting or accepting]).
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of rigging a publicly exhibited contest (knowledge of rigging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of rigging a publicly exhibited contest (knowledge of rigging).

### COMMENT

1. See § 18-5-402(1), (2), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).
3. When using this model instruction, provide the jury with instruction(s) defining the relevant offense(s) without including the two final paragraphs describing the prosecution’s burden of proof. See Instructions 5-4:05 to 5-4:07. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s).

## 5-4:09 BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS PARTICIPANT)

The elements of the crime of bribery in sports (benefit or threat; sports participant) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to influence a sports participant not to give his [her] best efforts in a sports contest,
5. conferred or offered or agreed to confer, any benefit upon or threatened any detriment to,
6. a sports participant.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (benefit or threat; sports participant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (benefit or threat; sports participant).

### COMMENT

1. See § 18-5-403(2)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:350.3 (defining “sports contest”); Instruction F:350.7 (defining “sports participant”).

## 5-4:10 BRIBERY IN SPORTS (BENEFIT OR THREAT; SPORTS OFFICIAL)

The elements of the crime of bribery in sports (benefit or threat; sports official) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to influence a sports official to perform his [her] duties improperly,
5. conferred or offered or agreed to confer, any benefit upon or threatened any detriment to,
6. a sports official.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (benefit or threat; sports official).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (benefit or threat; sports official).

### COMMENT

1. See § 18-5-403(2)(b), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.5 (defining "sports official").

## **5-4:11 BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS PARTICIPANT)**

The elements of the crime of bribery in sports (soliciting or accepting; sports participant) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a sports participant, and
5. accepted, agreed to accept, or solicited any benefit from another person,
6. upon an understanding that the defendant would thereby be influenced not to give his [her] best efforts in a sports contest.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (soliciting or accepting; sports participant).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (soliciting or accepting; sports participant).

### COMMENT

1. See § 18-5-403(2)(c), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:350.3 (defining “sports contest”); Instruction F:350.7 (defining “sports participant”).

## **5-4:12 BRIBERY IN SPORTS (SOLICITING OR ACCEPTING; SPORTS OFFICIAL)**

The elements of the crime of bribery in sports (soliciting or accepting; sports official) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a sports official, and
5. accepted, agreed to accept, or solicited any benefit from another person,
6. upon an understanding that the defendant would thereby be influenced to perform his [her] duties improperly.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (soliciting or accepting; sports official).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (soliciting or accepting; sports official).

### COMMENT

1. *See* § 18-5-403(2)(d), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:350.3 (defining “sports contest”); Instruction F:350.5 (defining “sports official”).

## 5-4:13 BRIBERY IN SPORTS (TAMPERING)

The elements of the crime of bribery in sports (tampering) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to influence the outcome of a sports contest,
5. tampered with any sports participant, sports official, or any animal or equipment or other thing involved in the conduct or operation of a sports contest in a manner contrary to the rules and usages purporting to govern such a contest.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery in sports (tampering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of bribery in sports (tampering).

### COMMENT

1. See § 18-5-403(2)(e), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:350.3 (defining "sports contest"); Instruction F:350.5 (defining "sports official"); Instruction F:350.7 (defining "sports participant"); Instruction F:360 (defining "tamper").

## CHAPTER 5-5

### OFFENSES RELATING TO THE UNIFORM COMMERCIAL CODE

<a href="#"><u>5-5:01</u></a>	FAILURE TO PAY OVER ASSIGNED ACCOUNTS
<a href="#"><u>5-5:02.INT</u></a>	FAILURE TO PAY OVER ASSIGNED ACCOUNTS – INTERROGATORY (AMOUNT)
<a href="#"><u>5-5:03</u></a>	CONCEALMENT OR REMOVAL OF SECURED PROPERTY
<a href="#"><u>5-5:04.INT</u></a>	CONCEALMENT OR REMOVAL OF SECURED PROPERTY – INTERROGATORY (VALUE)
<a href="#"><u>5-5:05</u></a>	FAILURE TO PAY OVER PROCEEDS
<a href="#"><u>5-5:06.INT</u></a>	FAILURE TO PAY OVER PROCEEDS – INTERROGATORY (AMOUNT)
<a href="#"><u>5-5:07</u></a>	ISSUANCE OF A FRAUDULENT RECEIPT
<a href="#"><u>5-5:08</u></a>	FALSE STATEMENT IN RECEIPT
<a href="#"><u>5-5:09</u></a>	ISSUANCE OF A DUPLICATE RECEIPT NOT MARKED
<a href="#"><u>5-5:10</u></a>	WAREHOUSE’S GOODS MINGLED
<a href="#"><u>5-5:11</u></a>	DELIVERY OF GOODS WITHOUT RECEIPT
<a href="#"><u>5-5:12</u></a>	NEGOTIATING A RECEIPT WITH INTENT TO DECEIVE
<a href="#"><u>5-5:13</u></a>	ISSUANCE OF A BAD CHECK
<a href="#"><u>5-5:14.SP</u></a>	ISSUANCE OF A BAD CHECK – SPECIAL INSTRUCTION (KNOWLEDGE OF INSUFFICIENT FUNDS)

### CHAPTER COMMENTS

1. Many of the terms that appear in this chapter have special statutory definitions. *See* § 18-5-501, C.R.S. 2020 (“The definitions set forth in the ‘Uniform Commercial Code’, title 4, C.R.S., shall apply to sections 18-5-502 to 18-5-511.”). The Committee recommends that users review any relevant

official comments when drafting definitional instructions tailored to the evidence at trial. *See* § 4-9-102, cmts. 2-26, C.R.S. 2020.

2. The Committee added this chapter in 2015.

## 5-5:01 FAILURE TO PAY OVER ASSIGNED ACCOUNTS

The elements of the crime of failure to pay over assigned accounts are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully and wrongfully,
4. was, under the terms of an assignment of an account, as that term is defined in these instructions, an assignor who was permitted to collect the proceeds from the debtor to pay over any proceeds to the assignee, and
5. after collection of the proceeds,
6. failed to pay over the proceeds to the assignee.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay over assigned accounts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay over assigned accounts.

### COMMENT

1. See § 18-5-502, C.R.S. 2020.

2. See Instruction F:195 (defining “willfully”); see also § 4-9-102(a)(2), C.R.S. 2020 (defining “account”); § 4-9-102(a)(3) (defining “account debtor”).

3. The terms “assignor” and “assignee” are not defined by statute. See, e.g., *Black’s Law Dictionary*, 142, 144 (10th ed. 2014) (defining an “assignee” as “[o]ne to whom property rights or powers are transferred by another,” and an “assignor” as “[s]omeone who transfers property rights or powers to another.”).

## **5-5:02.INT FAILURE TO PAY OVER ASSIGNED ACCOUNTS – INTERROGATORY (AMOUNT)**

If you find the defendant not guilty of failure to pay over assigned accounts, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to pay over assigned accounts, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the amount of the proceeds withheld one thousand dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the amount of the proceeds beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. *See* § 18-5-502, C.R.S. 2020.

## 5-5:03 CONCEALMENT OR REMOVAL OF SECURED PROPERTY

The elements of the crime of concealment or removal of secured property are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. gave a security interest in personal property, or had actual knowledge of a security interest in personal property given by another person, and
5. during the existence of the security interest,
6. concealed the encumbered property or removed the encumbered property from Colorado,
7. without written consent of the secured creditor.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of concealment or removal of secured property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of concealment or removal of secured property.

### COMMENT

1. See § 18-5-504, C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); § 4-1-201(b)(12), (35), (43), C.R.S. 2020 (defining “creditor,” “security interest,” and “writing”).

3. See *People v. Armijo*, 589 P.2d 935, 938 (Colo. 1979) (the statute does not require that the security interest be perfected and applies to any valid security interest, perfected or not).

## **5-5:04.INT CONCEALMENT OR REMOVAL OF SECURED PROPERTY – INTERROGATORY (VALUE)**

If you find the defendant not guilty of concealment or removal of secured property, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of concealment or removal of secured property, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the value of the property concealed or removed one thousand dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the value of the property beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. *See* § 18-5-504, C.R.S. 2020.

## 5-5:05 FAILURE TO PAY OVER PROCEEDS

The elements of the crime of failure to pay over proceeds are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. gave a security interest in personal property, and
4. retained possession of that property, and
5. according to the terms creating such security interest, was required to account to the secured creditor for the proceeds of any sale or disposition of the encumbered property, and
6. willfully and wrongfully failed to pay to the secured creditor the amounts due from the sale or disposition.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay over proceeds.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay over proceeds.

### COMMENT

1. See § 18-5-505, C.R.S. 2020.
2. See Instruction F:195 (defining “willfully”); § 4-1-201(b)(12), (35), C.R.S. 2020 (defining “creditor” and “security interest”).

## 5-5:06.INT FAILURE TO PAY OVER PROCEEDS – INTERROGATORY (AMOUNT)

If you find the defendant not guilty of failure to pay over proceeds, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to pay over proceeds, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

1. Was the amount of the proceeds the defendant wrongfully withheld one thousand dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the amount of the proceeds beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-5-505, C.R.S. 2020.

## 5-5:07 ISSUANCE OF A FRAUDULENT RECEIPT

The elements of the crime of issuance of a fraudulent receipt are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a warehouse, or an officer, agent, or servant of a warehouse, and
4. issued or aided in issuing a receipt,
5. knowing that the goods for which the receipt had been issued had not been actually received by the warehouse, or were not under the warehouse's actual control at the time of issuing the receipt.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a fraudulent receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a fraudulent receipt.

### COMMENT

1. See § 18-5-506, C.R.S. 2020.
2. See Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse").

## 5-5:08 FALSE STATEMENT IN RECEIPT

The elements of the crime of false statement in receipt are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a warehouse, or an officer, agent, or servant of a warehouse, and
4. fraudulently issued or aided in fraudulently issuing a receipt for goods knowing that it contained any false statement.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false statement in receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false statement in receipt.

### COMMENT

1. See § 18-5-507, C.R.S. 2020.
2. See Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse").

## 5-5:09 ISSUANCE OF A DUPLICATE RECEIPT NOT MARKED

The elements of the crime of issuance of a duplicate receipt not marked are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a warehouse, or an officer, agent, or servant of a warehouse, and
4. issued or aided in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for the same goods or any part of them was outstanding and uncanceled,
5. without placing upon the face thereof the word "duplicate."
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a duplicate receipt not marked.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a duplicate receipt not marked.

### COMMENT

1. See § 18-5-508, C.R.S. 2020.
2. See Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse"); see also § 4-7-501, C.R.S. 2020 ("Form of negotiation and requirements for due negotiation").

3. Section 18-5-508 includes an exception for cases involving “a lost or destroyed receipt after proceedings as provided for in section 4-7-601, C.R.S.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-5:10 WAREHOUSE'S GOODS MINGLED

The elements of the crime of warehouse's goods mingled are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a warehouse, or an officer, agent, or servant of a warehouse, and
4. knowing that goods deposited with or held by the warehouse were goods of which the warehouse was the owner, either solely or jointly or in common with others,
5. issued or aided in issuing a negotiable receipt for the goods that did not state such ownership.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of warehouse's goods mingled.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of warehouse's goods mingled.

### COMMENT

1. *See* § 18-5-509, C.R.S. 2020.
2. *See* Instruction 161.5 (defining "goods"); Instruction F:391.5 (defining "warehouse"); *see also* § 4-7-501, C.R.S. 2020 ("Form of negotiation and requirements for due negotiation").

## 5-5:11 DELIVERY OF GOODS WITHOUT RECEIPT

The elements of the crime of delivery of goods without receipt are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a warehouse, or an officer, agent, or servant of a warehouse, and
4. delivered goods out of the possession of such warehouse,
5. knowing that a negotiable receipt, the negotiation of which would transfer the right of the possession of those goods, was outstanding and uncanceled,
6. without obtaining the possession of that receipt at or before the time of the delivery.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of delivery of goods without receipt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of delivery of goods without receipt.

### COMMENT

1. *See* § 18-5-510, C.R.S. 2020.

2. See Instruction 161.5 (defining “goods”); Instruction F:391.5 (defining “warehouse”); *see also* § 4-7-501, C.R.S. 2020 (“Form of negotiation and requirements for due negotiation”).

3. Section 18-5-510 includes an exception for “cases provided for in section 4-7-601, C.R.S.” However, the Committee has not drafted a model affirmative defense instruction.

## 5-5:12 NEGOTIATING A RECEIPT WITH INTENT TO DECEIVE

The elements of the crime of negotiating a receipt with intent to deceive:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. deposited goods to which he [she] did not have title, or upon which there was a security interest in personal property, and
4. took for such goods a negotiable receipt, and
5. afterwards negotiated that receipt for value,
6. with intent to deceive, and
7. without disclosing his [her] want of title or the existence of such security interest.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of negotiating a receipt with intent to deceive.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of negotiating a receipt with intent to deceive.

### COMMENT

1. See § 18-5-511, C.R.S. 2020.

2. See Instruction 161.5 (defining “goods”); Instruction F:185 (defining “with intent”); § 4-1-201(b)(35), C.R.S. 2020 (defining “security interest”); *see also* § 4-7-501, C.R.S. 2020 (“Form of negotiation and requirements for due negotiation”).

## 5-5:13 ISSUANCE OF A BAD CHECK

The elements of the crime of issuance of a bad check are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. other than by committing the offense of fraud by check (insufficient funds),
4. issued or passed a check or similar sight order for the payment of money,
5. knowing that [he] [she] [the issuer] did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuance of a bad check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuance of a bad check.

### COMMENT

1. See § 18-5-512(3), C.R.S. 2020.
2. See Instruction F:183.6 (defining “insufficient funds”).
3. Do not use the definition of “issuer” in Instruction F:189. That definition is derived from section 18-5-701(4), C.R.S. 2020, which applies to

financial transaction device crimes. *See* § 18-5-701(3), C.R.S. 2020 (excluding a “check” from the definition of a “financial transaction device”); *see also* Instruction F:153 (defining “financial transaction device”).

4. If the defendant is not charged with fraud by check, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 5-2:01 (fraud by check – insufficient funds). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for fraud by check.

## 5-5:14.SP ISSUANCE OF A BAD CHECK – SPECIAL INSTRUCTION (KNOWLEDGE OF INSUFFICIENT FUNDS)

Except in the case of a postdated check or order, the following evidence gives rise to a permissible inference that the issuer had knowledge of his [her] insufficient funds: he [she] had no account with the bank or other drawee at the time he [she] issued the check or order; or he [she] had insufficient funds upon deposit with the bank or other drawee to pay the check or order, on presentation within thirty days after issue.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. Section 18-5-512(4), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained to the jury as a permissible inference. *See People v. Felgar*, 58 P.3d 1122, 1125 (Colo. App. 2002) (construing a parallel provision, in section 18-5-205(8), as creating a permissible inference, and holding that the trial court committed reversible error by instructing the jury, in the language of the statute, that if certain circumstances existed it could presume that the defendant had knowledge of insufficient funds in his account); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissive inference in a criminal case does not violate due process).

## CHAPTER 5-7

### FINANCIAL TRANSACTION DEVICE CRIMES

- [5-7:01](#) UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE
- [5-7:02.INT](#) UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – INTERROGATORY (VALUE)
- [5-7:03.SP](#) UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – SPECIAL INSTRUCTION (NOTICE)
- [5-7:04](#) CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE
- [5-7:05.INT](#) CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (POSSESSION OF MULTIPLE DEVICES)
- [5-7:06.INT](#) CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF A SINGLE DEVICE)
- [5-7:07.INT](#) CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF MULTIPLE DEVICES)
- [5-7:08](#) CRIMINAL POSSESSION OF FORGERY DEVICES
- [5-7:09](#) UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (MADE OR MANUFACTURED)
- [5-7:10](#) UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (ALTERATION OR ADDITION)
- [5-7:11](#) UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (COMPLETION)

## 5-7:01 UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE

The elements of the crime of unauthorized use of a financial transaction device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. used a financial transaction device for the purpose of obtaining cash, credit, property, or services, or for making financial payment,
6. with notice that the financial transaction device had expired, had been revoked, or had been cancelled, or with notice that his [her] use of the financial transaction device was, for any reason, unauthorized by the issuer thereof or the account holder.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized use of a financial transaction device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized use of a financial transaction device.

### COMMENT

1. See § 18-5-702(1), C.R.S. 2020.

2. See Instruction F:153 (defining “financial transaction device”); Instruction F:242 (defining “notice”); Instruction F:185 (defining “with intent”); Instruction F:189 (defining “issuer”).
3. The term “defraud” is not defined by statute.
4. See *People v. Novitskiy*, 81 P.3d 1070, 1073 (Colo. App. 2003) (“we construe § 18-5-702 to require that a defendant in fact obtain possession or use of cash, credit, property, or services through the unauthorized use of a financial transaction device”); *People v. Pipkin*, 762 P.2d 736, 737 (Colo. App. 1988) (“the statutory requirement that notice be given in person or in writing applies to the account holder or to one in possession of the card with permission of the account holder and not to one using an allegedly lost or stolen card”); cf. *People v. Patton*, 2016 COA 187, ¶ 13, 425 P.3d 1152, 1156 (“We conclude that [section 18-5-702(2)] does not require notice only in person or in writing, because the word ‘includes’ is a word that is meant to extend rather than limit.”).
5. In 2019, the Committee added the citation to *Patton* in Comment 4.

## **5-7:02.INT UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – INTERROGATORY (VALUE)**

If you find the defendant not guilty of unauthorized use of a financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unauthorized use of a financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the value of the cash, credit, property, or services obtained or of the financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use [insert value(s) from section 18-5-702(3)]? (Answer “Yes” or “No”)
- [2. Was the value of the cash, credit, property, or services obtained or of the financial payments made by unauthorized use of a single financial transaction device within a six-month period from the date of the first unauthorized use [insert value(s) from section 18-5-702(3)]? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-5-702(3), (4), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes a bracketed example of a lesser valuation question.
4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.

## 5-7:03.SP UNAUTHORIZED USE OF A FINANCIAL TRANSACTION DEVICE – SPECIAL INSTRUCTION (NOTICE)

The sending of a notice in writing by registered or certified mail, return receipt requested, duly stamped and addressed to such account holder at his [her] last address known to the issuer, evidenced by a signed returned receipt signed by the account holder, gives rise to a permissible inference that the notice was received.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See Section 18-5-702(2), C.R.S. 2020.
2. This concept should be explained as a permissible inference. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing “prima facie” proof provision as establishing a permissible inference); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 5-7:04 CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE

The elements of criminal possession or sale of a blank financial transaction device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without the authorization of the issuer or manufacturer,
4. had in his [her] possession or under his [her] control or received from another person, with intent to use, deliver, circulate, or sell it or with intent to cause the use, delivery, circulation, or sale of it, or sold,
5. any financial transaction device which had at least one or more characteristics of a financial transaction device but did not contain all of the characteristics of a completed financial transaction device because it had not been embossed or magnetically encoded with the name of the account holder, personal identification code, expiration date, or other proprietary institutional information.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession or sale of a blank financial transaction device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession or sale of a blank financial transaction device.

## COMMENT

1. *See* § 18-5-705(1), (6), C.R.S. 2020.
2. *See* Instruction F:06 (defining “account holder”); Instruction F:34 (defining “blank financial transaction device,” as incorporated into the fifth element above); Instruction F:153 (defining “financial transaction device”); Instruction F:185 (defining “with intent”); Instruction F:189 (defining “issuer”); Instruction F:270 (defining “personal identification code”); Instruction F:281 (defining “possession”).

**5-7:05.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (POSSESSION OF MULTIPLE DEVICES)**

If you find the defendant not guilty of criminal possession or sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession or sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess multiple devices? (Answer “Yes” or “No”)

The defendant possessed multiple devices only if:

1. the defendant possessed two or more blank financial transaction devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-5-705(3), C.R.S. 2020.
2. See Instruction F:34 (defining “blank financial transaction device”); see, e.g., Instruction E:28 (special verdict form).

**5-7:06.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF A SINGLE DEVICE)**

If you find the defendant not guilty of criminal possession or sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession or sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant deliver, circulate, or sell a device? (Answer “Yes” or “No”)

The defendant delivered, circulated, or sold a device only if:

1. the defendant delivered, circulated, or sold one blank financial transaction device.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**COMMENT**

1. See § 18-5-705(4), C.R.S. 2020.

2. See Instruction F:34 (defining “blank financial transaction device”); see, e.g., Instruction E:28 (special verdict form).

**5-7:07.INT CRIMINAL POSSESSION OR SALE OF A BLANK FINANCIAL TRANSACTION DEVICE – INTERROGATORY (DELIVERY, CIRCULATION, OR SALE OF MULTIPLE DEVICES)**

If you find the defendant not guilty of criminal sale of a blank financial transaction device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal sale of a blank financial transaction device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant deliver, circulate, or sell multiple devices?  
(Answer “Yes” or “No”)

The defendant delivered, circulated, or sold multiple devices only if:

1. the defendant delivered, circulated, or sold two or more blank financial transaction devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**COMMENT**

1. See § 18-5-705(5), C.R.S. 2020.

2. See Instruction F:34 (defining “blank financial transaction device”); *see, e.g.*, Instruction E:28 (special verdict form).

## 5-7:08 CRIMINAL POSSESSION OF FORGERY DEVICES

The elements of criminal possession of forgery devices are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. possessed any tools, photographic equipment, printing equipment, or any other device adapted, designed, or commonly used for committing or facilitating the commission of a crime involving the unauthorized manufacture, printing, embossing, or magnetic encoding of a financial transaction device or the altering or addition of any uniform product codes, optical characters, or holographic images to a financial transaction device, and
  4. intended to use the thing possessed, or knew that some person intended to use the thing possessed, in the commission of such a crime.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of forgery devices.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of forgery devices.

### COMMENT

1. *See* § 18-5-706, C.R.S. 2020.

2. See Instruction F:153 (defining “financial transaction device”); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:281 (defining “possession”).

3. If the defendant is not separately charged with unlawful manufacture of a financial transaction device in violation of section 18-5-707, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 5-7:09 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (MADE OR MANUFACTURED)

The elements of the crime of unlawful manufacture of a financial transaction device (made or manufactured) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely made or manufactured a financial transaction device,
6. by printing, embossing, or magnetically encoding.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (made or manufactured).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (made or manufactured).

### COMMENT

1. See § 18-5-707(1)(a), C.R.S. 2020.
2. See Instruction F:145 (defining “falsely make”); Instruction F:185 (defining “with intent”).

3. The term “defraud” is not defined by statute.

## **5-7:10 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (ALTERATION OR ADDITION)**

The elements of the crime of unlawful manufacture of a financial transaction device (alteration or addition) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to defraud,
  5. falsely altered or added uniform product codes, optical characters, or holographic images to a device which was or purported to be, or which was calculated to become or to represent if completed, a financial transaction device.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (alteration or addition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (alteration or addition).

### COMMENT

1. See § 18-5-707(1)(b), C.R.S. 2020.
2. See Instruction F:140 (defining “falsely alter”); Instruction F:185 (defining “with intent”).

3. The term “defraud” is not defined by statute.

## 5-7:11 UNLAWFUL MANUFACTURE OF A FINANCIAL TRANSACTION DEVICE (COMPLETION)

The elements of the crime of unlawful manufacture of a financial transaction device (completion) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
5. falsely completed a financial transaction device by adding to an incomplete device to make it a complete one.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacture of a financial transaction device (completion).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacture of a financial transaction device (completion).

### COMMENT

1. See § 18-5-707(1)(c), C.R.S. 2020.
2. See Instruction F:142 (defining "falsely complete"); Instruction F:185 (defining "with intent").
3. The term "defraud" is not defined by statute.

## CHAPTER 5-8

### EQUITY SKIMMING AND RELATED OFFENSES

<a href="#">5-8:01</a>	EQUITY SKIMMING OF REAL PROPERTY
<a href="#">5-8:02</a>	EQUITY SKIMMING OF A VEHICLE (CONTROL)
<a href="#">5-8:03</a>	EQUITY SKIMMING OF A VEHICLE (ARRANGING)
<a href="#">5-8:04</a>	EQUITY SKIMMING OF A VEHICLE (MONTHLY PAYMENTS)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

## 5-8:01 EQUITY SKIMMING OF REAL PROPERTY

The elements of the crime of equity skimming of real property are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. acquired an interest in real property that was encumbered by a loan secured by a mortgage or deed of trust, and
5. the loan was [in arrears at the time the defendant acquired the interest] [placed in default within eighteen months after the defendant acquired the interest], and
6. [failed to apply all rent derived from the person's interest in the real property first toward the satisfaction of all outstanding payments due on the loan and second toward any fees due to any association of real property owners that charges such fees for the upkeep of the housing facility, or common area including buildings and grounds thereof, of which the real property was a part before appropriating the remainder of such rent or any part thereof for any other purpose except for the purpose of repairs necessary to prevent waste of the real property]  
  
[after a foreclosure in which title had vested, collected rent on behalf of any person other than the owner of the real property].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of real property.

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of real property.

#### COMMENT

1. *See* § 18-5-802(1), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:307.5 (defining “real property”); Instruction F:311.5 (defining “rent”); Instruction F:329.5 (defining “security interest”).
3. *See* Instruction H:47.5 (affirmative defense of “full payment”). *But see* § 18-5-802(4)(a), C.R.S. 2020 (specifying that this affirmative defense is unavailable where the defendant is charged with violating section 18-5-802(1)(b)(II), C.R.S. 2020 (collecting rent on behalf of any person other than the owner of the real property after a foreclosure in which title has vested)).
4. Sections 18-5-802(5), (6), C.R.S. 2020, state that section 18-5-802(1) is inapplicable to a bona fide lender who accepts a deed in lieu of foreclosure or who forecloses on property, or to a bona fide purchaser who complies with prescribed notice and disclosure provision. However, the Committee has not drafted model affirmative defense instructions.
5. If necessary, draft a special instruction to explain the vesting of title upon expiration of the redemption period under section 38-38-501, C.R.S. 2020.

## 5-8:02 EQUITY SKIMMING OF A VEHICLE (CONTROL)

The elements of the crime of equity skimming of a vehicle (control) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that a vehicle was subject to a security interest, lien, or lease,
4. accepted possession of or exercised any control over the vehicle,
5. in exchange for consideration in the form of a verbal assurance or otherwise, and
6. obtained or exercised control over the vehicle of another, and
7. then sold or leased the vehicle to a third party,
8. without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (control).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle (control).

## COMMENT

1. *See* § 18-5-803(1)(a), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:196.5 (defining “lease”) Instruction F:329.5 (defining “security interest”); Instruction F:385.5 (defining “vehicle”).
3. Section 18-5-803(1)(a) includes excepting language where full payment is made within thirty days. However, the Committee takes no position concerning whether this provision establishes an element of the offense or an affirmative defense.

## 5-8:03 EQUITY SKIMMING OF A VEHICLE (ARRANGING)

The elements of the crime of equity skimming of a vehicle (arranging) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowing that a vehicle was subject to a security interest, lien, or lease,
  4. accepted possession of or exercised any control over the vehicle,
  5. in exchange for consideration in the form of a verbal assurance or otherwise, and
  6. arranged the sale or lease of the vehicle of another to a third party,
  7. without first obtaining written authorization from the secured creditor, lessor, or lienholder for the transaction of the sale or lease to the third party, and
  8. exercised control over any part of the funds received.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle (arranging).

## COMMENT

1. *See* § 18-5-803(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:196.5 (defining “lease”) Instruction F:329.5 (defining “security interest”); Instruction F:385.5 (defining “vehicle”).
3. Section 18-5-803(1)(b) includes excepting language where full payment is made within thirty days. However, the Committee takes no position concerning whether this provision establishes an element of the offense or an affirmative defense.

## 5-8:04 EQUITY SKIMMING OF A VEHICLE (MONTHLY PAYMENTS)

The elements of the crime of equity skimming of a vehicle (monthly payments) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that a vehicle was subject to a security interest, lien, or lease,
4. accepted possession of or exercised any control over the vehicle,
5. in exchange for consideration in the form of a verbal assurance or otherwise, and
6. knowingly,
7. failed to ascertain on a monthly basis whether payments were due to the secured creditor, lienholder, or lessor, and
8. failed to apply all funds he [she] received for any lease or sale of the vehicle toward the satisfaction of any outstanding payment due to the secured creditor, lienholder, or lessor in a timely manner.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of equity skimming of a vehicle (monthly payments).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of equity skimming of a vehicle

(monthly payments).

#### COMMENT

1. *See* § 18-5-803(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:196.5 (defining “lease”) Instruction F:329.5 (defining “security interest”); Instruction F:385.5 (defining “vehicle”).



## CHAPTER 5-9

### IDENTIFY THEFT AND RELATED OFFENSES

<a href="#"><u>5-9:01</u></a>	IDENTITY THEFT (USE)
<a href="#"><u>5-9:02</u></a>	IDENTITY THEFT (POSSESSION)
<a href="#"><u>5-9:03</u></a>	IDENTITY THEFT (FALSELY MADE, COMPLETED, ALTERED, OR UTTERED)
<a href="#"><u>5-9:04</u></a>	IDENTITY THEFT (FINANCIAL DEVICE OR EXTENSION OF CREDIT)
<a href="#"><u>5-9:05</u></a>	IDENTITY THEFT (GOVERNMENT-ISSUED DOCUMENT)
<a href="#"><u>5-9:06</u></a>	CRIMINAL POSSESSION OF A FINANCIAL DEVICE
<a href="#"><u>5-9:07.INT</u></a>	CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (MULTIPLE DEVICES)
<a href="#"><u>5-9:08.INT</u></a>	CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (DIFFERENT ACCOUNT HOLDERS)
<a href="#"><u>5-9:09</u></a>	CRIMINAL POSSESSION OF AN IDENTIFICATION DOCUMENT
<a href="#"><u>5-9:10.INT</u></a>	CRIMINAL POSSESSION OF AN IDENTIFICATION DOCUMENT – INTERROGATORY (DIFFERENT PERSONS)
<a href="#"><u>5-9:11</u></a>	GATHERING IDENTITY INFORMATION BY DECEPTION
<a href="#"><u>5-9:12</u></a>	POSSESSION OF IDENTITY THEFT TOOLS

## 5-9:01 IDENTITY THEFT (USE)

The elements of the crime of identity theft (use) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. used the personal identifying information, financial identifying information, or financial device of another,
5. without permission or lawful authority, and
6. with the intent,
7. to obtain cash, credit, property, services, or any other thing of value or to make a financial payment.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (use).

### COMMENT

1. See § 18-5-902(1)(a), C.R.S. 2020.
2. See Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:249

(defining “of another”); Instruction F:272 (defining “personal identifying information”).

3. See *People v. Beck*, 187 P.3d 1125, 1128-29 (Colo. App. 2008) (“Section 18-5-902(1) uses the phrase ‘thing of value,’ but does not explicitly incorporate the definition found in section 18-1-901(3)(r). . . . The list of things in the identity theft statute includes items such as cash and things that can be lawfully exchanged for cash, or financial payments. They all have financial or economic value and can be lawfully obtained, or made in the case of a financial payment, through the use of a financial device or personal or financial identifying information. None is a public right, duty, or entitlement that cannot be lawfully obtained in exchange for payment. Accordingly, we reject the People’s contention that, for purposes of the identity theft statute, the phrase ‘to obtain . . . any other thing of value’ includes the nonpecuniary benefits of misleading and influencing the actions of a police officer, such as obtaining the use of another person’s driving record.”).

4. See *People v. Perez*, 2016 CO 12, ¶¶ 14, 22, 367 P.3d 695, 699, 700 (holding that the term “knowingly” in the identity theft statute “applies to the use of the identifying information of another,” meaning the prosecution “must prove that an offender knowingly used personal identifying information and knew that the information belonged to another person”).

5. In 2017, the Committee added Comment 4.

## 5-9:02 IDENTITY THEFT (POSSESSION)

The elements of the crime of identity theft (possession) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed the personal identifying information, financial identifying information, or financial device of another,
5. without permission or lawful authority, and
6. with the intent,
7. to use or to aid or permit some other person to use such information or device to obtain cash, credit, property, services, or any other thing of value or to make a financial payment.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (possession).

### COMMENT

1. See § 18-5-902(1)(b), C.R.S. 2020.
2. See Instruction F:150 (defining "financial device"); Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining

“with intent”); Instruction F:195 (defining “knowingly”); Instruction F:249 (defining “of another”); Instruction F:272 (defining “personal identifying information”); Instruction F:281 (defining “possession”).

3. See *People v. Beck*, 187 P.3d 1125, 1128-29 (Colo. App. 2008) (“Section 18-5-902(1) uses the phrase ‘thing of value,’ but does not explicitly incorporate the definition found in section 18-1-901(3)(r). . . . The list of things in the identity theft statute includes items such as cash and things that can be lawfully exchanged for cash, or financial payments. They all have financial or economic value and can be lawfully obtained, or made in the case of a financial payment, through the use of a financial device or personal or financial identifying information. None is a public right, duty, or entitlement that cannot be lawfully obtained in exchange for payment. Accordingly, we reject the People’s contention that, for purposes of the identity theft statute, the phrase ‘to obtain . . . any other thing of value’ includes the nonpecuniary benefits of misleading and influencing the actions of a police officer, such as obtaining the use of another person’s driving record.”).

## 5-9:03 IDENTITY THEFT (FALSELY MADE, COMPLETED, ALTERED, OR UTTERED)

The elements of the crime of identity theft (falsely made, completed, altered, or uttered) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to defraud,
5. falsely made, completed, altered, or uttered a written instrument or financial device containing any personal identifying information or financial identifying information of another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (falsely made, completed, altered, or uttered).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (falsely made, completed, altered, or uttered).

### COMMENT

1. See § 18-5-902(1)(c), C.R.S. 2020.
2. See Instruction F:140.5 (defining “falsely alter”); Instruction F:143 (defining “falsely complete”); Instruction F:146 (defining “falsely make”);

Instruction F:150 (defining “financial device”); Instruction F:151 (defining “financial identifying information”); Instruction F:185 (defining “with intent”); Instruction F:249 (defining “of another”); Instruction F:272 (defining “personal identifying information”); Instruction F:395 (defining “written instrument”); *see also* Instruction F:385 (defining “utter” based on section 18-5-101(8), C.R.S. 2020, which defines the term for purposes of forgery and impersonation offenses in sections 18-5-101 to 18-5-110).

3. The term “defraud” is not defined by statute.

## 5-9:04 IDENTITY THEFT (FINANCIAL DEVICE OR EXTENSION OF CREDIT)

The elements of the crime of identity theft ([financial device] [extension of credit]) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed the personal identifying information or financial identifying information of another,
5. without permission or lawful authority,
6. to use in applying for or completing an application for a financial device or other extension of credit.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft ([financial device] [extension of credit]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft ([financial device] [extension of credit]).

### COMMENT

1. *See* § 18-5-902(1)(d), C.R.S. 2020.

2. See Instruction F:136 (defining “extension of credit”); Instruction F:150 (defining “financial device”); Instruction F:151 (defining “financial identifying information”); Instruction F:195 (defining “knowingly”); Instruction F:249 (defining “of another”); Instruction F:272 (defining “personal identifying information”); Instruction F:281 (defining “possession”).

## 5-9:05 IDENTITY THEFT (GOVERNMENT-ISSUED DOCUMENT)

The elements of the crime of identity theft (government-issued document) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. used or possessed the personal identifying information of another,
  5. without permission or lawful authority,
  6. with the intent to obtain a government-issued document.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of identity theft (government-issued document).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of identity theft (government-issued document).

### COMMENT

1. See § 18-5-902(1)(e), C.R.S. 2020.
2. See Instruction F:164 (defining "government"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:249 (defining "of another"); Instruction F:272 (defining

“personal identifying information”); Instruction F:281 (defining “possession”).

## 5-9:06 CRIMINAL POSSESSION OF A FINANCIAL DEVICE

The elements of criminal possession of a financial device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had in his [her] possession or under his [her] control,
4. any financial device,
5. that he [she] knew, or reasonably should have known, to be lost, stolen, or delivered under mistake as to the identity or address of the account holder.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of a financial device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of a financial device.

### COMMENT

1. See § 18-5-903(1), C.R.S. 2020.
2. See Instruction F:07 (defining "account holder"); Instruction F:150 (defining "financial device"); Instruction F:281 (defining "possession").
3. See *People v. Stevenson*, 881 P.2d 383 (Colo. App. 1994) (holding, at a time when the offense was codified at section 18-5-703(1)), that:

A person who finds a lost or stolen credit device commits no crime in temporarily taking it into possession for delivery to its lawful owner or other appropriate authority. Possession becomes criminal only if the actor is aware that the device is lost, stolen, or misdelivered and voluntarily maintains possession “for a sufficient period to have been able to terminate it.” *See* § 18-1-501(9).

*Stevenson*, 881 P.2d at 384.

## 5-9:07.INT CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (MULTIPLE DEVICES)

If you find the defendant not guilty of criminal possession of a financial device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of a financial device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess multiple devices? (Answer “Yes” or “No”)

The defendant possessed multiple devices only if:

1. the defendant possessed two or more financial devices.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-5-903(2)(b), C.R.S. 2020.
2. *See, e.g.,* Instruction E:28 (special verdict form).

## 5-9:08.INT CRIMINAL POSSESSION OF A FINANCIAL DEVICE – INTERROGATORY (DIFFERENT ACCOUNT HOLDERS)

If you find the defendant not guilty of criminal possession of a financial device, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of a financial device, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess devices of different account holders?  
(Answer “Yes” or “No”)

The defendant possessed devices of different account holders only if:

1. the defendant possessed four or more financial devices,
2. of which at least two were issued to different account holders.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-5-903(2)(c), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-9:09 CRIMINAL POSSESSION OF AN IDENTIFICATION DOCUMENT

The elements of criminal possession of an identification document are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. had in his [her] possession or under his [her] control,
5. another person's actual driver's license, actual government-issued identification card, actual social security card, or actual passport,
6. knowing that he [she] did so without permission or lawful authority.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal possession of an identification document.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal possession of an identification document.

### COMMENT

1. *See* § 18-5-903.5(1), C.R.S. 2020.

2. See Instruction F:164 (defining “government”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).

**5-9:10.INT CRIMINAL POSSESSION OF AN  
IDENTIFICATION DOCUMENT – INTERROGATORY  
(DIFFERENT PERSONS)**

If you find the defendant not guilty of criminal possession of an identification document, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal possession of an identification document, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess documents of different persons? (Answer “Yes” or “No”)

The defendant possessed documents of different persons only if:

1. the defendant possessed two or more identification documents,
2. of which at least two were issued to different persons.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-5-903.5(2)(b), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 5-9:11 GATHERING IDENTITY INFORMATION BY DECEPTION

The elements of the crime of gathering identity information by deception are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made or conveyed a materially false statement,
5. without permission or lawful authority,
6. with the intent to obtain, record, or access the personal identifying information or financial identifying information of another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gathering identity information by deception.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gathering identity information by deception.

### COMMENT

1. See § 18-5-904, C.R.S. 2020.
2. See Instruction F:151 (defining "financial identifying information"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining

“knowingly”); Instruction F:249 (defining “of another”); Instruction F:272 (defining “personal identifying information”); *see also* Instruction F:143 (defining “materially false statement” as part of the definition of “falsely complete” (identity theft and related offenses)).

## 5-9:12 POSSESSION OF IDENTITY THEFT TOOLS

The elements of the crime of possession of identity theft tools are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. possessed any tools, equipment, computer, computer network, scanner, printer, or other article adapted, designed, or commonly used for committing or facilitating the commission of the crime of identity theft, and
  4. intended to use the thing possessed, or knew that a person intended to use the thing possessed, in the commission of the crime of identity theft.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of identity theft tools.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of identity theft tools.

### COMMENT

1. See § 18-5-905, C.R.S. 2020.
2. See Instruction F:185 (defining "intentionally" and "with intent"); Instruction F:281 (defining "possession"); Instructions 5-9:01 to 5-9:05 (identity theft); see also Instruction F:61 (defining "computer," for purposes of the cybercrime statute); Instruction F:62 (defining "computer network," for purposes of the cybercrime statute).

3. If the defendant is not separately charged with identity theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4. In 2018, the Committee changed the term “computer crime” to “cybercrime” in Comment 2 pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## CHAPTER 5.5

### CYBERCRIME

<a href="#">5.5:01</a>	CYBERCRIME (AUTHORIZATION)
<a href="#">5.5:02</a>	CYBERCRIME (DEFRAUD)
<a href="#">5.5:03</a>	CYBERCRIME (PRETENSES)
<a href="#">5.5:04</a>	CYBERCRIME (THEFT)
<a href="#">5.5:05</a>	CYBERCRIME (ALTERATION OR DAMAGE)
<a href="#">5.5:06</a>	CYBERCRIME (TRANSMISSION)
<a href="#">5.5:07</a>	CYBERCRIME (ON-LINE EVENT TICKET SALE)
<a href="#">5.5:07.2</a>	CYBERCRIME (ENDANGER MINOR)
<a href="#">5.5:07.5</a>	CYBERCRIME (ACCESS INFORMATION)
<a href="#">5.5:07.8</a>	CYBERCRIME (ENCODING MACHINE)
<a href="#">5.5:08.INT</a>	CYBERCRIME – INTERROGATORY (VALUE)

### CHAPTER COMMENTS

1. In 2018, per a legislative amendment, the Committee changed the title of this chapter from “Computer Crime” to “Cybercrime.” *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:01 CYBERCRIME (AUTHORIZATION)

The elements of cybercrime (authorization) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. accessed a computer, computer network, or computer system or any part thereof without authorization; exceeded authorized access to a computer, computer network, or computer system or any part thereof; or used a computer, computer network, or computer system or any part thereof without authorization or in excess of authorized access.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (authorization).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (authorization).

### COMMENT

1. See § 18-5.5-102(1)(a), C.R.S. 2020.
2. See Instruction F:28 (defining "authorization"); Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system"); Instruction F:130 (defining "exceed authorized access"); Instruction F:383 (defining "use").

3. See also *People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant “accessed” a computer or computer system, within the meaning of section 18-5.5-102(1)(c)-(d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:02 CYBERCRIME (DEFRAUD)

The elements of cybercrime (defraud) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. accessed any computer network, computer system, or any part thereof,
5. for the purpose of devising or executing any scheme or artifice to defraud.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (defraud).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (defraud).

### COMMENT

1. See § 18-5.5-102(1)(b), C.R.S. 2020.
2. See Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:65 (defining “computer system”).
3. See also *People v. Rice*, 198 P.3d 1241, 1243-44 (Colo. App. 2008) (defendant “accessed” a computer or computer system, within the meaning of section 18-5.5-102(1)(c)-(d), by submitting false information through an automated phone system to make fraudulent claims for unemployment

benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. The term “defraud” is not defined by statute.

5. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

### 5.5:03 CYBERCRIME (PRETENSES)

The elements of cybercrime (pretenses) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. accessed any computer, computer network, or computer system, or any part thereof,
5. to obtain, by means of false or fraudulent pretenses, representations, or promises,
6. money; property; services; passwords or similar information through which a computer, computer network, or computer system or any part thereof may be accessed; or other thing of value.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (pretenses).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (pretenses).

#### COMMENT

1. See § 18-5.5-102(1)(c), C.R.S. 2020.
2. See Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:65 (defining “computer system”);

Instruction F:335 (defining “services”); Instruction F:371 (defining “thing of value”).

3. See *People v. Rice*, 198 P.3d 1241, 1243–44 (Colo. App. 2008) (defendant “accessed” a computer or computer system, within the meaning of section 18-5.5-102(1)(c)–(d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:04 CYBERCRIME (THEFT)

The elements of cybercrime (theft) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. accessed any computer, computer network, or computer system, or any part thereof, to commit the crime of theft.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (theft).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (theft).

### COMMENT

1. See § 18-5.5-102(1)(d), C.R.S. 2020.
2. See Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:65 (defining “computer system”); Chapter 4-4 (theft).
3. See *People v. Rice*, 198 P.3d 1241, 1243–44 (Colo. App. 2008) (defendant “accessed” a computer or computer system, within the meaning of section 18-5.5-102(1)(c)–(d), by submitting false information through an automated phone system to make fraudulent claims for unemployment benefits; the evidence established that the phone system was a computerized system which used an interactive voice response technology).

4. If the defendant is not separately charged with theft, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

### **5.5:05 CYBERCRIME (ALTERATION OR DAMAGE)**

The elements of cybercrime (alteration or damage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. without authorization or in excess of authorized access,
5. altered, damaged, interrupted, or caused the interruption or impairment of the proper functioning of, or caused any damage to,
6. any computer, computer network, computer system, computer software, program, application, documentation, or data contained in such computer, computer network, or computer system or any part thereof.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (alteration or damage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (alteration or damage).

#### COMMENT

1. See § 18-5.5-102(1)(e), C.R.S. 2020.

2. See Instruction F:28 (defining “authorization”); Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:63 (defining “computer program”); Instruction F:64 (defining “computer software”); Instruction F:65 (defining “computer system”); Instruction F:83 (defining “damage”); Instruction F:130 (defining “exceed authorized access”).

3. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:06 CYBERCRIME (TRANSMISSION)

The elements of cybercrime (transmission) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused the transmission of a computer program, software, information, code, data, or command by means of a computer, computer network, or computer system or any part thereof,
5. with the intent to cause damage to or cause the interruption or impairment of the proper functioning of, any computer, computer network, computer system, or part thereof; or that actually caused damage to or the interruption or impairment of the proper functioning of, any computer, computer network, computer system, or part thereof.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (transmission).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (transmission).

### COMMENT

1. See § 18-5.5-102(1)(f), C.R.S. 2020.
2. See Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:63 (defining “computer program”);

Instruction F:64 (defining “computer software”); Instruction F:65 (defining “computer system”); Instruction F:83 (defining “damage”).

3. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:07 CYBERCRIME (ON-LINE EVENT TICKET SALE)

The elements of cybercrime (on-line event ticket sale) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. used or caused to be used,
5. a software application that ran automated tasks over the internet to access a computer, computer network, or computer system, or any part thereof,
6. that circumvented or disabled any electronic queues, waiting periods, or other technological measure intended by the seller to limit the number of event tickets that may be purchased by any single person in an on-line event ticket sale.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (on-line event ticket sale).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (on-line event ticket sale).

### COMMENT

1. See § 18-5.5-102(1)(g), C.R.S. 2020.

2. See Instruction F:61 (defining “computer”); Instruction F:62 (defining “computer network”); Instruction F:64 (defining “computer software”); Instruction F:65 (defining “computer system”); Instruction F:253 (defining “on-line event ticket sale”).

3. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. See Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:07.2 CYBERCRIME (ENDANGER MINOR)

The elements of cybercrime (endanger minor) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. solicited or offered to arrange a situation in which a minor may engage in prostitution,
  5. by means of using a computer, computer network, computer system, or any part thereof.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (endanger minor).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (endanger minor).

### COMMENT

1. See § 18-5.5-102(1)(h), C.R.S. 2020.
2. See Instruction F:61 (defining "computer"); Instruction F:62 (defining "computer network"); Instruction F:65 (defining "computer system"); Instruction F:195 (defining "knowingly"); Instruction F:383 (defining "use").

3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 379, sec. 2, § 18-5.5-102(1)(h), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:07.5 CYBERCRIME (ACCESS INFORMATION)

The elements of cybercrime (access information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. directly or indirectly used a scanning device,
5. to access, read, obtain, memorize, or store, temporarily or permanently,
6. information encoded on a payment card without the permission of the authorized user of the payment card,
7. with the intent,
8. to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (access information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (access information).

### COMMENT

1. See § 18-5.5-102(1)(i), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:262.5 (defining “payment card”); Instruction F:328.5 (defining “scanning device”).
3. The term “defraud” is not defined by statute.
4. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 379, sec. 2, § 18-5.5-102(1)(i), 2018 Colo. Sess. Laws 2290, 2291.

### 5.5:07.8 CYBERCRIME (ENCODING MACHINE)

The elements of cybercrime (encoding machine) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. directly or indirectly used an encoding machine to place information encoded on a payment card onto a different payment card,
5. without the permission of the authorized user of the payment card from which the information being reencoded was obtained,
6. with the intent,
7. to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cybercrime (encoding machine).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cybercrime (encoding machine).

#### COMMENT

1. See § 18-5.5-102(1)(j), C.R.S. 2020.

2. See Instruction F:122.5 (defining “encoding machine”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:262.5 (defining “payment card”).

3. The term “defraud” is not defined by statute.

4. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 379, sec. 2, § 18-5.5-102(1)(j), 2018 Colo. Sess. Laws 2290, 2291.

## 5.5:08.INT CYBERCRIME – INTERROGATORY (VALUE)

If you find the defendant not guilty of cybercrime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of cybercrime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the cybercrime [insert a description of the amount(s) from section 18-5.5-102(3)].  
(Answer “Yes” or “No”)
  
- [2. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the cybercrime [insert a description of the amount(s) from section 18-5.5-102(3)].  
(Answer “Yes” or “No”)]
  
- [3. Was the loss, damage, value of services, or thing of value taken, or cost of restoration or repair caused by the cybercrime [insert a description of the amount(s) from section 18-5.5-102(3)].  
(Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the loss, damage, value of services, or thing of value taken, or cost of restoration or repair beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place,

and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-5.5-102(3)(a)(I)–(IX), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In cases where value is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one valuation question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for two lesser valuation questions.
4. Where more than one valuation question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one valuation question. *See* Instruction 4-4:06.INT, Comment 4.
5. In 2018, the Committee changed the term “computer crime” to “cybercrime” throughout this instruction pursuant to a legislative amendment. *See* Ch. 379, sec. 2, § 18-5.5-102(1), 2018 Colo. Sess. Laws 2290, 2291.



## CHAPTER 6-2

### BIGAMY

[6-2:01](#)

**BIGAMY (MARRIAGE)**

[6-2:02](#)

**BIGAMY (CIVIL UNION)**

[6-2:03](#)

**MARRYING A BIGAMIST**

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 6-2:01 BIGAMY (MARRIAGE)

The elements of the crime of bigamy (marriage) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a married person and, while still married,
  4. married, entered into a civil union, or cohabitated in this state with another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bigamy (marriage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bigamy (marriage).

### COMMENT

1. *See* § 18-6-201(1), C.R.S. 2020.
2. *See* Instruction F:56.8 (defining “cohabitation”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. *See* Instruction H:47.7 (affirmative defense of “reasonable belief or extended absence”).

4. Where the existence of a common law marriage is at issue, the court should draft a supplemental instruction explaining the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).
5. The statute does not define the term “civil union.”

## 6-2:02 BIGAMY (CIVIL UNION)

The elements of the crime of bigamy (civil union) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a partner in a civil union and, while still legally in a civil union,
4. married, entered into another civil union, or cohabitated in this state with another person who was not a current partner in the civil union.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bigamy (civil union).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bigamy (civil union).

### COMMENT

1. *See* § 18-6-201(1.5), C.R.S. 2020.
2. *See* Instruction F:56.8 (defining “cohabitation”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:47.7 (affirmative defense of “reasonable belief or extended absence”).
4. The statute does not define the term “civil union.”

## 6-2:03 MARRYING A BIGAMIST

The elements of the crime of marrying a bigamist are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was an unmarried person, and
5. married or cohabitated with another in this state under circumstances known to him [her] which would have rendered the other person guilty of bigamy, as that offense is defined in these instructions.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of marrying a bigamist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of marrying a bigamist.

### COMMENT

1. See § 18-6-202, C.R.S. 2020.
2. See Instruction F:56.8 (defining “cohabitation”); Instruction F:195 (defining “knowingly”).
3. Because this instruction requires the jury to determine whether another person would be guilty of bigamy, the court should provide the jury with a modified version of either Instruction 6-2:01 or Instruction 6-

2:02 (defining bigamy in the context of marriages and civil unions, respectively). The court should change the first element to read “That a person” rather than “That the defendant,” omit the phrase “at or about the date and place charged” from the second element, and omit the two concluding paragraphs that explain the burden of proof.



## CHAPTER 6-3

### INCEST

- [6-3:01](#) INCEST (AN ANCESTOR OR DESCENDANT, INCLUDING A NATURAL CHILD TWENTY-ONE YEARS OF AGE OR OLDER, BROTHER, SISTER, UNCLE, AUNT, NEPHEW, OR NIECE)
- [6-3:02](#) INCEST (ADOPTED CHILD OR STEPCHILD)
- [6-3:03](#) AGGRAVATED INCEST (NATURAL CHILD UNDER THE AGE OF TWENTY-ONE)
- [6-3:04](#) AGGRAVATED INCEST (STEPCHILD, OR CHILD BY ADOPTION)
- [6-3:05](#) AGGRAVATED INCEST (DESCENDANT, BROTHER, SISTER, UNCLE, AUNT, NEPHEW, OR NIECE)

**6-3:01 INCEST (AN ANCESTOR OR DESCENDANT,  
INCLUDING A NATURAL CHILD TWENTY-ONE YEARS OF  
AGE OR OLDER, BROTHER, SISTER, UNCLE, AUNT,  
NEPHEW, OR NIECE)**

The elements of the crime of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. married, inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,
5. an ancestor or descendant, including [a natural child twenty-one years of age or older] [a [brother] [sister] of the whole or half blood] [an [uncle] [aunt] [nephew] [niece] of the whole blood].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of incest ([ancestor] [descendant] [natural child] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

## COMMENT

1. See § 18-6-301(1), C.R.S. 2020.
2. See Instruction F:92 (defining “descendant”); Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. The term “ancestor” is not defined in Part 3 of Article 6.
4. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. See *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

## 6-3:02 INCEST (ADOPTED CHILD OR STEPCHILD)

The elements of the crime of incest ([adopted child] [stepchild]) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,
5. a[n] [adopted child] [stepchild],
6. twenty-one years of age or older,
7. to whom the defendant was not legally married.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of incest ([adopted child] [stepchild]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of incest ([adopted child] [stepchild]).

### COMMENT

1. See § 18-6-301(1), C.R.S. 2020.
2. See Instruction F:92 (defining “descendant,” a term which need not be separately defined if the excepting language concerning marriage to an adopted child or stepchild is incorporated into the instruction as shown

above); Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).

3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

### **6-3:03 AGGRAVATED INCEST (NATURAL CHILD UNDER THE AGE OF TWENTY-ONE)**

The elements of the crime of aggravated incest (natural child) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. married or inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,
5. his [her] natural child,
6. who was under twenty-one years of age.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest (natural child).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest (natural child).

#### COMMENT

1. See § 18-6-302(1)(a), C.R.S. 2020.
2. See Instruction F:52 (defining "child," a term which need not be separately defined if the statutory age requirement is incorporated into the instruction as shown above); Instruction F:195 (defining "knowingly");

Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).

3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. *See People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

## **6-3:04 AGGRAVATED INCEST (STEPCHILD, OR CHILD BY ADOPTION)**

The elements of the crime of aggravated incest ([stepchild] [child by adoption]) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,
5. his [her] [stepchild] [child by adoption],
6. who was under twenty-one years of age, and
7. to whom the defendant was not legally married.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest ([stepchild] [child by adoption]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest ([stepchild] [child by adoption]).

### COMMENT

1. See § 18-6-302(1)(a), C.R.S. 2020.

2. See Instruction F:52 (defining “child,” a term which need not be separately defined if the statutory age requirement is incorporated into the instruction as shown above); Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. See *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).

### **6-3:05 AGGRAVATED INCEST (DESCENDANT, BROTHER, SISTER, UNCLE, AUNT, NEPHEW, OR NIECE)**

The elements of the crime of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. married, or inflicted sexual penetration or sexual intrusion on, or subjected to sexual contact,
5. [a descendant] [a [brother] [sister] of the whole or half blood] [an [uncle] [aunt] [nephew] [niece] of the whole blood who is under ten years of age].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated incest ([descendant] [brother] [sister] [uncle] [aunt] [nephew] [niece]).

#### COMMENT

1. See § 18-6-302(1)(b), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).
3. Although section 18-6-302(1)(b), C.R.S. 2020, uses the term “descendant,” it is not followed by the word “including” and the section does not contain a definition of the term. Further, the definition of “descendant” that appears in section 18-6-301(1), C.R.S. 2020, applies to that “section only.”
4. Where the existence of a common law marriage is at issue, draft a supplemental instruction that defines the essential elements of a common law marriage. See *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987).



## CHAPTER 6-4

### WRONGS TO CHILDREN

- [6-4:01](#) CHILD ABUSE (KNOWINGLY OR RECKLESSLY)  
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[6-4:04](#) CHILD ABUSE (CRIMINALLY NEGLIGENT EXCISION OR INFIBULATION OF FEMALE GENITALIA)  
[6-4:05](#) CHILD ABUSE (KNOWING EXPOSURE TO CONTROLLED SUBSTANCE MANUFACTURING ACTIVITIES OR PRECURSOR CHEMICALS)  
[6-4:06.SP](#) CHILD ABUSE – SPECIAL INSTRUCTION (KNOWING EXPOSURE TO CONTROLLED SUBSTANCE MANUFACTURING ACTIVITIES OR PRECURSOR CHEMICALS)  
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## 6-4:01 CHILD ABUSE (KNOWINGLY OR RECKLESSLY)

The elements of the crime of child abuse (knowingly or recklessly) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or recklessly,
4. caused an injury to a child's life or health, or permitted a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health, or engaged in a continued pattern of conduct that resulted in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately resulted in the death of a child or serious bodily injury to a child.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly or recklessly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly or recklessly).

### COMMENT

1. See § 18-6-401(1)(a), (7)(a)(I), (III), (V), C.R.S. 2020.
2. See Instruction F:49 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:308 (defining "recklessly"); Instruction F:332 (defining "serious bodily injury").

3. Section 18-6-401(1)(a) uses the phrase “injury to a child’s life or health,” rather than the more familiar term: “bodily injury.” However, a division of the court of appeals has concluded that the type of “injury” required under section 18-6-401(1)(a) is synonymous with “bodily injury,” as defined by section 18-1-901(3)(c), C.R.S. 2020 (“‘Bodily injury’ means physical pain, illness, or any impairment of physical or mental condition.”). *See People v. Sherrod*, 204 P.3d 472, 475 (Colo. App. 2007) (“Section 18-6-401(1)(a) contains no language that would accord the term ‘health’ something other than its commonly understood meaning. We therefore interpret the term ‘health’ to include both physical and mental well-being.”), *rev’d on other grounds*, 204 P.3d 466 (Colo. 2009); *see also* Instruction F:36 (defining “bodily injury”).

4. *See* Instruction H:10 (affirmative defense of “physical force pursuant to a special relationship”); Instruction H:48 (affirmative defense of “safe surrender of a newborn”).

5. *See People v. Casias*, 2012 COA 117, ¶ 35, 312 P.3d 208, 215 (“In connection with the child abuse charge, the prosecution had to prove, with respect to the ‘knowing’ mental state, only that defendant was aware of the abusive nature of his conduct in relation to J.C. or of the circumstances in which he committed an act against her well-being; and with respect to the ‘reckless’ element, only that defendant was aware of (and consciously chose to disregard) a substantial and unjustifiable risk that his conduct could result in injury to her life or health.”).

6. *See Friend v. People*, 2018 CO 90, ¶ 37, 429 P.3d 1191, 1197 (holding that child abuse resulting in death is a lesser included offense of child abuse murder).

7. + *See People v. Jones*, 2020 CO 45, ¶ 71, 464 P.3d 735, 748 (holding that the term “person” as used in the child abuse statute “does not include a fetus who is later born alive”).

8. + *See People v. Dyer*, 2019 COA 161, ¶¶ 51-52, 457 P.3d 783, 793-94 (holding that, where medical experts testified that the child was “medically neglected,” the defendant was not entitled to an instruction differentiating medical neglect from child abuse).

9. In 2019, the Committee added Comment 6.
10. + In 2020, the Committee added Comments 7 and 8.

## 6-4:02 CHILD ABUSE (CRIMINAL NEGLIGENCE)

The elements of the crime of child abuse (criminal negligence) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with criminal negligence,
4. caused an injury to a child's life or health, or permitted a child to be unreasonably placed in a situation that posed a threat of injury to the child's life or health, or engaged in a continued pattern of conduct that resulted in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately resulted in the death of a child or serious bodily injury to a child.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (criminal negligence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (criminal negligence).

### COMMENT

1. See § 18-6-401(1)(a), (7)(a)(II), (IV), (VI), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:49 (defining "child"); Instruction F:79 (defining "criminal negligence"); Instruction F:332 (defining "serious bodily injury").

3. See Instruction H:10 (affirmative defense of “physical force pursuant to a special relationship”); Instruction H:48 (affirmative defense of “safe surrender of a newborn”).

4. Section 18-6-401(1)(a) uses the phrase “injury to a child’s life or health,” rather than the more familiar term: “bodily injury.” However, a division of the court of appeals has concluded that the type of “injury” required under section 18-6-401(1)(a) is synonymous with “bodily injury,” as defined by section 18-1-901(3)(c), C.R.S. 2020 (“‘Bodily injury’ means physical pain, illness, or any impairment of physical or mental condition.”). See *People v. Sherrod*, 204 P.3d 472, 475 (Colo. App. 2007) (“Section 18-6-401(1)(a) contains no language that would accord the term ‘health’ something other than its commonly understood meaning. We therefore interpret the term ‘health’ to include both physical and mental well-being.”), *rev’d on other grounds*, 204 P.3d 466 (Colo. 2009); see also Instruction F:36 (defining “bodily injury”).

### **6-4:03 CHILD ABUSE (KNOWING OR RECKLESS EXCISION OR INFIBULATION OF FEMALE GENITALIA)**

The elements of the crime of child abuse (knowing or reckless excision or infibulation of female genitalia) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. knowingly or recklessly,
4. excised or infibulated, in whole or in part,
5. the labia majora, labia minora, vulva, or clitoris of a female child.]
- [3. was a parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child, and
4. knowingly or recklessly,
5. allowed the excision or infibulation, in whole or in part,
6. of the child's labia majora, labia minora, vulva, or clitoris.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowing or reckless excision or infibulation of female genitalia).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowing or reckless excision or infibulation of female genitalia).

## COMMENT

1. See § 18-6-401(1)(b)(I), C.R.S. 2020.
2. See Instruction F:49 (defining “child”); Instruction F:195 (defining “knowingly”); Instruction F:308 (defining “recklessly”).
3. The statute does not define the terms “clitoris,” “excision,” “infibulation,” “labia majora,” “labia minora,” or “vulva.” See, e.g., *Webster’s Third New International Dictionary* 425, 792, 1159, 1259, 2567 (2002) (p. 425, defining “clitoris” as “a small erectile organ at the anterior or ventral part of the vulva homologous to the penis in the male”) (p. 792, defining “excise” as “to cut out,” and defining “excision” as “the act or procedure of excising”) (p. 1159, defining “infibulation” as “an act or practice of fastening by ring, clasp, or stitches, the labia majora in girls and the prepuce in boys in order to prevent sexual intercourse”) (p. 1259, defining “labia majora” as “the outer fatty folds bounding the vulva”) (p. 1259, defining “labia minora” as “the inner highly vascular largely connective-tissue folds bounding the vulva”) (p. 2567, defining “vulva” as “the external part of the female genital organs”).
4. Section 18-6-401(b)(II), C.R.S. 2020, provides as follows:

Belief that the conduct described in subparagraph (I) of this paragraph (b) is required as a matter of custom, ritual, or standard practice or consent to the conduct by the child on whom it is performed or by the child’s parent or legal guardian shall not be an affirmative defense to a charge of child abuse under this paragraph (b).

This provision appears to state a proposition of law that governs the trial court’s rulings concerning the availability of affirmative defense instructions. Accordingly, the Committee has not drafted a special instruction embodying this concept.

5. Section 18-6-401(1)(b)(III), C.R.S. 2020, establishes an exemption from criminal liability for certain types of surgical procedures. However, the Committee has not drafted a model affirmative defense instruction.

6. In 2015, the Committee corrected Comment 5 by adding a reference to a subsection in the citation to section 18-6-401(1)(b)(III).

## **6-4:04 CHILD ABUSE (CRIMINALLY NEGLIGENT EXCISION OR INFIBULATION OF FEMALE GENITALIA)**

The elements of the crime of child abuse (criminally negligent excision or infibulation of female genitalia) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. with criminal negligence,
4. excised or infibulated, in whole or in part,
5. the labia majora, labia minora, vulva, or clitoris of a female child.]
- [3. was a parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child, and
4. with criminal negligence,
5. allowed the excision or infibulation, in whole or in part,
6. of the child's labia majora, labia minora, vulva, or clitoris.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (criminally negligent excision or infibulation of female genitalia).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (criminally negligent excision or infibulation of female genitalia).

## COMMENT

1. *See* § 18-6-401(1)(b)(I), C.R.S. 2020.
2. *See* Instruction F:49 (defining “child”); Instruction F:79 (defining “criminal negligence”).
3. *See* Instruction 6-4:03, Comment 3 (discussion of terms not defined by statute), Comment 4 (discussion of affirmative defenses that are unavailable pursuant to statute), Comment 5 (discussion of affirmative defense).

## 6-4:05 CHILD ABUSE (KNOWING EXPOSURE TO CONTROLLED SUBSTANCE MANUFACTURING ACTIVITIES OR PRECURSOR CHEMICALS)

The elements of the crime of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in the presence of a child, or on the premises where a child was found, or where a child resided, or in a vehicle containing a child,
- [5. engaged in the manufacture or attempted manufacture of a controlled substance.]
- [5. possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers,
6. with the intent to use the product as an immediate precursor in the manufacture of a controlled substance.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals).

## COMMENT

1. *See* § 18-6-401(c)(I), C.R.S. 2020.
2. *See* Instruction F:49 (defining “child”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); Instruction F:179 (defining “immediate precursor”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); *see also* Instruction F:283 (defining “premises” for purposes of burglary and related offenses).
3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).
4. *See* Instruction H:68 (defining the affirmative defense of “medical marijuana,” which is unavailable, pursuant to Colo. Const. Art. XVIII, § 14(2)(a), (5)(a)(I), if the defendant “[e]ngaged in the medical use of marijuana in a way that endanger[ed] the health or well-being of any person”).

**6-4:06.SP CHILD ABUSE – SPECIAL INSTRUCTION  
(KNOWING EXPOSURE TO CONTROLLED SUBSTANCE  
MANUFACTURING ACTIVITIES OR PRECURSOR  
CHEMICALS)**

It is no defense to the crime of child abuse (knowing exposure to controlled substance manufacturing activities or precursor chemicals), that the defendant did not know a child was present, a child could be found, a child resided on the premises, or that a vehicle contained a child.

**COMMENT**

1. Section 18-6-401(1)(c)(I), C.R.S. 2020.

## **6-4:07 CHILD ABUSE (KNOWINGLY ALLOWING EXPOSURE TO METHAMPHETAMINE MANUFACTURING ACTIVITIES)**

The elements of the crime of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a parent or lawful guardian or person having the care or custody of a child, and
  5. allowed the child to be present at or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knew, or reasonably should have known, that another person was engaged in the manufacture or attempted manufacture of methamphetamine.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly allowing exposure to methamphetamine manufacturing activities).

## COMMENT

1. *See* § 18-6-401(c)(II), C.R.S. 2020.
2. *See* Instruction F:49 (defining “child”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); *see also* Instruction F:283 (defining “premises” for purposes of burglary and related offenses).
3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).

## 6-4:08 CHILD ABUSE (KNOWINGLY ALLOWING EXPOSURE TO PRECURSOR CHEMICALS)

The elements of the crime of child abuse (knowingly allowing exposure to precursor chemicals) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a parent or lawful guardian or person having the care or custody of a child, and
  5. allowed the child to be present or reside at a premises or to be in a vehicle where the parent, guardian, or person having care or custody of the child knew, or reasonably should have known, that another person possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the product as an immediate precursor in the manufacture of a controlled substance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of child abuse (knowingly allowing exposure to precursor chemicals).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of child abuse (knowingly allowing exposure to precursor chemicals).

## COMMENT

1. See § 18-6-401(c)(III), C.R.S. 2020.
2. See Instruction F:49 (defining “child”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules that are identified in section § 18-18-102(5), C.R.S. 2020); Instruction F:179 (defining “immediate precursor”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); *see also* Instruction F:283 (defining “premises” for purposes of burglary and related offenses).
3. If the defendant is not separately charged with a controlled substance offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. See Instruction G2:01 (criminal attempt); Instruction 18:05 (manufacture of a controlled substance).

## 6-4:09.INT CHILD ABUSE – INTERROGATORY (DEATH)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the child abuse result in death? (Answer “Yes” or “No”)

The prosecution has the burden to prove, beyond a reasonable doubt, that the child abuse resulted in death.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-6-401(7)(a)(I), (II), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in death if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury necessarily must find that the abuse resulted in death.

## 6-4:10.INT CHILD ABUSE – INTERROGATORY (SERIOUS BODILY INJURY)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the child abuse result in serious bodily injury? (Answer “Yes” or “No”)

The prosecution has the burden to prove, beyond a reasonable doubt, that the child abuse resulted in serious bodily injury.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-6-401(7)(a)(III), (IV), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in serious bodily injury if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury must necessarily find that the abuse resulted in serious bodily injury.

## **6-4:11.INT CHILD ABUSE – INTERROGATORY (INJURY OTHER THAN SERIOUS BODILY INJURY)**

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the abuse cause any injury other than serious bodily injury?  
(Answer “Yes” or “No”)

The abuse caused any injury other than serious bodily injury only if:

1. the child abuse resulted in any injury other than injury which, either at the time of the actual injury or at a later time, involved a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-6-401(7)(a)(V), C.R.S. 2020.

2. *See, e.g.,* Instruction E:28 (special verdict form).
3. It is not necessary to submit a special interrogatory asking the jury to determine whether the child abuse resulted in any injury other than serious bodily injury if the instruction defining the offense is drafted in such a manner that, in order to find the defendant guilty, the jury necessarily must find that the abuse resulted in bodily injury. For example, a jury could not logically find a defendant guilty of child abuse involving mutilation of female genitalia, as defined in section 18-6-401(b)(I), and then make a finding that the child abuse resulted in “no . . . injury” for purposes of section 18-6-401(7)(b).
4. It appears unlikely that the “injury” defined by section 18-6-401(7)(a)(V) could include an injury that does not meet the definition of a “bodily injury” under section 18-1-901(3)(c), C.R.S. 2020. Nevertheless, out of an abundance of caution, the instruction uses the language of the statute and asks whether the child abuse resulted in an injury other than serious bodily injury.

## 6-4:12.INT CHILD ABUSE – INTERROGATORY (POSITION OF TRUST)

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant violate a position of trust? (Answer “Yes” or “No”)

The defendant violated a position of trust only if:

1. the defendant was in a position of trust in relation to the child, and
2. participated in a continued pattern of conduct that resulted in the child’s malnourishment or failed to ensure the child’s access to proper medical care.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-6-401(7)(e)(I), C.R.S. 2020.

2. See Instruction F:280 (defining “position of trust”); *see, e.g.*, Instruction E:28 (special verdict form).
3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I)–(V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I)–(V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I)–(IV), C.R.S. 2020.
4. *See People v. Becker*, 2014 COA 36, ¶ 2, 347 P.3d 1168, 1170 (“a prior child abuse conviction, as specified in section 18-6-401(7)(e), C.R.S. 2013, serves as a sentence enhancer – and not as an element – of the child abuse crimes set forth in sections 18-6-401(1)(a)(7)(b)(I)–(II), C.R.S. 2013”).
5. In 2015, the Committee added Comment 4.

**6-4:13.INT CHILD ABUSE – INTERROGATORY  
(CONTINUED PATTERN OF PUNISHMENT, ISOLATION,  
OR CONFINEMENT)**

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant participate in a continued pattern? (Answer “Yes” or “No”)

The defendant participated in a continued pattern only if:

1. the defendant participated in a continued pattern of cruel punishment, or unreasonable isolation, or confinement of the child.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-6-401(7)(e)(II), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I)-(V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I)-(V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I)-(IV), C.R.S. 2020.

## **6-4:14.INT CHILD ABUSE – INTERROGATORY (REPEATED THREATS)**

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant make repeated threats? (Answer “Yes” or “No”)

The defendant made repeated threats only if:

1. the defendant made repeated threats of harm or death to the child, or to a significant person in the child’s life, and
2. the threats were made in the presence of the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. *See* § 18-6-401(7)(e)(III), C.R.S. 2020.
2. *See, e.g.,* Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I)-(V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I)-(V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I)-(IV), C.R.S. 2020.

**6-4:15.INT CHILD ABUSE – INTERROGATORY  
(CONTINUED PATTERN OF ACTS OF DOMESTIC  
VIOLENCE)**

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit a continued pattern of domestic violence?  
(Answer “Yes” or “No”)

The defendant committed a continued pattern of domestic violence only if:

1. the defendant committed a continued pattern of acts of domestic violence,
2. in the presence of the child.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-6-401(7)(e)(IV), C.R.S. 2020.

2. See Instruction F:108 (defining “domestic violence”); *see, e.g.*, Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I)–(V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I)–(V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I)–(IV), C.R.S. 2020.

**6-4:16.INT CHILD ABUSE – INTERROGATORY  
(CONTINUED PATTERN OF EXTREME DEPRIVATION)**

If you find the defendant not guilty of child abuse, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of child abuse, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant participate in a continued pattern of extreme deprivation? (Answer “Yes” or “No”)

The defendant participated in a continued pattern of extreme deprivation only if:

1. the defendant participated in a continued pattern of extreme deprivation of hygienic or sanitary conditions in the child’s daily living environment.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-6-401(7)(e)(V), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).

3. In a case where the defendant has a prior qualifying conviction under section 18-6-401(7)(e), it is unnecessary to ask the jury to determine any of the circumstances enumerated in section 18-6-401(7)(e)(I)-(V) if there is no rational basis for the jury to find the defendant guilty without also finding that the child abuse resulted in death or serious bodily injury (because the sentence enhancement factors of section 18-6-401(7)(e)(I)-(V) apply only to cases that involve either a non-serious injury, or no injury at all). *See* § 18-6-401(7)(a)(I)-(IV), C.R.S. 2020.

## **6-4:17 SEXUAL EXPLOITATION OF A CHILD (EXPLICIT SEXUAL CONDUCT FOR SEXUALLY EXPLOITATIVE MATERIAL)**

The elements of the crime of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. for any purpose,
5. caused, induced, enticed, or permitted a child to engage in, or be used for,
6. any explicit sexual conduct for the making of any sexually exploitative material.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (explicit sexual conduct for sexually exploitative material).

### **COMMENT**

1. *See* § 18-6-403(3)(a), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:132 (defining “explicit sexual conduct”); Instruction F:341 (defining “sexually exploitative material”).
3. See Instruction H:36 (affirmative defense of “mistake as to age”).
4. The words “for any purpose” are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a)–(d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the “for any purpose” language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the “for any purpose” element.
5. Section 18-6-403(7) provides that a juvenile charged with posting a private image by a juvenile, *see* Instructions 7-1:08 and 7-1:09, is not subject to prosecution for this offense “for the same electronic or digital photograph, video, or image arising out of the same criminal episode.” *Cf.* § 18-1-408, C.R.S. 2020 (prosecution of multiple counts for same act).
6. In 2017, the Committee added Comment 5 pursuant to new legislation. *See* Ch. 390, sec. 3, § 18-6-403(7), 2017 Colo. Sess. Laws 2012, 2013.

## 6-4:18 SEXUAL EXPLOITATION OF A CHILD (PUBLICATION)

The elements of the crime of sexual exploitation of a child (publication) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. for any purpose,
  5. prepared, arranged for, published (including but not limited to publishing through digital or electronic means), produced, promoted, made, sold, financed, offered, exhibited, advertised, dealt in, or distributed (including but not limited to distributing through digital or electronic means),
  6. any sexually exploitative material.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (publication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (publication).

### COMMENT

1. See § 18-6-403(3)(b), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:341 (defining “sexually exploitative material”).
3. See Instruction H:36 (affirmative defense of “mistake as to age”).
4. The words “for any purpose” are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a)–(d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the “for any purpose” language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the “for any purpose” element.
5. See *People v. Mantos*, 250 P.3d 586, 590 (Colo. App. 2009) (downloading and saving already-existing material in a share-capable computer file is not proscribed by the terms “prepares” and “arranges for” in section 18-6-403(3)(b)).
6. See *People v. Rowe*, 2012 COA 90, ¶ 13, 318 P.3d 57, 60 (“Reading the plain language of [section 18-6-403(3)(b)] and construing the term ‘offer’ according to its common usage, we hold that a defendant ‘offers’ sexually exploitative material by making it available or accessible to others. In the context of a peer-to-peer file sharing network, a defendant offers sexually exploitative material by knowingly leaving it in the share folder for other users to download.”).
7. Section 18-6-403(3.5) provides that a juvenile is not subject to prosecution for this offense if his or her conduct is “limited to the elements of the petty offense of possession of a private image by a juvenile,” see Instruction 7-1:11, or is “limited to the elements of the civil infraction of exchange of a private image by a juvenile,” see § 18-7-109(3), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.
8. Section 18-6-403(7) provides that a juvenile charged with posting a private image by a juvenile, see Instructions 7-1:08 and 7-1:09, is not subject to prosecution for this offense “for the same electronic or digital

photograph, video, or image arising out of the same criminal episode.” Cf. § 18-1-408, C.R.S. 2020 (prosecution of multiple counts for same act).

9. See *People v. Robles-Sierra*, 2018 COA 28, ¶¶ 39–40, 44–45, \_\_ P.3d \_\_ (holding that, because the General Assembly “sought to cut a wide swath” in enacting the statute, the defendant’s activity of downloading sexually exploitative material off a peer-to-peer sharing network and making it accessible to others qualified as both “publishing” and “distributing”).

10. + See *People v. Meils*, 2019 COA 180, ¶¶ 43–44, 471 P.3d 1130, 1138–39 (holding that, because section 18-6-403(3) is written in the disjunctive, it prescribes alternative ways of committing the same offense, meaning the defendant could not be convicted of “both creating and possessing sexually exploitative material”).

11. In 2017, the Committee added Comments 7 and 8 pursuant to new legislation. See Ch. 390, sec. 3, § 18-6-403(3.5), (7), 2017 Colo. Sess. Laws 2012, 2013.

12. In 2019, the Committee added Comment 9.

13. + In 2020, the Committee added Comment 10.

## **6-4:19 SEXUAL EXPLOITATION OF A CHILD (POSSESSION OR CONTROL)**

The elements of the crime of sexual exploitation of a child (possession or control) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. for any purpose,
5. possessed or controlled,
6. any sexually exploitative material.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (possession or control).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (possession or control).

### COMMENT

1. See § 18-6-403(3)(b.5), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:281 (defining "possession"); Instruction F:341 (defining "sexually exploitative material").

3. See Instruction H:36 (affirmative defense of “mistake as to age”).
4. Section 18-6-403(3)(b.5), C.R.S. 2020, states that it:

does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site.

See Instruction F:90.5 (defining “defense counsel personnel”); Instruction F:196.35 (defining “law enforcement personnel”). However, the Committee has not drafted a model affirmative defense instruction. See also *People v. Arapahoe Cty. Court*, 74 P.3d 429, 431 (Colo. App. 2003) (“we do not address the argument that the statutory exception in § 18-6-403(3)(b.5) for court personnel does not include defense counsel”).

5. The words “for any purpose” are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a)-(d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the “for any purpose” language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the “for any purpose” element.

6. See *Fabiano v. Armstrong*, 141 P.3d 907, 910 (Colo. App. 2006) (section 18-6-403(3)(b.5) does not contain any requirement that the prohibited material be retained for any minimum period of time).

7. Section 18-6-403(3.5) provides that a juvenile is not subject to prosecution for this offense if his or her conduct is “limited to the elements of the petty offense of possession of a private image by a juvenile,” see Instruction 7-1:11, or is “limited to the elements of the civil infraction of exchange of a private image by a juvenile,” see § 18-7-109(3), C.R.S. 2020.

However, the Committee has not drafted model affirmative defense instructions.

8. Section 18-6-403(7) provides that a juvenile charged with posting a private image by a juvenile, *see* Instructions 7-1:08 and 7-1:09, is not subject to prosecution for this offense “for the same electronic or digital photograph, video, or image arising out of the same criminal episode.” *Cf.* § 18-1-408, C.R.S. 2020 (prosecution of multiple counts for same act).

9. *See People in Interest of T.B.*, 2019 CO 53, ¶ 33, 445 P.3d 1049, 1056 (holding that liability for possessing sexually exploitative material “does not require proof that the material depicts ‘an act or acts of sexual abuse of a child’”).

10. + *See People v. Meils*, 2019 COA 180, ¶¶ 43–44, 471 P.3d 1130, 1138–39 (holding that, because section 18-6-403(3) is written in the disjunctive, it prescribes alternative ways of committing the same offense, meaning the defendant could not be convicted of “both creating and possessing sexually exploitative material”).

11. In 2017, the Committee added Comments 7 and 8 pursuant to new legislation. *See* Ch. 390, sec. 3, § 18-6-403(3.5), (7), 2017 Colo. Sess. Laws 2012, 2013. The Committee also modified the statutory quotation in Comment 4 and added the cross-references to Instructions F:90.5 and F:196.35 pursuant to a legislative amendment. *See* Ch. 141, sec. 1, § 18-6-403(3)(b.5), 2017 Colo. Sess. Laws 470, 470–71.

12. In 2019, the Committee added Comment 9.

13. + In 2020, the Committee added Comment 10.

## **6-4:20 SEXUAL EXPLOITATION OF A CHILD (POSSESSION WITH INTENT)**

The elements of the crime of sexual exploitation of a child (possession with intent) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. for any purpose,
5. possessed,
6. with the intent to deal in, sell, or distribute (including but not limited to distributing through digital or electronic means),
7. any sexually exploitative material.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (possession with intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (possession with intent).

### COMMENT

1. See § 18-6-403(3)(c), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:281 (defining “possession”); Instruction F:341 (defining “sexually exploitative material”).
3. See Instruction H:36 (affirmative defense of “mistake as to age”).
4. The words “for any purpose” are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a)-(d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the “for any purpose” language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the “for any purpose” element.
5. Section 18-6-403(7) provides that a juvenile charged with posting a private image by a juvenile, *see* Instructions 7-1:08 and 7-1:09, is not subject to prosecution for this offense “for the same electronic or digital photograph, video, or image arising out of the same criminal episode.” *Cf.* § 18-1-408, C.R.S. 2020 (prosecution of multiple counts for same act).
6. In 2017, the Committee added Comment 5 pursuant to new legislation. *See* Ch. 390, sec. 3, § 18-6-403(7), 2017 Colo. Sess. Laws 2012, 2013.

## **6-4:21 SEXUAL EXPLOITATION OF A CHILD (EXPLICIT SEXUAL CONDUCT FOR A PERFORMANCE)**

The elements of the crime of sexual exploitation of a child (explicit sexual conduct for a performance) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. for any purpose,
5. caused, induced, enticed, or permitted a child to engage in, or be used for,
6. any explicit sexual conduct,
7. for the purpose of producing a performance.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual exploitation of a child (explicit sexual conduct for a performance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual exploitation of a child (explicit sexual conduct for a performance).

### COMMENT

1. See § 18-6-403(3)(d), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:132 (defining “explicit sexual conduct”); Instruction F:281 (defining “possession”); Instruction F:341 (defining “sexually exploitative material”).
3. See Instruction H:36 (affirmative defense of “mistake as to age”).
4. The words “for any purpose” are included as an element because section 18-6-403(3) indicates that this phrase modifies all of the provisions in section 18-6-403(3)(a)–(d). However, four of those statutory subsections identify the prohibited purpose that must be proved, and the only one that does not – section 18-6-403(3)(b.5) – repeats the “for any purpose” language. Accordingly, except in cases involving a charge under section 18-6-403(3)(b.5), it may be appropriate to eliminate the “for any purpose” element.
5. Section 18-6-403(7) provides that a juvenile charged with posting a private image by a juvenile, *see* Instructions 7-1:08 and 7-1:09, is not subject to prosecution for this offense “for the same electronic or digital photograph, video, or image arising out of the same criminal episode.” *Cf.* § 18-1-408, C.R.S. 2020 (prosecution of multiple counts for same act).
6. In 2017, the Committee added Comment 5 pursuant to new legislation. *See* Ch. 390, sec. 3, § 18-6-403(7), 2017 Colo. Sess. Laws 2012, 2013.

## **6-4:22.INT SEXUAL EXPLOITATION OF A CHILD – INTERROGATORY (MOVING IMAGES)**

If you find the defendant not guilty of sexual exploitation of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual exploitation of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess moving images? (Answer “Yes” or “No”)

The defendant possessed moving images only if:

1. the defendant’s possession of sexually exploitative material was of a video, video tape, or motion picture.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-6-403(5)(b)(II), C.R.S. 2020.
2. *See* Instruction F:234 (defining “motion picture”); Instruction F:389 (defining “video” and “video tape”); *see, e.g.*, Instruction E:28 (special verdict form).

## 6-4:23.INT SEXUAL EXPLOITATION OF A CHILD – INTERROGATORY (QUANTITY)

If you find the defendant not guilty of sexual exploitation of a child, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual exploitation of a child, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess a large number of items? (Answer “Yes” or “No”)

The defendant possessed a large number of items only if:

1. the defendant’s possession was of more than twenty different items qualifying as sexually exploitative material.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-6-403(5)(b)(II), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. + *See People v. Bott*, 2020 CO 86, ¶¶ 1–4, 477 P.3d 137, 138–39 (holding that section 18-6-403 “makes clear the legislature’s intent that possession

pursuant to subsection (3)(b.5) of *any* number of items exceeding twenty that qualify as sexually exploitative material constitutes a single offense” (emphasis added), meaning the defendant’s possession of 294 images of child pornography could only subject him to a single conviction).

4. + In 2020, the Committee added Comment 3.

## 6-4:24 PROCUREMENT OF A CHILD FOR SEXUAL EXPLOITATION

The elements of the crime of procurement of a child for sexual exploitation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. gave, transported, provided, or made available, or offered to give, transport, provide, or make available,
5. a child,
6. to another person,
7. for the purpose of sexual exploitation of a child.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of procurement of a child for sexual exploitation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of procurement of a child for sexual exploitation.

### COMMENT

1. See § 18-6-404, C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:185 (defining “intentionally”).

3. If the defendant is not separately charged with sexual exploitation of a child, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. See Instructions 6-4:17 to 6-4:21. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## CHAPTER 6-6

### HARBORING A MINOR

<a href="#"><u>6-6:01</u></a>	HARBORING A MINOR (FAILING TO RELEASE)
<a href="#"><u>6-6:02</u></a>	HARBORING A MINOR (FAILING TO DISCLOSE LOCATION)
<a href="#"><u>6-6:03</u></a>	HARBORING A MINOR (OBSTRUCTING)
<a href="#"><u>6-6:04</u></a>	HARBORING A MINOR (ASSISTING)
<a href="#"><u>6-6:05</u></a>	HARBORING A MINOR (FAILING TO NOTIFY)

### CHAPTER COMMENTS

1. Section 18-6-601(1)(b), C.R.S. 2020, provides as follows: “If the shelter provided to the minor is by a licensed child care facility, including a licensed homeless youth shelter, the minor, despite the minor’s status, may reside at such facility or shelter for a period not to exceed two weeks after the time of intake, pursuant to the procedures set forth in article 5.7 of title 26, C.R.S.” However, the Committee has not drafted a model affirmative defense instruction.
2. Section 18-6-601(1)(c), C.R.S. 2020, creates a defense to the prosecution of every offense in this chapter where “the defendant had custody of the minor or lawful parenting time with the minor pursuant to a court order.” However, the Committee has not drafted a model affirmative defense instruction.
3. The Committee added this chapter in 2016.

## 6-6:01 HARBORING A MINOR (FAILING TO RELEASE)

The elements of the crime of harboring a minor (failing to release) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. provided shelter to a minor,
5. without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, and
6. intentionally,
7. failed to release the minor to a law enforcement officer after being requested to do so by the officer.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harboring a minor (failing to release).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harboring a minor (failing to release).

### COMMENT

1. See § 18-6-601(1)(a)(I), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).

3. Although section 18-6-601 does not define the term “minor,” section 2-4-401, C.R.S. 2020, provides that “[t]he following definitions apply to every statute, unless the context otherwise requires,” and it defines “minor” in subsection (6) as “any person who has not attained the age of twenty-one years.” *But see People v. Salazar*, 920 P.2d 893, 897-98 (Colo. App. 1996) (holding, under an earlier version of this statute codifying the offense of “harboring a runaway child,” that the trial court did not err “by defining ‘child’ as a person less than 18 years of age,” and observing that a survey of the Children’s Code and “criminal statutes shows that ‘minor’ is consistently defined as a person under the age of 18”).

4. + *See People v. Flynn*, 2020 COA 54, ¶¶ 16, 18, 463 P.3d 360, 362-63 (“[S]ection 18-6-601(1)(a)(I) criminalizes a person’s conduct when he or she intentionally fails to release a minor to the specific officer who requested the minor’s release. . . . [T]he statute’s use of the word ‘the’ to reference the officer requesting a minor’s release particularizes or defines that officer as the same previously referenced law enforcement officer to whom the minor would be released.”).

5. + In 2020, the Committee added Comment 4.

## 6-6:02 HARBORING A MINOR (FAILING TO DISCLOSE LOCATION)

The elements of the crime of harboring a minor (failing to disclose location) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. provided shelter to a minor,
5. without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, and
6. intentionally,
7. failed to disclose the location of the minor to a law enforcement officer when requested to do so, and
8. the defendant knew the location of the minor and had either taken the minor to that location or had assisted the minor in reaching that location.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harboring a minor (failing to disclose location).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harboring a minor (failing to disclose location).

## COMMENT

1. See § 18-6-601(1)(a)(II), C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).
3. Although section 18-6-601 does not define the term “minor,” section 2-4-401, C.R.S. 2020, provides that “[t]he following definitions apply to every statute, unless the context otherwise requires,” and it defines “minor” in subsection (6) as “any person who has not attained the age of twenty-one years.” *But see People v. Salazar*, 920 P.2d 893, 897-98 (Colo. App. 1996) (holding, under an earlier version of this statute codifying the offense of “harboring a runaway child,” that the trial court did not err “by defining ‘child’ as a person less than 18 years of age,” and observing that a survey of the Children’s Code and “criminal statutes shows that ‘minor’ is consistently defined as a person under the age of 18”).

## 6-6:03 HARBORING A MINOR (OBSTRUCTING)

The elements of the crime of harboring a minor (obstructing) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. provided shelter to a minor,
5. without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, and
6. intentionally,
7. obstructed a law enforcement officer from taking the minor into custody.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harboring a minor (obstructing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harboring a minor (obstructing).

### COMMENT

1. See § 18-6-601(1)(a)(III), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).

3. Although section 18-6-601 does not define the term “minor,” section 2-4-401, C.R.S. 2020, provides that “[t]he following definitions apply to every statute, unless the context otherwise requires,” and it defines “minor” in subsection (6) as “any person who has not attained the age of twenty-one years.” *But see People v. Salazar*, 920 P.2d 893, 897-98 (Colo. App. 1996) (holding, under an earlier version of this statute codifying the offense of “harboring a runaway child,” that the trial court did not err “by defining ‘child’ as a person less than 18 years of age,” and observing that a survey of the Children’s Code and “criminal statutes shows that ‘minor’ is consistently defined as a person under the age of 18”).

4. The term “obstructed” is not defined by statute. See *Black’s Law Dictionary* 1246 (10th ed. 2014) (defining “obstruct” as “[t]o make difficult or impossible; to keep from happening; hinder”).

## 6-6:04 HARBORING A MINOR (ASSISTING)

The elements of the crime of harboring a minor (assisting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. provided shelter to a minor,
5. without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, and
6. intentionally,
7. assisted the minor in avoiding or attempting to avoid the custody of a law enforcement officer.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harboring a minor (assisting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harboring a minor (assisting).

### COMMENT

1. See § 18-6-601(1)(a)(IV), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).

3. Although section 18-6-601 does not define the term “minor,” section 2-4-401, C.R.S. 2020, provides that “[t]he following definitions apply to every statute, unless the context otherwise requires,” and it defines “minor” in subsection (6) as “any person who has not attained the age of twenty-one years.” *But see People v. Salazar*, 920 P.2d 893, 897-98 (Colo. App. 1996) (holding, under an earlier version of this statute codifying the offense of “harboring a runaway child,” that the trial court did not err “by defining ‘child’ as a person less than 18 years of age,” and observing that a survey of the Children’s Code and “criminal statutes shows that ‘minor’ is consistently defined as a person under the age of 18”).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 6-6:05 HARBORING A MINOR (FAILING TO NOTIFY)

The elements of the crime of harboring a minor (failing to notify) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. provided shelter to a minor,
5. without the consent of a parent, guardian, custodian of the minor, or the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, and
6. intentionally,
7. failed to notify, within twenty-four hours after shelter had been provided,
8. the parent, guardian, custodian of the minor, the person with whom the child resided the majority of the time pursuant to a court order allocating parental responsibilities, or a law enforcement officer that the minor was being sheltered.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harboring a minor (failing to notify).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harboring a minor (failing to notify).

## COMMENT

1. See § 18-6-601(1)(a)(V), C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).
3. Although section 18-6-601 does not define the term “minor,” section 2-4-401, C.R.S. 2020, provides that “[t]he following definitions apply to every statute, unless the context otherwise requires,” and it defines “minor” in subsection (6) as “any person who has not attained the age of twenty-one years.” *But see People v. Salazar*, 920 P.2d 893, 897-98 (Colo. App. 1996) (holding, under an earlier version of this statute codifying the offense of “harboring a runaway child,” that the trial court did not err “by defining ‘child’ as a person less than 18 years of age,” and observing that a survey of the Children’s Code and “criminal statutes shows that ‘minor’ is consistently defined as a person under the age of 18”).



## CHAPTER 6-7

### CONTRIBUTING TO DELINQUENCY

6-7:01

CONTRIBUTING TO THE DELINQUENCY OF A  
MINOR

## 6-7:01 CONTRIBUTING TO THE DELINQUENCY OF A MINOR

The elements of the crime of contributing to the delinquency of a minor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly induced, aided, or encouraged another to violate [insert a reference to the federal or state law, municipal or county ordinance, or court order], and
4. the person who was induced, aided, or encouraged by the defendant was under the age of eighteen years.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of contributing to the delinquency of a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of contributing to the delinquency of a minor.

### COMMENT

1. See § 18-6-701(1), C.R.S. 2020.
2. If the defendant is not separately charged with violating the referenced law, ordinance, or court order, draft a separate instruction to define it (or include the appropriate elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof).

Place the instruction defining the referenced law, ordinance, or court order after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining any relevant terms and theories of criminal liability for the referenced law, ordinance, or court order.

3. In *Gorman v. People*, 19 P.3d 662, 665–67 (Colo. 2000), the supreme court concluded “that the culpable mental state of knowingly applies to the *act* of contributing to the delinquency,” but not to the age element. As the court explained, “[i]n order to be convicted of the offense of contributing to the delinquency of a minor, a person must know that he or she is inducing, aiding or encouraging *someone* to violate a ‘federal or state law,’ a ‘municipal or county ordinance,’ or a ‘court order.’” *Id.* at 665 (emphasis added).

4. See § 18-1-503.5(1), C.R.S. 2020 (“If the criminality of conduct depends on a child being younger than eighteen years of age and the child was in fact at least fifteen years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be eighteen years of age or older”); *Gorman v. People*, 19 P.3d 662, 667–69 (Colo. 2000) (although the culpable mental state of “knowingly” does not apply to the age element of the crime of contributing to the delinquency of a minor, the affirmative defense of section 18-3-406 (now section 18-1-503.5) is applicable to the offense); Instruction H:36 (defining the affirmative defense in section 18-1-503.5(1)).

5. See *People v. Miller*, 830 P.2d 1092, 1093-94 (Colo. App. 1991) (section 18-6-701(1) “does not require that the minor be charged or convicted of a crime nor does it require the minor to be over the age of ten”).



## CHAPTER 6-8

### DOMESTIC VIOLENCE

- [6-8:01.INT](#) TRIGGERING MISDEMEANOR OFFENSE OF DOMESTIC VIOLENCE – INTERROGATORY (HABITUAL DOMESTIC VIOLENCE OFFENDER)
- [6-8:01.5.INT](#) PRIOR OFFENSES OF DOMESTIC VIOLENCE – INTERROGATORY (HABITUAL DOMESTIC VIOLENCE OFFENDER)
- [6-8:02](#) VIOLATION OF A PROTECTION ORDER (PROHIBITED CONDUCT)
- [6-8:03](#) VIOLATION OF A PROTECTION ORDER (LOCATING)
- [6-8:04](#) VIOLATION OF A PROTECTION ORDER (FIREARMS OR AMMUNITION)

**6-8:01.INT TRIGGERING MISDEMEANOR OFFENSE OF DOMESTIC VIOLENCE – INTERROGATORY (HABITUAL DOMESTIC VIOLENCE OFFENDER)**

If you find the defendant not guilty of [insert name of misdemeanor offense(s)], you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of [insert name of misdemeanor offense(s)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense[s] of [insert name of misdemeanor offense(s)], of which you found the defendant guilty, include an act of domestic violence? (Answer “Yes” or “No”)

The offense[s] of [insert name of misdemeanor offense(s)], of which you found the defendant guilty, included an act of domestic violence only if:

1. you determine, as a matter of fact, that [it] [they] included,
- [2. an act or threatened act of violence,
3. upon a person with whom the actor was or had been involved in an intimate relationship.]
- [2. any other crime or municipal ordinance violation,
3. against a person, or against property, including an animal,
4. when used as a method of coercion, control, punishment, intimidation, or revenge,
5. directed against a person with whom the actor was or had been involved in an intimate relationship.]

The prosecution has the burden to prove each numbered condition

beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-6-801(7), C.R.S. 2020 (habitual domestic violence offender sentence enhancement elevates any qualifying misdemeanor offense to a class five felony).
2. *See* Instruction F:108 (defining the term “domestic violence” pursuant to section 18-6-800.3(1), with reference to an “intimate relationship” (a term that is defined in section 18-6-800.3(2), C.R.S. 2020, and Instruction F:187)); *see, e.g.*, Instruction E:28 (special verdict form).
3. Section 18-6-801(7)(a) provides for an escalation from a misdemeanor to a class 5 felony if two factors are present: (1) the present misdemeanor offense “includes an act of domestic violence”; and (2) the defendant “has been previously convicted of three or more prior offenses that included an act of domestic violence and that were separately brought and tried and arising out of separate criminal episodes.” The first factor must be submitted to the jury. *See* § 18-6-801(7)(c) (“The trier of fact shall determine whether an offense charged includes an act of domestic violence.”). As to the second factor, the court should conduct a bifurcated trial to allow the jury to determine whether the defendant’s prior convictions included an act of domestic violence, unless a jury had already so determined (or the defendant had so admitted) during the prior proceedings. *See* § 18-6-801(7)(d). In the course of this bifurcated trial, the court should issue a modified version of this interrogatory for each prior offense. *See* Instruction 6-8:01.5.INT.

Furthermore, the Committee notes that, unlike the general statute for habitual sentencing proceedings, the domestic violence statute does not explicitly state that *the judge* (rather than the jury) shall determine that the defendant in the present trial is the same defendant who suffered the prior convictions. Compare § 18-1.3-803(4) C.R.S. 2020 (specifying that, if the defendant denies being previously convicted as alleged, “*the trial judge . . . shall proceed to try the issues of whether the defendant has been previously convicted*” (emphasis added)), with § 18-6-801(7)(d) (simply providing for sentencing determinations pertaining to “any prior conviction” allegedly involving an act of domestic violence). Nevertheless, the Committee concludes that, by implication, the domestic violence statute similarly leaves to the court to determine whether the present defendant has suffered prior convictions. That is, the statute does not require a jury to determine whether the defendant is the same person who was previously convicted; rather, it requires a jury to determine whether those prior convictions included an act of domestic violence. See *People v. Jaso*, 2014 COA 131, ¶ 21, 347 P.3d 1174, 1178–79 (holding that, where the jury’s guilty verdict on violation of a protection order “did not reflect a finding of ‘coercion, control, punishment, intimidation, or revenge,’ because the necessary elements of the charged crime . . . required the jury to find only that defendant contacted [the victim] knowing there was a protection order in place,” the trial court “engaged in constitutionally impermissible judicial fact-finding” when it found that the defendant’s contact with the victim “was made for the purpose of coercion or control”).

4. In 2016, the Committee modified this instruction and Comment 3 to reflect a legislative amendment, and it deleted the prior Comment 4. See Ch. 106, sec. 1, § 18-6-801(7), 2016 Colo. Sess. Laws 306, 306–07.
5. In 2019, the Committee added the citation to *Jaso* in Comment 3.

## **6-8:01.5.INT PRIOR OFFENSES OF DOMESTIC VIOLENCE – INTERROGATORY (HABITUAL DOMESTIC VIOLENCE OFFENDER)**

In addition to the offenses that you have already considered, the charges in this case allege that the defendant was previously convicted of [insert name of prior offense], and that this offense included an act of domestic violence. The court has already determined that the defendant was in fact convicted of [insert prior offense]. Now, you must decide whether that offense included an act of domestic violence. To do so, you should answer the following verdict question on the verdict form:

Did the offense of [insert prior offense], of which the defendant was previously convicted, include an act of domestic violence? (Answer “Yes” or “No”)

The offense of [insert prior offense], of which the defendant was previously convicted, included an act of domestic violence only if:

1. you determine, as a matter of fact, that it included,
  - [2. an act or threatened act of violence,
  3. upon a person with whom the actor was or had been involved in an intimate relationship.]
- [2. any other crime or municipal ordinance violation,
3. against a person, or against property, including an animal,
4. when used as a method of coercion, control, punishment, intimidation, or revenge,
5. directed against a person with whom the actor was or had been involved in an intimate relationship.]

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-6-801(7), C.R.S. 2020 (habitual domestic violence offender sentence enhancement elevates any qualifying misdemeanor offense to a class five felony).
2. *See* Instruction F:108 (defining the term “domestic violence” pursuant to section 18-6-800.3(1), with reference to an “intimate relationship” (a term that is defined in section 18-6-800.3(2), C.R.S. 2020, and Instruction F:187)); *see, e.g.*, Instruction E:28 (special verdict form).
3. Section 18-6-801(7)(a) elevates a misdemeanor offense that included an act of domestic violence to a class 5 felony if the defendant had previously been convicted of three or more prior offenses that included acts of domestic violence. Subsection (d) requires the jury to make this determination, absent specific circumstances. *See* Instruction 6-8:01.INT, Comment 3. Thus, this interrogatory is to be given in the second phase of a bifurcated trial as contemplated in section 18-6-801(7)(d). Additionally, the court should give separate interrogatories for each prior conviction where the existence of an act of domestic violence is in dispute. Furthermore, in the event that the prior convictions involve the same type of offense, the court should be sure to differentiate the prior convictions in the individual interrogatories.
4. In 2016, the Committee added this instruction pursuant to new legislation. *See* Ch. 106, sec. 1, § 18-6-801(7), 2016 Colo. Sess. Laws 306, 306-07.

## 6-8:02 VIOLATION OF A PROTECTION ORDER (PROHIBITED CONDUCT)

The elements of the crime of violation of a protection order (prohibited conduct) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,
  4. knowingly,
  5. contacted, harassed, injured, intimidated, molested, threatened, or touched the protected person or protected property (including an animal) identified in the protection order; or entered or remained on premises or came within a specified distance of the protected person, protected property (including an animal), or premises; or violated any other provision of the protection order designed to protect the protected person from imminent danger to life or health; and
  6. the defendant's conduct was prohibited by the protection order.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (prohibited conduct).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (prohibited conduct).

#### COMMENT

1. See § 18-6-803.5(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:293.5 (defining “protected person”); Instruction F:294 (defining “protection order”); Instruction F:319 (defining “restrained person”).
3. In *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), the supreme court interpreted an earlier version of the statute and held as follows:

Since the second portion of the statute requires a knowing violation, which is satisfied either implicitly by personal service of the restraining order or explicitly by actual knowledge of the contents of the order, section 18-1-503(4) requires that the mental state of knowingly apply to every element of the crime, “unless an intent to limit its application clearly appears.” An examination of the legislative history underlying section 18-6-803.5 reveals no intent on the part of the General Assembly to limit the application of the culpable mental state of “knowingly” to only one element of the offense. Moreover, the words the General Assembly chose to describe the conduct portion of the offense in section 18-6-803.5 evidence no clear intent to limit the application of the knowledge requirement. Thus, the mental state of “knowingly” applies not only to the second prong of the statute, but also to the first, conduct, prong.

Nothing in the statutory amendments after *Coleby* suggests that the holding in that case has been legislatively overruled. Accordingly, the above instruction applies the mens rea of “knowingly” to the prohibited conduct.

4. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2020 (repeat offender; violation of restraining order

issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.

5. See *Hotsenpiller v. Morris*, 2017 COA 95, ¶ 48, \_\_ P.3d \_\_ (holding that “consent of victim” is not a valid affirmative defense to violation of a protection order because “[a] protected person simply cannot ‘consent,’ under section 18-1-505, to another person’s violation of a court order”).

6. See *People in Interest of L.C.*, 2017 COA 82, ¶ 37, \_\_ P.3d \_\_ (“By using the disjunctive ‘or’ in section 18-6-803.5(1)(a), the General Assembly intended to describe alternative ways of committing the offense of violation of a protective order. Thus, violation of a protective order does not in every instance require proof that the accused contacted the protected person.” (citations omitted)).

7. In 2017, the Committee added Comment 5.

8. In 2019, the Committee added Comment 6.

## 6-8:03 VIOLATION OF A PROTECTION ORDER (LOCATING)

The elements of the crime of violation of a protection order (locating) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,
4. knowingly,
5. hired, employed, or otherwise contracted with another person to locate or assist in the location of the protected person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (locating).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (locating).

### COMMENT

1. See § 18-6-803.5(1)(b), C.R.S. 2020.

2. See Instruction F:14 (defining “assist”); Instruction F:195 (defining “knowingly”); Instruction F:293.5 (defining “protected person”); Instruction F:294 (defining “protection order”); Instruction F:319 (defining “restrained person”).

3. Section 18-6-803.5(1)(b) excepts from criminal liability conduct permitted pursuant to section 18-13-126(1)(b). See Instruction H:49 (affirmative defense of “locating a protected person – lawful purpose”).

4. See Instruction 6-8:02, Comment 3 (discussing *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), and the application of the mens rea of “knowingly” to the prohibited conduct).

5. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2020 (repeat offender; violation of restraining order issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.

## **6-8:04 VIOLATION OF A PROTECTION ORDER (FIREARMS OR AMMUNITION)**

The elements of the crime of violation of a protection order (firearms or ammunition) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. after having been personally served with a protection order that identified the defendant as a restrained person, or otherwise having acquired from the court or law enforcement personnel actual knowledge of the contents of a protection order that identified the defendant as a restrained person,
  4. knowingly,
  5. violated a civil protection order,
  6. by possessing or attempting to purchase or receive a firearm or ammunition while the protection order was in effect; or failing to timely file a receipt or written statement with the court as required by law.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a protection order (firearms or ammunition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a protection order (firearms or ammunition).

## COMMENT

1. See § 18-6-803.5(1)(c), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:294 (defining “protection order”); Instruction F:319 (defining “restrained person”).
3. See Instruction 6-8:02, Comment 3 (discussing *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001), and the application of the mens rea of “knowingly” to the prohibited conduct).
4. The question of whether a civil protection order was issued “pursuant to section 13-14-105.5, C.R.S., or pursuant to section 18-1-1001(9)” is a matter of law for the court to determine.
5. In cases under section 18-6-803.5(1)(c)(II), the court should draft a special instruction, tailored to the evidence, explaining the relevant filing requirement(s) of section 13-14-105.5(9), section 18-1-1001(9)(i), or section 18-6-801(8)(i).
6. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factors in section 18-6-803.5(2)(a), C.R.S. 2020 (repeat offender; violation of restraining order issued pursuant to section 18-1-1001). These issues are matters of law for the court to determine.
7. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
8. In 2015, the Committee added Comment 7.



## CHAPTER 6.5

### CRIMES AGAINST AT-RISK ADULTS AND JUVENILES

- [6.5:01](#) CRIMINAL NEGLIGENCE RESULTING IN THE DEATH OF AN AT-RISK PERSON
- [6.5:02](#) CRIMINAL NEGLIGENCE RESULTING IN SERIOUS BODILY INJURY TO AN AT-RISK PERSON
- [6.5:03](#) CRIMINAL NEGLIGENCE RESULTING IN BODILY INJURY TO AN AT-RISK PERSON
- [6.5:04](#) CARETAKER NEGLECT OR ENDANGERMENT OF AN AT-RISK PERSON
- [6.5:04.5](#) UNLAWFUL ABANDONMENT OF AN AT-RISK PERSON
- [6.5:05](#) CRIMINAL EXPLOITATION OF AN AT-RISK PERSON
- [6.5:06.INT](#) CRIMINAL EXPLOITATION OF AN AT-RISK PERSON – INTERROGATORY (VALUE)
- [6.5:06.4](#) FALSE IMPRISONMENT OF AN AT-RISK PERSON (LOCKED ROOM)
- [6.5:06.5](#) FALSE IMPRISONMENT OF AN AT-RISK PERSON (PHYSICALLY RESTRAINING)
- [6.5:06.6](#) FALSE IMPRISONMENT OF AN AT-RISK PERSON (FORCE OR THREATS)
- [6.5:07](#) MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FAILURE TO REPORT)
- [6.5:08](#) MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FALSE REPORT)

## 6.5:01 CRIMINAL NEGLIGENCE RESULTING IN THE DEATH OF AN AT-RISK PERSON

The elements of criminal negligence resulting in the death of an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. engaged in conduct amounting to criminal negligence,
  4. that resulted in the death,
  5. of an at-risk person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in the death of an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in the death of an at-risk person.

### COMMENT

1. See § 18-6.5-103(2)(a), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:66 (defining "conduct"); Instruction F:79 (defining "criminal negligence").
3. See *People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).

4. See *People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) (“Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims’ ages.”).

5. See also *People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) (“‘Conduct’ is defined as ‘an act or omission and its accompanying state of mind.’ Section 18-1-501(2) (emphasis supplied). Therefore, § 18-6.5-103(2)(b) does not require the commission of an act to trigger its requirements.”).

6. In 2016, the Committee modified this instruction, pursuant to a legislative amendment, by replacing the bracketed alternatives of “adult” and “juvenile” with the word “person.” See Ch. 172, sec. 3, § 18-6.5-103(2)(a), 2016 Colo. Sess. Laws 545, 547.

## 6.5:02 CRIMINAL NEGLIGENCE RESULTING IN SERIOUS BODILY INJURY TO AN AT-RISK PERSON

The elements of criminal negligence resulting in serious bodily injury to an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. engaged in conduct amounting to criminal negligence,
  4. that resulted in serious bodily injury,
  5. to an at-risk person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in serious bodily injury to an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in serious bodily injury to an at-risk person.

### COMMENT

1. *See* § 18-6.5-103(2)(b), C.R.S. 2020.
2. *See* Instruction F:26.5 (defining “at-risk person”); Instruction F:66 (defining “conduct”); Instruction F:79 (defining “criminal negligence”); Instruction F:332 (defining “serious bodily injury”).

3. See *People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) (“‘Conduct’ is defined as ‘an act or omission and its accompanying state of mind.’ Section 18-1-501(2) (emphasis supplied). Therefore, § 18-6.5-103(2)(b) does not require the commission of an act to trigger its requirements.”).
4. See *People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).
5. See *People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) (“Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims’ ages.”).
6. In 2016, the Committee modified this instruction, pursuant to a legislative amendment, by replacing the bracketed alternatives of “adult” and “juvenile” with the word “person.” See Ch. 172, sec. 3, § 18-6.5-103(2)(b), 2016 Colo. Sess. Laws 545, 548.

### 6.5:03 CRIMINAL NEGLIGENCE RESULTING IN BODILY INJURY TO AN AT-RISK PERSON

The elements of criminal negligence resulting in bodily injury to an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. engaged in conduct amounting to criminal negligence,
  4. that resulted in bodily injury,
  5. to an at-risk person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal negligence resulting in bodily injury to an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal negligence resulting in bodily injury to an at-risk person.

#### COMMENT

1. *See* § 18-6.5-103(2)(c), C.R.S. 2020.
2. *See* Instruction F:26.5 (defining “at-risk person”); Instruction F:36 (defining “bodily injury”); Instruction F:66 (defining “conduct”); Instruction F:79 (defining “criminal negligence”).

3. See *People v. Lovato*, 179 P.3d 208, 211 (Colo. App. 2007) (section 18-6.5-103(2) creates a separate substantive offense).

4. See *People v. Davis*, 935 P.2d 79, 86 (Colo. App. 1996) (“Examining §§ 18-6.5-102 and 18-6.5-103 . . . we find no indication that the General Assembly intended to require that a defendant act with knowledge of the age of a victim in order to be charged with a crime against an at-risk adult. The relevant statutes contain no mens rea element. Nor do they provide a defense for those defendants who might make a reasonable mistake as to their victims’ ages.”).

5. See also *People v. Madison*, 176 P.3d 793, 805 (Colo. App. 2007) (“‘Conduct’ is defined as ‘an act or omission and its accompanying state of mind.’ Section 18-1-501(2) (emphasis supplied). Therefore, § 18-6.5-103(2)(b) does not require the commission of an act to trigger its requirements.”).

6. In 2016, the Committee modified this instruction, pursuant to a legislative amendment, by replacing the bracketed alternatives of “adult” and “juvenile” with the word “person.” See Ch. 172, sec. 3, § 18-6.5-103(2)(c), 2016 Colo. Sess. Laws 545, 548.

## 6.5:04 CARETAKER NEGLECT OR ENDANGERMENT OF AN AT-RISK PERSON

The elements of the crime of caretaker neglect or endangerment of an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. committed caretaker neglect against, or acted in a manner likely to be injurious to the physical or mental welfare of,
  5. an at-risk person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of caretaker neglect or endangerment of an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of caretaker neglect or endangerment of an at-risk person.

### COMMENT

1. See § 18-6.5-103(6)(a), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:44 (defining "caretaker"); Instruction F:45 (defining "caretaker neglect"); Instruction F:195 (defining "knowingly").

3. In 2016, the Committee deleted the bracketed alternatives of “adult,” “elder,” and “juvenile” and replaced them with “person” pursuant to a legislative amendment, and it deleted the previous Comment 3. *See* Ch. 172, sec. 3, § 18-6.5-103(6), 2016 Colo. Sess. Laws 545, 549.

4. In 2019, the Committee updated the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 365, sec. 3, § 18-6.5-103(6), 2019 Colo. Sess. Laws 3359, 3360.

## 6.5:04.5 UNLAWFUL ABANDONMENT OF AN AT-RISK PERSON

The elements of the crime of unlawful abandonment of an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally and unreasonably,
  4. deserted an at-risk person,
  5. in a manner that endangered the safety of that person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful abandonment of an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful abandonment of an at-risk person.

### COMMENT

1. See §§ 18-6.5-102(14), 18-6.5-103(6)(b), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:185 (defining "intentionally"); see also Instruction F:379.5 (defining "unlawful abandonment").
3. Section 18-6.5-103(6)(b) criminalizes "unlawfully abandon[ing] an at-risk person." In turn, section 18-6.5-102(14) defines "unlawful

abandonment” as “the intentional and unreasonable desertion of an at-risk person in a manner that endangers the safety of that person.” The Committee has thus incorporated that definitional statute into its elements of the crime. Furthermore, the Committee notes that the statute does not define the terms “unreasonable” or “desertion.”

4. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 365, secs. 2-3, §§ 18-6.5-102(14), 18-6.5-103(6)(b), 2019 Colo. Sess. Laws 3359, 3359-60.

## 6.5:05 CRIMINAL EXPLOITATION OF AN AT-RISK PERSON

The elements of the crime of criminal exploitation of an at-risk person are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. used deception, harassment, intimidation, or undue influence,
  5. to permanently or temporarily deprive an at-risk person of the use, benefit, or possession of any thing of value.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal exploitation of an at-risk person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal exploitation of an at-risk person.

### COMMENT

1. See § 18-6.5-103(7.5)(a), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:30 (defining "benefit"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession"); Instruction F:379 (defining "undue influence"); *see also* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. In 2016, the Committee replaced the word “elder” with “person” pursuant to a legislative amendment. *See* Ch. 172, sec. 3, § 18-6.5-103(7.5)(a), 2016 Colo. Sess. Laws 545, 549.

## 6.5:06.INT CRIMINAL EXPLOITATION OF AN AT-RISK PERSON – INTERROGATORY (VALUE)

If you find the defendant not guilty of criminal exploitation of an at-risk person, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of criminal exploitation of an at-risk person, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form.

1. Was the value of the thing involved in the defendant’s criminal exploitation of an at-risk person five hundred dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-6.5-103(7.5)(b), C.R.S. 2020.
2. See Instruction F:26.5 (defining “at-risk person”); see, e.g., Instruction E:28 (special verdict form).
3. In 2016, the Committee replaced the word “elder” with “person” pursuant to a legislative amendment, and it added the cross-reference to Instruction 26.5 in Comment 2. See Ch. 172, sec. 3, § 18-6.5-103(7.5)(b), 2016 Colo. Sess. Laws 545, 549.

## 6.5:06.4 FALSE IMPRISONMENT OF AN AT-RISK PERSON (LOCKED ROOM)

The elements of the crime of false imprisonment of an at-risk person (locked room) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. without proper legal authority,
  5. confined or detained an at-risk person in a locked or barricaded room or other space, and
  6. such confinement or detention was part of a continued pattern of cruel punishment or unreasonable isolation or confinement of the at-risk person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false imprisonment of an at-risk person (locked room).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false imprisonment of an at-risk person (locked room).

### COMMENT

1. See § 18-6.5-103(9)(a)(I), C.R.S. 2020.

2. See Instruction F:26.5 (defining “at-risk person”); Instruction F:195 (defining “knowingly”).
3. The Committee added this instruction in 2019 pursuant to new legislation. See Ch. 365, sec. 3, § 18-6.5-103(9)(a)(I), 2019 Colo. Sess. Laws 3359, 3360.

## 6.5:06.5 FALSE IMPRISONMENT OF AN AT-RISK PERSON (PHYSICALLY RESTRAINING)

The elements of the crime of false imprisonment of an at-risk person (physically restraining) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unreasonably,
4. without proper legal authority,
5. confined or detained an at-risk person,
6. by tying, caging, chaining, or otherwise using similar physical restraints to restrict the at-risk person's freedom of movement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false imprisonment of an at-risk person (physically restraining).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false imprisonment of an at-risk person (physically restraining).

### COMMENT

1. See § 18-6.5-103(9)(a)(II), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:195 (defining "knowingly").

3. *See* Instruction H:49.3 (affirmative defense of “promoted welfare”).
4. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 365, sec. 3, § 18-6.5-103(9)(a)(II), 2019 Colo. Sess. Laws 3359, 3360.

## 6.5:06.6 FALSE IMPRISONMENT OF AN AT-RISK PERSON (FORCE OR THREATS)

The elements of the crime of false imprisonment of an at-risk person (force or threats) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unreasonably,
4. without proper legal authority,
5. confined or detained an at-risk person,
6. by means of force, threats, or intimidation designed to restrict the at-risk person's freedom of movement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false imprisonment of an at-risk person (force or threats).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false imprisonment of an at-risk person (force or threats).

### COMMENT

1. See § 18-6.5-103(9)(a)(III), C.R.S. 2020.
2. See Instruction F:26.5 (defining "at-risk person"); Instruction F:195 (defining "knowingly").

3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 365, sec. 3, § 18-6.5-103(9)(a)(III), 2019 Colo. Sess. Laws 3359, 3360.

## **6.5:07 MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FAILURE TO REPORT)**

The elements of the crime of mistreatment of at-risk elder or at-risk adult with IDD (failure to report) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a[n] [insert relevant status from section 18-6.5-108(1)(b), C.R.S. 2020], and
4. observed the mistreatment of an at-risk elder or an at-risk adult with IDD, or had reasonable cause to believe that an at-risk elder or an at-risk adult with IDD had been mistreated or was at imminent risk of mistreatment, and
5. willfully,
6. failed to report such fact to a law enforcement agency within twenty-four hours after making the observation or discovery.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of mistreatment of at-risk elder or at-risk adult with IDD (failure to report).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of mistreatment of at-risk elder or at-risk adult with IDD (failure to report).

## COMMENT

1. *See* § 18-6.5-108(1)(a)-(c), C.R.S. 2020.
2. *See* Instruction F:24.5 (defining “at-risk adult with IDD”); Instruction F:25 (defining “at-risk elder”); Instruction F:195 (defining “willfully”); Instruction F:230.5 (defining “mistreated or mistreatment” (at-risk persons)).
3. Section 18-6.5-108(1)(d) provides for an exemption from liability where the person knew that another person had already reported the observed mistreatment. However, the Committee has not drafted a model affirmative defense instruction.
4. The Committee added this instruction in 2016.

## 6.5:08 MISTREATMENT OF AT-RISK ELDER OR AT-RISK ADULT WITH IDD (FALSE REPORT)

The elements of the crime of mistreatment of at-risk elder or at-risk adult with IDD (false report) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a false report of mistreatment of an at-risk elder or an at-risk adult with IDD,
5. to a law enforcement agency.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of mistreatment of at-risk elder or at-risk adult with IDD (false report).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of mistreatment of at-risk elder or at-risk adult with IDD (false report).

### COMMENT

1. See § 18-6.5-108(4), C.R.S. 2020.
2. See Instruction F:24.5 (defining "at-risk adult with IDD"); Instruction F:25 (defining "at-risk elder"); Instruction F:195 (defining "knowingly"); Instruction F:230.5 (defining "mistreatment" (at-risk persons)).

3. The Committee added this instruction in 2016.

## CHAPTER 7-1

### OBSCENITY

<a href="#"><u>7-1:01</u></a>	WHOLESALE PROMOTION OF OBSCENITY
<a href="#"><u>7-1:02</u></a>	WHOLESALE PROMOTION OF OBSCENITY TO A MINOR
<a href="#"><u>7-1:03</u></a>	PROMOTION OF OBSCENITY
<a href="#"><u>7-1:04</u></a>	PROMOTION OF OBSCENITY TO A MINOR
<a href="#"><u>7-1:05.SP</u></a>	PROMOTION OF OBSCENITY – SPECIAL INSTRUCTION (SIX OR MORE ITEMS)
<a href="#"><u>7-1:06</u></a>	POSTING A PRIVATE IMAGE FOR HARASSMENT
<a href="#"><u>7-1:07</u></a>	POSTING A PRIVATE IMAGE FOR PECUNIARY GAIN
<a href="#"><u>7-1:08</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF ANOTHER)
<a href="#"><u>7-1:09</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF SELF)
<a href="#"><u>7-1:10.INT</u></a>	POSTING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (AGGRAVATING CIRCUMSTANCES)
<a href="#"><u>7-1:11</u></a>	POSSESSING A PRIVATE IMAGE BY A JUVENILE
<a href="#"><u>7-1:12.INT</u></a>	POSSESSING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (SEPARATE IMAGES)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 7-1:01 WHOLESALE PROMOTION OF OBSCENITY

The elements of the crime of wholesale promotion of obscenity are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowing its content and character,
  4. wholesale promoted or possessed with intent to wholesale promote,
  5. any obscene material.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wholesale promotion of obscenity.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wholesale promotion of obscenity.

### COMMENT

1. *See* § 18-7-102(1)(a), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:219.3 (defining "material"); Instruction F:246.2 (defining "obscene" (obscenity)); Instruction F:281 (defining "possession"); Instruction F:391.8 (defining "wholesale promote").

3. *See People v. Ford*, 773 P.2d 1059, 1068 (Colo. 1989) (“Section 18-7-102 imposes liability on a person who promotes obscene material if he knows its contents and character. Thus, the statute requires that a particular defendant act ‘knowingly,’ which is a clearly defined mental state. The defendant need not know that the material is ‘obscene.’”).
4. Sections 18-1-702(5), (6), C.R.S. 2020, provide exemptions from liability in circumstances involving law enforcement activities and conduct occurring in a person’s residence. However, the Committee has not drafted model affirmative defense instructions.
5. *See* Instruction 7-1:05.SP, Comment 3 (taking no position on whether the permissible inference of section 18-7-102(4) applies to “wholesale” promotion).

## 7-1:02 WHOLESALE PROMOTION OF OBSCENITY TO A MINOR

The elements of the crime of wholesale promotion of obscenity to a minor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing its content and character,
4. wholesale promoted to a minor or possessed with intent to wholesale promote to a minor,
5. any obscene material.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wholesale promotion of obscenity to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wholesale promotion of obscenity to a minor.

### COMMENT

1. See § 18-7-102(1.5)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:219.3 (defining "material"); Instruction F:229.3 (defining "minor" (obscenity)); Instruction F:246.2 (defining "obscene" (obscenity)); Instruction F:281 (defining "possession"); Instruction F:391.8 (defining "wholesale promote").

3. *See People v. Ford*, 773 P.2d 1059, 1068 (Colo. 1989) (“Section 18-7-102 imposes liability on a person who promotes obscene material if he knows its contents and character. Thus, the statute requires that a particular defendant act ‘knowingly,’ which is a clearly defined mental state. The defendant need not know that the material is ‘obscene.’”).
4. *See* Instruction 7-1:01, Comment 4 (discussing the excepting language in sections 18-7-102(5), (6)).
5. *See* Instruction 7-1:05.SP, Comment 3 (taking no position on whether the permissible inference of section 18-7-102(4) applies to “wholesale” promotion).

## 7-1:03 PROMOTION OF OBSCENITY

The elements of the crime of promotion of obscenity are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing its content and character,
- [4. promoted or possessed with intent to promote any obscene material.]
- [4. produced, presented, or directed an obscene performance or participated in a portion thereof that was obscene or that contributed to its obscenity.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of promotion of obscenity.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of promotion of obscenity.

### COMMENT

1. See § 18-7-102(2)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:219.3 (defining "material"); Instruction F:246.2 (defining "obscene" (obscenity)); Instruction F:281 (defining "possession"); Instruction F:287.6 (defining "promote").

3. *See People v. Ford*, 773 P.2d 1059, 1068 (Colo. 1989) (“Section 18-7-102 imposes liability on a person who promotes obscene material if he knows its contents and character. Thus, the statute requires that a particular defendant act ‘knowingly,’ which is a clearly defined mental state. The defendant need not know that the material is ‘obscene.’”).

4. *See* Instruction 7-1:01, Comment 4 (discussing the excepting language in sections 18-7-102(5), (6)).

## 7-1:04 PROMOTION OF OBSCENITY TO A MINOR

The elements of the crime of promotion of obscenity to a minor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing its content and character,
- [4. promoted to a minor or possessed with intent to promote to a minor any obscene material.]
- [4. produced, presented, or directed an obscene performance involving a minor or participated in a portion thereof that was obscene or that contributed to its obscenity.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of promotion of obscenity to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of promotion of obscenity to a minor.

### COMMENT

1. See § 18-7-102(2.5)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:219.3 (defining "material"); Instruction F:229.3 (defining "minor" (obscenity)); Instruction F:246.2 (defining "obscene" (obscenity)); Instruction F:281 (defining "possession"); Instruction F:287.6 (defining "promote").

3. *See People v. Ford*, 773 P.2d 1059, 1068 (Colo. 1989) (“Section 18-7-102 imposes liability on a person who promotes obscene material if he knows its contents and character. Thus, the statute requires that a particular defendant act ‘knowingly,’ which is a clearly defined mental state. The defendant need not know that the material is ‘obscene.’”).

4. *See* Instruction 7-1:01, Comment 4 (discussing the excepting language in sections 18-7-102(5), (6)).

## 7-1:05.SP PROMOTION OF OBSCENITY – SPECIAL INSTRUCTION (SIX OR MORE ITEMS)

Evidence that a person possessed six or more identical obscene materials gives rise to a permissible inference that the person possessed them with intent to promote them.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is warranted by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-7-102(4), C.R.S. 2020.
2. See *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 362 (Colo. 1985) (“[I]t is clear that the presumption [in section 18-7-102(4)] must be classified as permissive to comply with constitutional requirements. It must be construed to allow, but not to require, the trier of fact to infer the presumed fact (intent to promote) from the proven fact (possession of six or more identical obscene materials) and, of course, the jury must be properly instructed as to this effect.”).
3. The Committee takes no position on whether this instruction applies to the crimes of wholesale promotion of obscenity. See Instructions 7-1:01 and 7-1:02.

## 7-1:06 POSTING A PRIVATE IMAGE FOR HARASSMENT

The elements of the crime of posting a private image for harassment are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was eighteen years of age or older, and
4. with the intent,
  - [5. to harass, intimidate, or coerce an identified or identifiable person eighteen years of age or older,
  6. posted or distributed through the use of social media or any website any photograph, video, or other image displaying the private intimate parts of the depicted person,]
  - [5. to harass, intimidate, or coerce an identified or identifiable person,
  6. posted or distributed through the use of social media or any website an image displaying sexual acts of the depicted person,]
  - [7. without the depicted person's consent, and]
  - [7. when the defendant knew or should have known that the depicted person had a reasonable expectation that the image would remain private, and]
8. the conduct resulted in serious emotional distress of the depicted person.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of posting a private image for harassment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of posting a private image for harassment.

### COMMENT

1. See § 18-7-107(1)(a), C.R.S. 2020.
2. See Instruction F:101.5 (defining “displaying sexual acts”); Instruction F:176.5 (defining “image”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:285.6 (defining “private intimate parts”); Instruction F:336.2 (defining “sexual acts”); Instruction F:346.5 (defining “social media”).
3. See Instruction H:49.5 (affirmative defense of “newsworthy event”).
4. The statute does not define “serious emotional distress.” *Cf. People v. Carey*, 198 P.3d 1223, 1236 (Colo. App. 2008) (holding, in the context of a stalking case, that “[b]ecause the phrase ‘serious emotional distress’ is understandable to persons of common intelligence, it was within the trial court’s discretion to refuse to instruct the jury on the definition of ‘severe emotional distress’ found in the civil jury instructions”).
5. Section 18-7-107(5), C.R.S. 2020, creates exemptions for interactive computer services, information services, and telecommunications services, as defined in Title 47 of the United States Code. However, the Committee has not drafted model affirmative defense instructions.
6. For the fifth and sixth elements, the Committee has created bracketed alternatives because it appears from the statute that (1) if the defendant posted a “photograph, video, or other image displaying the private intimate parts” of a person, such a posting is criminalized only if the

depicted person is eighteen years of age or older, but (2) if the defendant posted “an image displaying sexual acts” of a person, such a posting is criminalized regardless of the age of the depicted person.

7. In 2018, pursuant to a legislative amendment, the Committee modified the first alternative of the fifth element; added the second bracketed alternative for the fifth and sixth elements; added cross-references to Instructions F:101.5, F:176.5, and F:336.2 in Comment 2; and added Comment 6. *See* Ch. 192, sec. 1, § 18-7-107(1)(a), 2018 Colo. Sess. Laws 1276, 1276.

## 7-1:07 POSTING A PRIVATE IMAGE FOR PECUNIARY GAIN

The elements of the crime of posting a private image for pecuniary gain are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was eighteen years of age or older, and
- [4. posted or distributed through social media or any website any photograph, video, or other image displaying the private intimate parts of an identified or identifiable person eighteen years of age or older,]
- [4. posted or distributed through social media or any website an image displaying sexual acts of an identified or identifiable person,]
5. with the intent,
6. to obtain a pecuniary benefit from any person as a result of the posting, viewing, or removal of the private image, and
- [7. the defendant had not obtained the depicted person's consent.]
- [7. the defendant knew or should have known that the depicted person had a reasonable expectation that the image would remain private.]
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of posting a private image for pecuniary gain.

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of posting a private image for pecuniary gain.

#### COMMENT

1. *See* § 18-7-108(1)(a), C.R.S. 2020.
2. *See* Instruction F:101.5 (defining “displaying sexual acts”); Instruction F:176.5 (defining “image”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:285.6 (defining “private intimate parts”); Instruction F:336.2 (defining “sexual acts”); Instruction F:346.5 (defining “social media”).
3. *See* Instruction H:49.5 (affirmative defense of “newsworthy event”).
4. Section 18-7-108(5), C.R.S. 2020, creates exemptions for interactive computer services, information services, and telecommunications services, as defined in Title 47 of the United States Code. However, the Committee has not drafted model affirmative defense instructions.
5. For the fourth element, the Committee has created bracketed alternatives because it appears from the statute that (1) if the defendant posted a “photograph, video, or other image displaying the private intimate parts” of a person, such a posting is criminalized only if the depicted person is eighteen years of age or older, but (2) if the defendant posted “an image displaying sexual acts” of a person, such a posting is criminalized regardless of the age of the depicted person.
6. In 2018, pursuant to a legislative amendment, the Committee added the second bracketed alternative for the fourth element; added cross-references to Instructions F:101.5, F:176.5, and F:336.2 in Comment 2; and added Comment 5. *See* Ch. 192, sec. 2, § 18-7-108(1)(a), 2018 Colo. Sess. Laws 1276, 1277.

## 7-1:08 POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF ANOTHER)

The elements of the [crime] [offense] of posting a private image by a juvenile (image of another) are:

1. That the [defendant] [juvenile],
2. in the State of Colorado, at or about the date and place charged,
3. while under eighteen years of age,
4. knowingly,
5. through digital or electronic means,
6. distributed, displayed, or published to the view of another person,
7. a sexually explicit image of a person other than [himself] [herself] who is at least fourteen years of age or is less than four years younger than the [defendant] [juvenile],
- [8. without the depicted person's permission.]
- [8. when the recipient did not solicit or request to be supplied with the image and suffered emotional distress.]
- [8. when he [she] knew or should have known that the depicted person had a reasonable expectation that the image would remain private.]
- [9. and that the [defendant's] [juvenile's] conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find [the defendant guilty] [that the juvenile committed the offense] of posting a private image by a juvenile (image of another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find [the defendant not guilty] [that the juvenile did not commit the offense] of posting a private image by a juvenile (image of another).

#### COMMENT

1. *See* § 18-7-109(1)(a), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:340.5 (defining “sexually explicit image”).
3. *See* Instruction H:49.8 (affirmative defense of “coerced, threatened, or intimidated”).
4. Because this offense only applies to juveniles, the Committee has added the third element, which stems from the statutory definition of “juvenile” as it applies to this offense. *See* § 18-7-109(8)(a).

Furthermore, the Committee recognizes that juveniles are not entitled to a trial by jury for misdemeanors or petty offenses. *See* § 19-2-107(2), C.R.S. 2020. Nevertheless, the Committee has created this instruction in the event that a juvenile would ever face a jury trial, either in criminal court or in juvenile court. Furthermore, the Committee has provided bracketed language throughout the instruction to match the appropriate venue. If the proceeding takes places in criminal court, the court should use the first set of brackets. If the proceeding takes place in juvenile court, the court should use the second set of brackets, which replaces several terms (i.e., “crime,” “defendant,” “guilty”) with their appropriate counterpart (i.e., “offense,” “juvenile,” “committed the offense”).

5. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(1)(a), 2017 Colo. Sess. Laws 2012, 2013-14.

## **7-1:09 POSTING A PRIVATE IMAGE BY A JUVENILE (IMAGE OF SELF)**

The elements of the [crime] [offense] of posting a private image by a juvenile (image of self) are:

1. That the [defendant] [juvenile],
2. in the State of Colorado, at or about the date and place charged,
3. while under eighteen years of age,
4. knowingly,
5. through digital or electronic means,
6. distributed, displayed, or published,
7. to the view of another person who is at least fourteen years of age or is less than four years younger than the [defendant] [juvenile],
8. a sexually explicit image of [himself] [herself],
9. when the recipient did not solicit or request to be supplied with the image and suffered emotional distress.
- [10. and that the [defendant's] [juvenile's] conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find [the defendant guilty] [that the juvenile committed the offense] of posting a private image by a juvenile (image of self).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find [the defendant not guilty] [that the juvenile did not commit the offense] of posting a private image by a juvenile (image of self).

## COMMENT

1. *See* § 18-7-109(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:340.5 (defining “sexually explicit image”).
3. *See* Instruction H:49.8 (affirmative defense of “coerced, threatened, or intimidated”).
4. Because this offense only applies to juveniles, the Committee has added the third element, which stems from the statutory definition of “juvenile” as it applies to this offense. *See* § 18-7-109(8)(a).

Furthermore, the Committee recognizes that juveniles are not entitled to a trial by jury for misdemeanors or petty offenses. *See* § 19-2-107(2), C.R.S. 2020. Nevertheless, the Committee has created this instruction in the event that a juvenile would ever face a jury trial in criminal court for this offense. Furthermore, the Committee has provided bracketed language throughout the instruction to match the appropriate venue. If the proceeding takes place in criminal court, the court should use the first set of brackets. If the proceeding takes place in juvenile court, the court should use the second set of brackets, which replaces several terms (i.e., “crime,” “defendant,” “guilty”) with their appropriate counterpart (i.e., “offense,” “juvenile,” “committed the offense”).

5. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(1)(b), 2017 Colo. Sess. Laws 2012, 2014.

## **7-1:10.INT POSTING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (AGGRAVATING CIRCUMSTANCES)**

If you find [the defendant not guilty] [that the juvenile did not commit the offense] of posting a private image by a juvenile, you should disregard this instruction and sign the verdict form to indicate your [not guilty verdict] [verdict of non-commission].

If, however, you find [the defendant guilty] [that the juvenile committed the offense] of posting a private image by a juvenile, you should sign the verdict form to indicate your finding of [guilt] [commission], and answer the following verdict question on the verdict form:

Were there aggravating circumstances? (Answer “Yes” or “No”)

There were aggravating circumstances only if:

- [1. the [defendant] [juvenile] committed the offense with the intent to coerce, intimidate, threaten, or otherwise cause emotional distress to the depicted person.]
- [1. the [defendant] [juvenile] had previously posted a private image and completed a diversion program or education program for the act pursuant to law or had a prior adjudication for posting a private image by a juvenile.]
- [1. the [defendant] [juvenile] distributed, displayed, or published three or more images that depicted three or more separate and distinct persons.]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-7-109(5)(a), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); *see, e.g.*, Instruction E:28 (special verdict form).
3. If necessary, the court should instruct the jury about the relevant diversion or education program. *See* § 18-7-109(5)(e).
4. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(5)(a), 2017 Colo. Sess. Laws 2012, 2015.

## 7-1:11 POSSESSING A PRIVATE IMAGE BY A JUVENILE

The elements of the [crime] [offense] of possessing a private image by a juvenile are:

1. That the [defendant] [juvenile],
2. in the State of Colorado, at or about the date and place charged,
3. while under eighteen years of age,
4. knowingly,
5. through digital or electronic means,
6. possessed a sexually explicit image of another person who was at least fourteen years of age or was less than four years younger than the [defendant] [juvenile],
7. without the depicted person's permission, and
8. did not take reasonable steps to either destroy or delete the image within seventy-two hours after initially viewing the image, and
9. did not report the initial viewing of such image to law enforcement or a school resource officer within seventy-two hours after initially viewing the image.
- [10. and that the [defendant's] [juvenile's] conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find [the defendant guilty] [that the juvenile committed the offense] of possessing a private image by a juvenile.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find [the defendant not guilty] [that the juvenile did not commit the offense] of possessing a private image by a juvenile.

#### COMMENT

1. *See* § 18-7-109(2), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:340.5 (defining “sexually explicit image”); Instruction F:329 (defining “school resource officer”).
3. *See* Instruction H:49.8 (affirmative defense of “coerced, threatened, or intimidated”).
4. Because this offense only applies to juveniles, the Committee has added the third element, which stems from the statutory definition of “juvenile” as it applies to this offense. *See* § 18-7-109(8)(a).

Furthermore, the Committee recognizes that juveniles are not entitled to a trial by jury for misdemeanors or petty offenses. *See* § 19-2-107(2), C.R.S. 2020. Nevertheless, the Committee has created this instruction in the event that a juvenile would ever face a jury trial in criminal court for this offense. Furthermore, the Committee has provided bracketed language throughout the instruction to match the appropriate venue. If the proceeding takes place in criminal court, the court should use the first set of brackets. If the proceeding takes place in juvenile court, the court should use the second set of brackets, which replaces several terms (i.e., “crime,” “defendant,” “guilty”) with their appropriate counterpart (i.e., “offense,” “juvenile,” “committed the offense”).

5. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(2), 2017 Colo. Sess. Laws 2012, 2014.

## **7-1:12.INT POSSESSING A PRIVATE IMAGE BY A JUVENILE – INTERROGATORY (SEPARATE IMAGES)**

If you find [the defendant not guilty] [that the juvenile did not commit the offense] of possessing a private image by a juvenile, you should disregard this instruction and sign the verdict form to indicate your [not guilty verdict] [verdict of non-commission].

If, however, you find [the defendant guilty] [that the juvenile committed the offense] of possessing a private image by a juvenile, you should sign the verdict form to indicate your finding of [guilt] [commission], and answer the following verdict question on the verdict form:

Did the [defendant] [juvenile] possess a high number of separate images depicting distinct persons? (Answer “Yes” or “No”)

The [defendant] [juvenile] possessed a high number of separate images depicting distinct persons only if:

1. the [defendant] [juvenile] possessed ten or more separate images, and
2. the images depicted three or more separate and distinct persons.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-7-109(5)(b), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 390, sec. 4, § 18-7-109(5)(b), 2017 Colo. Sess. Laws 2012, 2015.



## CHAPTER 7-2

### PROSTITUTION

<a href="#"><u>7-2:01</u></a>	PROSTITUTION
<a href="#"><u>7-2:02</u></a>	PROSTITUTION WITH KNOWLEDGE OF BEING INFECTED WITH HIV
<a href="#"><u>7-2:03</u></a>	SOLICITING ANOTHER FOR PROSTITUTION
<a href="#"><u>7-2:04</u></a>	SOLICITING FOR PROSTITUTION (ARRANGING)
<a href="#"><u>7-2:05</u></a>	SOLICITING FOR PROSTITUTION (DIRECTING)
<a href="#"><u>7-2:06</u></a>	PANDERING (INDUCING)
<a href="#"><u>7-2:07</u></a>	PANDERING (ARRANGING)
<a href="#"><u>7-2:08</u></a>	KEEPING A PLACE OF PROSTITUTION (USE)
<a href="#"><u>7-2:09</u></a>	KEEPING A PLACE OF PROSTITUTION (CONTINUED USE)
<a href="#"><u>7-2:10</u></a>	PATRONIZING A PROSTITUTE (ACT)
<a href="#"><u>7-2:11</u></a>	PATRONIZING A PROSTITUTE (PLACE)
<a href="#"><u>7-2:12</u></a>	PATRONIZING A PROSTITUTE WITH KNOWLEDGE OF BEING INFECTED
<a href="#"><u>7-2:13</u></a>	PIMPING
<a href="#"><u>7-2:14</u></a>	PROSTITUTE MAKING DISPLAY

## 7-2:01 PROSTITUTION

The elements of the crime of prostitution are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. performed or offered or agreed to perform,
4. any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse,
5. with any person who was not his [her] spouse,
6. in exchange for money or other thing of value.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitution.

### COMMENT

1. See § 18-7-201(1), C.R.S. 2020.
2. See Instruction F:16 (defining "anal intercourse"); Instruction F:81 (defining "cunnilingus"); Instruction F:147 (defining "fellatio"); Instruction F:217 (defining "masturbation"); Instruction F:371 (defining "thing of value").
3. The term "sexual intercourse" is not defined in section 18-7-201.

4. Section 18-7-201.3(1), C.R.S. 2020, establishes an affirmative defense where the offense “was committed as a direct result of being a victim of human trafficking.”

5. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

6. In 2015, the Committee added Comment 4. *See* Ch. 107, sec. 1, § 18-7-201.3(1), 2015 Colo. Sess. Laws 311, 311.

7. In 2019, the Committee added Comment 5 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

## 7-2:02 PROSTITUTION WITH KNOWLEDGE OF BEING INFECTED WITH HIV

The elements of the crime of prostitution with knowledge of being infected with HIV are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. performed or offered or agreed to perform,
  4. any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse,
  5. with a person who was not his [her] spouse,
  6. in exchange for money or any other thing of value, and
  7. the defendant had been tested for acquired immune deficiency syndrome, and the results of such test indicated the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitution with knowledge of being infected with HIV.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitution with knowledge of being infected with HIV.

## COMMENT

1. See § 18-7-201.7(1), C.R.S. 2020.
2. See Instruction F:16 (defining “anal intercourse”); Instruction F:81 (defining “cunnilingus”); Instruction F:147 (defining “fellatio”); Instruction F:217 (defining “masturbation”); Instruction F:371 (defining “thing of value”).
3. In 2016, the General Assembly repealed the crime of prostitution with knowledge of being infected with acquired immune deficiency syndrome, effective July 1, 2016. Therefore, the court should not provide this instruction if the alleged offense occurred after the effective date. See Ch. 230, sec. 3, § 18-7-201.7, 2016 Colo. Sess. Laws 895, 914.
4. Although the title of the offense includes the word “knowledge,” the provision defining the offense does not include a requirement that the defendant have known of the test results. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
5. In 2016, the Committee added Comment 3 and renumbered the subsequent comment.

## 7-2:03 SOLICITING ANOTHER FOR PROSTITUTION

The elements of the crime of soliciting another for prostitution are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. solicited another for the purpose of prostitution.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting another for prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting another for prostitution.

### COMMENT

1. *See* § 18-7-202(1)(a), C.R.S. 2020.
2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).
3. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to

trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

4. + In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_ P.3d \_\_, a division of the court of appeals interpreted the crime of soliciting another or arranging a meeting for *child* prostitution, *see* Instructions 7-4:01 and 7-4:02, and held that the phrase “for the purpose of” “means that a defendant must have had the specific intent to solicit another for child prostitution.” On certiorari review, the supreme court “express[ed] no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ . . . describes the culpable mental state of with intent.” *People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2. Nevertheless, the court held that the crime of soliciting another or arranging a meeting for child prostitution features a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

5. In 2019, the Committee added Comment 3 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

6. + In 2020, the Committee added Comment 4.

## 7-2:04 SOLICITING FOR PROSTITUTION (ARRANGING)

The elements of the crime of soliciting for prostitution (arranging) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. arranged or offered to arrange a meeting of persons for the purpose of prostitution.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for prostitution (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for prostitution (arranging).

### COMMENT

1. See § 18-7-202(1)(b), C.R.S. 2020.
2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. See Instruction 7-2:01 (prostitution).
3. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of

human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

4. + In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_ P.3d \_\_, a division of the court of appeals interpreted the crime of soliciting another or arranging a meeting for *child* prostitution, *see* Instructions 7-4:01 and 7-4:02, and held that the phrase “for the purpose of” “means that a defendant must have had the specific intent to solicit another for child prostitution.” On certiorari review, the supreme court “express[ed] no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ . . . describes the culpable mental state of with intent.” *People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2. Nevertheless, the court held that the crime of soliciting another or arranging a meeting for child prostitution features a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

5. In 2019, the Committee added Comment 3 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

6. + In 2020, the Committee added Comment 4.

## 7-2:05 SOLICITING FOR PROSTITUTION (DIRECTING)

The elements of the crime of soliciting for prostitution (directing) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  - + 3. knowingly,
  4. directed another to a place,
  5. for the purpose of prostitution.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for prostitution (directing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for prostitution (directing).

### COMMENT

1. See § 18-7-202(1)(c), C.R.S. 2020.
2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. See Instruction 7-2:01 (prostitution).

3. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

4. + Section 18-7-202(1)(c) applies to one who “[d]irects another to a place *knowing* such direction is for the purpose of prostitution” (emphasis added). Previously, this instruction tracked that language directly. But in 2020, in accordance with its longstanding protocols, the Committee changed the word “knowing” to “knowingly” and repositioned it such that it applies to all subsequent elements. In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_\_ P.3d \_\_\_, a division of the court of appeals interpreted the crime of soliciting another or arranging a meeting for *child* prostitution, *see* Instructions 7-4:01 and 7-4:02, and held that the phrase “for the purpose of” “means that a defendant must have had the specific intent to solicit another for child prostitution.” On certiorari review, the supreme court “express[ed] no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ . . . describes the culpable mental state of with intent.” *People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2. Nevertheless, the court held that the crime of soliciting another or arranging a meeting for child prostitution features a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to

all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

5. In 2019, the Committee added Comment 3 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

6. + In 2020, the Committee modified this instruction, as explained in the new Comment 4.

## 7-2:06 PANDERING (INDUCING)

The elements of the crime of pandering (inducing) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. for money or other thing of value,
4. induced a person by [menacing] [criminal intimidation] to commit prostitution.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering (inducing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering (inducing).

### COMMENT

1. See § 18-7-203(1)(a), C.R.S. 2020.
2. See Instruction F:371 (defining “thing of value”).
3. It is unclear how the term “criminal intimidation” should be defined because there is no offense with that name. The term may be similar to the offense of “criminal extortion.” See *Whimbush v. People*, 869 P.2d 1245, 1249 (Colo. 1994) (“The former version of [section 18-3-207] did not expressly prohibit threats to the ‘economic well-being’ of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled ‘criminal intimidation.’ Ch. 121, sec. 1, § 40-3-207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm,

and the crime was elevated to a class 4 felony entitled 'criminal extortion.' Ch. 167, sec. 8, § 18-3-207, 1975 Colo. Sess. Laws 616, 618.").

4. If the defendant is not separately charged with prostitution or menacing, give the jury the elemental instruction for the offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s). *See* Instruction 3-2:30 (menacing); Instruction 7-2:01 (prostitution).

## 7-2:07 PANDERING (ARRANGING)

The elements of the crime of pandering (arranging) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. for money or other thing of value,
  5. arranged or offered to arrange a situation in which a person may practice prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering (arranging).

### COMMENT

1. *See* § 18-7-203(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury

with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

## 7-2:08 KEEPING A PLACE OF PROSTITUTION (USE)

The elements of the crime of keeping a place of prostitution (use) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and
4. knowingly,
5. granted or permitted the use of the place for the purpose of prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of prostitution (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of prostitution (use).

### COMMENT

1. See § 18-7-204(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above

instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

4. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

5. In 2019, the Committee added Comment 4 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

## 7-2:09 KEEPING A PLACE OF PROSTITUTION (CONTINUED USE)

The elements of the crime of keeping a place of prostitution (continued use) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and
4. permitted the continued use of the place for the purpose of prostitution,
5. after becoming aware of facts or circumstances from which he [she] should reasonably have known that the place was being used for purposes of prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of prostitution (continued use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of prostitution (continued use).

### COMMENT

1. See § 18-7-204(1)(b), C.R.S. 2020.
2. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding

paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

3. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

4. In 2019, the Committee added Comment 3 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.

## 7-2:10 PATRONIZING A PROSTITUTE (ACT)

The elements of the crime of patronizing a prostitute (act) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in an act of sexual intercourse or deviate sexual conduct,
4. with a prostitute,
5. who was not his [her] spouse.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute (act).

### COMMENT

1. See § 18-7-205(1)(a), C.R.S. 2020.
2. The terms "sexual intercourse" and "deviate sexual conduct" are not defined for purposes of section 18-7-205.
3. Although the term "prostitute" is not defined by statute, a supplemental instruction defining the offense of "prostitution" (without the two concluding paragraphs that explain the burden of proof) should provide sufficient guidance. See Instruction 7-2:01 (prostitution).

## 7-2:11 PATRONIZING A PROSTITUTE (PLACE)

The elements of the crime of patronizing a prostitute (place) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. entered or remained in a place of prostitution,
4. with intent to engage in an act of sexual intercourse or deviate sexual conduct,
5. with a person who was not his [her] spouse.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute (place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute (place).

### COMMENT

1. *See* § 18-7-205(1)(b), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”).
3. The terms “sexual intercourse” and “deviate sexual conduct” are not defined for purposes of section 18-7-205.
4. Give the jury the elemental instruction for the offense of prostitution and omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after

the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

## 7-2:12 PATRONIZING A PROSTITUTE WITH KNOWLEDGE OF BEING INFECTED

The elements of the crime of patronizing a prostitute with knowledge of being infected are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had been tested for acquired immune deficiency syndrome, and the results of such test indicated the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, and
4. engaged in an act of sexual intercourse or deviate sexual conduct with a prostitute who was not his [her] spouse; or entered or remained in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct with a person who was not his [her] spouse.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostitute with knowledge of being infected.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostitute with knowledge of being infected.

### COMMENT

1. See § 18-7-205.7(1), C.R.S. 2020 (incorporating section 18-7-205(1)).

2. See Instruction F:185 (defining “with intent”).
3. In 2016, the General Assembly repealed the crime of patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome, effective July 1, 2016. Therefore, the court should not provide this instruction if the alleged offense occurred after the effective date. See Ch. 230, sec. 3, § 18-7-205.7, 2016 Colo. Sess. Laws 895, 914.
4. The term “deviate sexual conduct” is not defined by statute.
5. Although the title of the offense includes the word “knowledge,” the provision defining the offense does not include a requirement that the defendant have known of the test results. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
6. Give the jury the elemental instruction for the offense of prostitution and omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. See Instruction 7-2:01 (prostitution).
7. Although the term “prostitute” is not defined by statute, the supplemental instruction recommended in Comment 6 should provide sufficient guidance.
8. In 2016, the Committee added Comment 3 and renumbered the subsequent comments.

## 7-2:13 PIMPING

The elements of the crime of pimping are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. lived on or was supported or maintained in whole or in part by money or other thing of value,
5. earned, received, procured, or realized by any other person,
6. through prostitution.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pimping.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pimping.

### COMMENT

1. See § 18-7-206, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).
3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental

instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

## 7-2:14 PROSTITUTE MAKING DISPLAY

The elements of the crime of prostitute making display are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. endeavored by word, gesture, or action,
  4. to further the practice of prostitution,
  5. in any public place or within public view.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prostitute making display.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prostitute making display.

### COMMENT

1. *See* § 18-7-207, C.R.S. 2020.
2. *See* Instruction F:303 (defining “public place”).
3. If the defendant is not separately charged with prostitution, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. *See* Instruction 7-2:01 (prostitution).

4. Section 18-7-209, C.R.S. 2020, provides for immunity from criminal liability for minors who are charged with this crime and were victims of human trafficking. The Committee expresses no opinion regarding whether this provision allows for the determination of immunity prior to trial. *Cf. People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) (“We conclude that section 18-1-704.5(3) was intended to and indeed does authorize a court to dismiss a criminal prosecution at the pretrial stage of the case when the conditions of the statute have been satisfied. . . . [T]he phrase ‘shall be immune from criminal prosecution’ can only be construed to mean that the statute was intended to bar criminal proceedings against a person for the use of force under the circumstances set forth in subsection (2) of section 18-1-704.5.”). In addition, the Committee expresses no opinion on whether this statute could authorize affirmative defense instructions. *Cf. id.* at 981 (“[I]f the pretrial motion to dismiss on grounds of statutory immunity is denied, the defendant may nonetheless raise at trial, as an affirmative defense to criminal charges arising out of the defendant’s use of physical force against an intruder into his home, the statutory conditions set forth in section 18-1-704.5(2).”); *see also* Instruction H:32.7 (affirmative defense of victim of human trafficking of a minor).

5. In 2019, the Committee added Comment 4 pursuant to new legislation. *See* Ch. 147, sec. 3, § 18-7-209, 2019 Colo. Sess. Laws 1764, 1766.



## CHAPTER 7-3

### PUBLIC INDECENCY

<a href="#"><u>7-3:01</u></a>	PUBLIC INDECENCY (SEXUAL INTERCOURSE)
<a href="#"><u>7-3:02</u></a>	PUBLIC INDECENCY (LEWD EXPOSURE)
<a href="#"><u>7-3:03</u></a>	PUBLIC INDECENCY (LEWD FONDLING OR CARESS)
<a href="#"><u>7-3:04</u></a>	PUBLIC INDECENCY (KNOWING EXPOSURE)
<a href="#"><u>7-3:05</u></a>	INDECENT EXPOSURE (KNOWING EXPOSURE)
<a href="#"><u>7-3:06</u></a>	INDECENT EXPOSURE (MASTURBATION)

## 7-3:01 PUBLIC INDECENCY (SEXUAL INTERCOURSE)

The elements of the crime of public indecency (sexual intercourse) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. performed an act of sexual intercourse,
4. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (sexual intercourse).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (sexual intercourse).

### COMMENT

1. See § 18-7-301(1)(a), C.R.S. 2020.
2. See Instruction F:303 (defining “public place”).
3. See *People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; “superimposing a requirement that an offender must know that he or she is in a ‘public place’ within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly”).

## 7-3:02 PUBLIC INDECENCY (LEWD EXPOSURE)

The elements of the crime of public indecency (lewd exposure) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public,
4. performed a lewd exposure of an intimate part of the body, other than the genitals,
5. with intent to arouse or to satisfy the sexual desire of any person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (lewd exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (lewd exposure).

### COMMENT

1. See § 18-7-301(1)(c), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:186 (defining “intimate parts”); Instruction F:303 (defining “public place”).

3. The term “lewd” is not defined by statute. *See Webster’s Third New International Dictionary* 1301 (2002) (defining “lewd,” in relevant part, as: “inciting to sensual desire or imagination”).

4. *See People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; “superimposing a requirement that an offender must know that he or she is in a ‘public place’ within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly”).

### 7-3:03 PUBLIC INDECENCY (LEWD FONDLING OR CARESS)

The elements of the crime of public indecency (lewd fondling or caress) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in a public place or where the conduct may reasonably have been expected to be viewed by members of the public,
4. performed a lewd fondling or caress of the body of another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (lewd fondling or caress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (lewd fondling or caress).

#### COMMENT

1. See § 18-7-301(1)(d), C.R.S. 2020.
2. See Instruction F:186 (defining "intimate parts"); Instruction F:303 (defining "public place").
3. The term "lewd" is not defined by statute. See *Webster's Third New International Dictionary* 1301 (2002) (defining "lewd," in relevant part, as: "inciting to sensual desire or imagination").

4. See *People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; “superimposing a requirement that an offender must know that he or she is in a ‘public place’ within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly”).

### 7-3:04 PUBLIC INDECENCY (KNOWING EXPOSURE)

The elements of the crime of public indecency (knowing exposure) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in a public place or where the conduct might reasonably have been expected to be viewed by members of the public,
4. knowingly,
5. exposed his [her] genitals to the view of a person,
6. under circumstances in which such conduct was likely to cause affront or alarm to the other person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of public indecency (knowing exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of public indecency (knowing exposure).

#### COMMENT

1. *See* § 18-7-301(1)(e), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:303 (defining “public place”).

3. See *People v. Hoskay*, 87 P.3d 194, 198 (Colo. App. 2003) (trial court did not err by refusing to instruct the jury that, in order to commit the offense of public indecency, a person must know that he is in a public place; “superimposing a requirement that an offender must know that he or she is in a ‘public place’ within the meaning of § 18-1-901(3)(n) would frustrate the clear intent of the General Assembly”).

4. See *People in Interest of D.C.*, 2019 COA 22, ¶¶ 8-9, 14, 439 P.3d 72, 74-75 (holding that, where the defendant exposed himself in a classroom in the Division of Youth Corrections, the evidence supported a finding that “the conduct may reasonably be expected to be viewed by members of the public” because many members of the community were routinely present in the school; further stating that “we see no reason why DYC teachers, staff, and juvenile residents are not ‘members of the public’”).

5. + See *People v. Lopez*, 2020 COA 119, ¶¶ 1, 12, 471 P.3d 1285, 1287-88 (holding that “the common area in a prison facility is a ‘public’ area for purposes of the public indecency statute; further holding that, under the facts presented, public indecency was a lesser non-included offense of indecent exposure).

6. In 2019, the Committee added Comment 4.

7. + In 2020, the Committee added Comment 5.

### 7-3:05 INDECENT EXPOSURE (KNOWING EXPOSURE)

The elements of the crime of indecent exposure (knowing exposure) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. exposed his [her] genitals to the view of any person,
5. under circumstances in which such conduct was likely to cause affront or alarm to the other person,
6. with the intent to arouse or satisfy the sexual desire of any person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of indecent exposure (knowing exposure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of indecent exposure (knowing exposure).

#### COMMENT

1. See § 18-7-302(1)(a), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).

3. *See People v. Barrus*, 232 P.3d 264, 271 (Colo. App. 2009) (“to satisfy the elements of the crime of indecent exposure, a person must do something that would make his or her genitals visible to another person”; however, the prosecution is not required to prove that another person was “subjectively affronted or alarmed”).
4. + *See People v. Lopez*, 2020 COA 119, ¶¶ 1, 12, 471 P.3d 1285, 1287–88 (holding that “the common area in a prison facility is a ‘public’ area for purposes of the public indecency statute; further holding that, under the facts presented, public indecency was a lesser non-included offense of indecent exposure).
5. + In 2020, the Committee added Comment 4.

## 7-3:06 INDECENT EXPOSURE (MASTURBATION)

The elements of the crime of indecent exposure (masturbation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. performed an act of masturbation in a manner which exposed the act to the view of any person,
5. under circumstances in which such conduct was likely to cause affront or alarm to the other person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of indecent exposure (masturbation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of indecent exposure (masturbation).

### COMMENT

1. *See* § 18-7-302(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:218 (broadly defining “masturbation,” for purposes of this offense only, in a manner that does not require exposure of the genitals).



## CHAPTER 7-4

### CHILD PROSTITUTION

- [7-4:01](#) SOLICITING FOR CHILD PROSTITUTION (ANOTHER)
- [7-4:02](#) SOLICITING FOR CHILD PROSTITUTION (ARRANGING)
- [7-4:03](#) SOLICITING FOR CHILD PROSTITUTION (DIRECTING)
- [7-4:04](#) PANDERING OF A CHILD (INDUCING)
- [7-4:05](#) PANDERING OF A CHILD (ARRANGING)
- [7-4:06](#) PROCUREMENT OF A CHILD
- [7-4:07](#) KEEPING A PLACE OF CHILD PROSTITUTION (USE)
- [7-4:08](#) KEEPING A PLACE OF CHILD PROSTITUTION (CONTINUED USE)
- [7-4:09](#) PIMPING OF A CHILD
- [7-4:10](#) INDUCEMENT OF CHILD PROSTITUTION
- [7-4:11](#) PATRONIZING A PROSTITUTED CHILD (ACT)
- [7-4:12](#) PATRONIZING A PROSTITUTED CHILD (PLACE)
- [7-4:13.SP](#) CHILD PROSTITUTION CRIMES – SPECIAL INSTRUCTION (IGNORANCE OR REASONABLE BELIEF IS NOT A DEFENSE)

## 7-4:01 SOLICITING FOR CHILD PROSTITUTION (ANOTHER)

The elements of the crime of soliciting for child prostitution (another) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. + solicited another for the purpose of prostitution of a child or by a child.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (another).

### COMMENT

1. See § 18-7-402(1)(a), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").
3. + Section 18-7-402(1)(a) provides that the solicitation must be "for the purpose of prostitution of a child or by a child." In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_ P.3d \_\_, a division of the court of appeals held that the phrase "for the purpose of" "means that a defendant must have had the

specific intent to solicit another for child prostitution.” *See also id.* at ¶ 30 (concluding that “the phrase ‘for the purpose of’ is the equivalent of ‘intentionally’”). On certiorari review, the supreme court declined to opine on this ruling. *See People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2 (“We express no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ in subsections (a) and (b) describes the culpable mental state of with intent.”). But the supreme court *did* hold that the crime of solicitation for child prostitution requires a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

Previously, this instruction contained two substantive elements; the third element read “solicited another,” while the fourth read “for the purpose of prostitution of a child or by a child.” In 2020, in light of the *Ross* decisions, the Committee combined this language into a single element.

4. *See People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) (“the statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution”; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

5. + *See People v. Ross*, 2021 CO 9, ¶¶ 4, 33, 479 P.3d 910, 912, 917 (“[N]either the victim’s age nor the defendant’s knowledge of, or belief concerning, the victim’s age is an element of soliciting for child prostitution. . . . [I]f a defendant solicits another for the purpose of prostitution of a child, the defendant violates subsection (a). It doesn’t matter whether anyone is ultimately prostituted and, if so, whether that person turns out to be a child. By the same token, if a defendant solicits another for the purpose of prostitution of an *adult*, the defendant does not violate subsection (a). That’s true regardless of whether anyone is ultimately prostituted and, if so, whether that person turns out to be a child.” (emphasis added)); *see also* Instruction 7-4:13.SP (ignorance or reasonable belief of age not a defense – special instruction).

6. + In 2020, the Committee modified this instruction in light of the *Ross* cases, as explained in the revised Comment 3; it also added Comment 5.

## 7-4:02 SOLICITING FOR CHILD PROSTITUTION (ARRANGING)

The elements of the crime of soliciting for child prostitution (arranging) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. + arranged or offered to arrange a meeting of persons for the purpose of prostitution of a child or by a child.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (arranging).

### COMMENT

1. See § 18-7-402(1)(b), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").
3. + Section 18-7-402(1)(b) provides that the arrangement must be "for the purpose of prostitution of a child or by a child." In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_ P.3d \_\_, a division of the court of appeals held that the phrase "for the purpose of" "means that a defendant must have had the

specific intent to solicit another for child prostitution.” *See also id.* at ¶ 30 (concluding that “the phrase ‘for the purpose of’ is the equivalent of ‘intentionally’”). On certiorari review, the supreme court declined to opine on this ruling. *See People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2 (“We express no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ in subsections (a) and (b) describes the culpable mental state of with intent.”). But the supreme court *did* hold that the crime of arranging for child prostitution requires a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

Previously, this instruction contained two substantive elements; the third element read “arranged or offered to arrange a meeting of persons,” while the fourth read “for the purpose of prostitution of a child or by a child.” In 2020, in light of the *Ross* decisions, the Committee combined this language into a single element.

4. *See People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) (“the statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution”; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

5. + *See People v. Ross*, 2021 CO 9, ¶¶ 4, 33, 479 P.3d 910, 912, 917 (“[N]either the victim’s age nor the defendant’s knowledge of, or belief concerning, the victim’s age is an element of [arranging] for child prostitution. . . . [I]f a defendant [arranges a meeting] for the purpose of prostitution of a child, the defendant violates subsection [(b)]. It doesn’t matter whether anyone is ultimately prostituted and, if so, whether that person turns out to be a child. By the same token, if a defendant [arranges a meeting] for the purpose of prostitution of an *adult*, the defendant does not violate subsection [(b)]. That’s true regardless of whether anyone is ultimately prostituted and, if so, whether that person turns out to be a child.” (emphasis added)); *see also* Instruction 7-4:13.SP (ignorance or reasonable belief of age not a defense – special instruction).

6. + In 2020, the Committee modified this instruction in light of the *Ross* cases, as explained in the revised Comment 3; it also added Comment 5.

## 7-4:03 SOLICITING FOR CHILD PROSTITUTION (DIRECTING)

The elements of the crime of soliciting for child prostitution (directing) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  - + 3. knowingly,
  4. directed another to a place,
  5. for the purpose of prostitution of a child or by a child.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting for child prostitution (directing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting for child prostitution (directing).

### COMMENT

1. See § 18-7-402(1)(c), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").
3. See *People v. Jacobs*, 91 P.3d 438, 441 (Colo. App. 2003) ("the statutory elements of the general inchoate offense of solicitation do not apply to the

separate substantive offense of soliciting for child prostitution”; abandonment and renunciation is not an affirmative defense to soliciting for child prostitution).

4. + Section 18-7-402(1)(c) applies to one who “[d]irects another to a place *knowing* such direction is for the purpose of prostitution of a child or by a child” (emphasis added). Previously, this instruction tracked that language directly. But in 2020, in accordance with its longstanding protocols, the Committee changed the word “knowing” to “knowingly” and repositioned it such that it applies to all subsequent elements. In *People v. Ross*, 2019 COA 79, ¶ 8, \_\_ P.3d \_\_, a division of the court of appeals interpreted the crime of soliciting another or arranging a meeting for child prostitution, *see* Instructions 7-4:01 and 7-4:02, and held that the phrase “for the purpose of” “means that a defendant must have had the specific intent to solicit another for child prostitution.” On certiorari review, the supreme court “express[ed] no opinion on the soundness of the division’s conclusion that the phrase ‘for the purpose of’ . . . describes the culpable mental state of with intent.” *People v. Ross*, 2021 CO 9, ¶ 6 n.2, 479 P.3d 910, 913 n.2. Nevertheless, the court held that the crime of soliciting another or arranging a meeting for child prostitution features a culpable mental state, and that this mental state – *regardless* of whether it’s “with intent” or “knowingly” – applies to all of the elements of the crime, “including that the purpose of the defendant’s conduct was the prostitution of or by a child.” *Id.* at ¶ 4.

5. + In 2020, the Committee modified this instruction, as explained in the new Comment 4.

## 7-4:04 PANDERING OF A CHILD (INDUCING)

The elements of the crime of pandering of a child (inducing) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. for money or other thing of value,
  4. induced a child by menacing or criminal intimidation,
  5. to commit prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering of a child (inducing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering of a child (inducing).

### COMMENT

1. *See* § 18-7-403(1)(a), C.R.S. 2020.
2. *See* Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").
3. Section 18-7-403(1)(a) refers to "prostitution" rather than "prostitution by a child" or "prostitution by a child" (phrases which are defined, for purposes of Part 4 of Article 7, in section 18-7-401(6), (7)).

Thus, it is unclear whether “prostitution” should be defined based on sections 18-7-401(6), (7), or on the general definition in section 18-7-201(1).

4. It is unclear how the term “criminal intimidation” should be defined because there is no offense with that name. The term may be synonymous with the offense of “criminal extortion.” See *Whimbush v. People*, 869 P.2d 1245, 1249 (Colo. 1994) (“The former version of [section 18-3-207] did not expressly prohibit threats to the ‘economic well-being’ of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled ‘criminal intimidation.’ Ch. 121, sec. 1, § 40-3-207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm, and the crime was elevated to a class 4 felony entitled ‘criminal extortion.’ Ch. 167, sec. 8, § 18-3-207, 1975 Colo. Sess. Laws 616, 618.”).

5. If the defendant is not separately charged with menacing, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense. See Instruction 3-2:30 (menacing).

## 7-4:05 PANDERING OF A CHILD (ARRANGING)

The elements of the crime of pandering of a child (arranging) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. for money or other thing of value,
  4. knowingly,
  5. arranged or offered to arrange a situation in which a child may practice prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pandering of a child (arranging).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pandering of a child (arranging).

### COMMENT

1. See § 18-7-403(1)(b), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").
3. Section 18-7-403(1)(b) refers to "prostitution" rather than "prostitution by a child" or "prostitution by a child" (phrases which are

defined, for purposes of Part 4 of Article 7, in section 18-7-401(6), (7)). Thus, it is unclear whether “prostitution” should be defined based on sections 18-7-401(6), (7), or on the general definition in section 18-7-201(1).

## 7-4:06 PROCUREMENT OF A CHILD

The elements of the crime of procurement of a child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. gave, transported, provided, or made available, or offered to give, transport, provide, or make available,
5. a child,
6. to another person,
7. for the purpose of prostitution of the child.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of procurement of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of procurement of a child.

### COMMENT

1. See § 18-7-403.5, C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:293 (defining "prostitution of a child").

## 7-4:07 KEEPING A PLACE OF CHILD PROSTITUTION (USE)

The elements of the crime of keeping a place of child prostitution (use) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and
4. knowingly,
5. granted or permitted the use of the place for the purpose of prostitution of a child or by a child.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of child prostitution (use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of child prostitution (use).

### COMMENT

1. See § 18-7-404(1)(a), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

## 7-4:08 KEEPING A PLACE OF CHILD PROSTITUTION (CONTINUED USE)

The elements of the crime of keeping a place of child prostitution (continued use) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had or exercised control over the use of any place which offered seclusion or shelter for the practice of prostitution, and
4. permitted the continued use of the place for the purpose of prostitution of a child or by a child,
5. after becoming aware of facts or circumstances from which he [she] should reasonably have known that the place was being used for purposes of such prostitution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping a place of child prostitution (continued use).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping a place of child prostitution (continued use).

### COMMENT

1. See § 18-7-404(1)(b), C.R.S. 2020.

2. See Instruction F:50 (defining “child”); Instruction F:292 (defining “prostitution by a child”); Instruction F:293 (defining “prostitution of a child”).

## 7-4:09 PIMPING OF A CHILD

The elements of the crime of pimping of a child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. lived on or was supported or maintained in whole or in part by money or other thing of value,
5. earned, received, procured, or realized by a child,
6. through prostitution.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pimping of a child.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pimping of a child.

### COMMENT

1. See § 18-7-405, C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:371 (defining "thing of value"); *see also* Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

## 7-4:10 INDUCEMENT OF CHILD PROSTITUTION

The elements of the crime of inducement of child prostitution are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. by word or action, other than by menacing or criminal intimidation,
4. induced a child,
5. to engage in an act of prostitution by a child.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducement of child prostitution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducement of child prostitution.

### COMMENT

1. See § 18-7-405.5, C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:195 (defining "knowingly"); Instruction F:292 (defining "prostitution by a child").
3. If the defendant is not separately charged with menacing, provide the jury with a supplemental instruction that defines "menacing" without the two concluding paragraphs that explain the burden of proof. See Instruction 3-2:30 (menacing). Place the elemental instruction for menacing

immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for menacing.

4. It is unclear how the term “criminal intimidation” should be defined because there is no offense with that name. The term may be synonymous with the offense of “criminal extortion.” See *Whimbush v. People*, 869 P.2d 1245, 1249 n.5 (Colo. 1994) (“The former version of [section 18-3-207] did not expressly prohibit threats to the ‘economic well-being’ of the threatened person, and the crime was categorized as a class 1 misdemeanor entitled ‘criminal intimidation.’ Ch. 121, sec. 1, § 40-3-207, 1971 Colo. Sess. Laws 388, 421. In 1975, the statute was amended to include threats to cause economic harm, and the crime was elevated to a class 4 felony entitled ‘criminal extortion.’ Ch. 167, sec. 8, § 18-3-207, 1975 Colo. Sess. Laws 616, 618.”).

5. See *People v. Hansen*, 708 P.2d 468, 470 (Colo. App. 1985) (“if a defendant’s attempts at persuasion do not induce the child to perform, or to agree to perform, a sexual act in exchange for money or other thing of value, he is not guilty of inducement of child prostitution”; “[h]owever, the crime of attempt to induce child prostitution requires neither that a sexual act be performed nor that an agreement to perform be made”).

## 7-4:11 PATRONIZING A PROSTITUTED CHILD (ACT)

The elements of the crime of patronizing a prostituted child (act) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in an act of prostitution of a child or by a child,
4. with a child who was not his [her] spouse.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostituted child (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostituted child (act).

### COMMENT

1. See § 18-7-406(1)(a), C.R.S. 2020.
2. See Instruction F:50 (defining “child”); Instruction F:292 (defining “prostitution by a child”); Instruction F:293 (defining “prostitution of a child”).
3. See *People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of “prostitution of a child” in section 18-7-401(7); “the crime of ‘patronizing a prostituted child’ requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron – i.e., the person having the

sexual contact with the child – or between the patron and the one inducing the child to participate in the sexual act, the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.”).

4. *See People v. Houser*, 2013 COA 11, ¶¶ 14–27, 337 P.3d 1238, 1244–47 (holding, as a matter of first impression, that a reasonable belief that a child was at least eighteen years old is not defense to charge of patronizing a prostituted child).

5. + *See People v. Maloy*, 2020 COA 71, ¶ 22, 465 P.3d 146, 154 (holding that the defendant’s conviction for patronizing a prostituted child violated equal protection because the crimes of pandering of a child, § 18-7-403(1)(a), C.R.S. 2020, and inducement of child prostitution, § 18-7-405.5, C.R.S. 2020, “penalize the same or more culpable conduct with lighter sentences”).

6. In 2015, the Committee added Comment 4.

7. + In 2020, the Committee added Comment 5.

## 7-4:12 PATRONIZING A PROSTITUTED CHILD (PLACE)

The elements of the crime of patronizing a prostituted child (place) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. entered or remained in a place of prostitution,
  4. with intent,
  5. to engage in an act of prostitution of a child or by a child,
  6. with a child who was not his [her] spouse.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of patronizing a prostituted child (place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of patronizing a prostituted child (place).

### COMMENT

1. See § 18-7-406(1)(b), C.R.S. 2020.
2. See Instruction F:50 (defining "child"); Instruction F:185 (defining "with intent"); Instruction F:292 (defining "prostitution by a child"); Instruction F:293 (defining "prostitution of a child").

3. See *People v. Madden*, 111 P.3d 452, 459-60 (Colo. 2005) (the General Assembly did not intend to remove the commercial aspect of prostitution when it enacted the definition of “prostitution of a child” in section 18-7-401(7); “the crime of ‘patronizing a prostituted child’ requires an exchange of something of value, a commercial transaction. Such a commercial transaction must occur between the patron – i.e., the person having the sexual contact with the child – or between the patron and the one inducing the child to participate in the sexual act, the pimp. It is precisely this exchange of something of value between the patron and either the pimp or the child that distinguishes this crime from that of sexual assault.”).

## 7-4:13.SP CHILD PROSTITUTION CRIMES – SPECIAL INSTRUCTION (IGNORANCE OR REASONABLE BELIEF IS NOT A DEFENSE)

It is no defense to a charge of [insert name(s) of offense(s) from Article 7, Part 4] that the defendant did not know the child’s age, or that he [she] reasonably believed the child to be eighteen years of age or older.

### COMMENT

1. See § 18-7-407, C.R.S. 2020 (applicable to “any criminal prosecution under sections 18-7-402 to 18-7-407”).
2. + See *People v. Maloy*, 2020 COA 71, ¶¶ 38–43, 465 P.3d 146, 156–57 (holding that this language in section 18-7-407 trumps the general affirmative defense of “mistake of age,” see Instruction H:36, meaning the defendant could not raise mistake of age as an affirmative defense to his child prostitution charges).
3. + See *People v. Ross*, 2021 CO 9, ¶ 5, 479 P.3d 910, 912 (“[W]hile section 18-7-407 . . . precludes a defendant from raising a defense based on either his lack of knowledge of the child’s age or his reasonable belief that the child was an adult, it does not relieve the People of their burden of proof under subsections (a) and (b) [of section 18-7-402(1)]. Thus, section 18-7-407 does not give the People a pass on their obligation to prove that, in soliciting another or arranging (or offering to arrange) a meeting, the defendant’s purpose was *child* prostitution.”).
4. + In 2020, the Committee added Comments 2 and 3.



## CHAPTER 7-5

### SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

[7-5:01](#)

### SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

#### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 7-5:01 SEXUALLY EXPLICIT MATERIALS HARMFUL TO CHILDREN

### COMMENT

1. In *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 782 (Colo. 1985), the supreme court ruled that sections 18-7-501 to 18-7-504, C.R.S., were unconstitutional because no portion of the statutes could be severed from the offending provisions. Because the General Assembly has not amended the statutes, the Committee has not drafted model instructions.

## **CHAPTER 7-6**

# **VISUAL REPRESENTATIONS CONTAINING ACTUAL VIOLENCE**

**7-6:01**

## **DISPENSING VIOLENT FILMS TO MINORS**

### **CHAPTER COMMENTS**

1. The Committee added this chapter in 2016.

## 7-6:01 DISPENSING VIOLENT FILMS TO MINORS

The elements of the crime of dispensing violent films to minors are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. sold, rented, or otherwise furnished to a minor any video tape, video disc, film representation, or other form of motion picture, and
  4. the average person, applying contemporary community standards, would find that the work, taken as a whole, predominantly appealed to the interest in violence, and
  5. the work depicted or described, in a patently offensive way, repeated acts of actual, not simulated, violence resulting in serious bodily injury or death, and
  6. the work, taken as a whole, lacked serious literary, artistic, political, or scientific value.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing violent films to minors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing violent films to minors.

### COMMENT

1. See § 18-7-601(1), C.R.S. 2020.

2. See Instruction F:229.2 (defining “minor” (dispensing violent films)); Instruction F:332 (defining “serious bodily injury”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:36 (affirmative defense of “mistake as to age”).

4. In *Gorman v. People*, 19 P.3d 662, 665–67 (Colo. 2000), the supreme court considered the crime of contributing to the delinquency of a minor and concluded that “the culpable mental state of knowingly applies to the *act* of contributing to the delinquency,” but not to the age element. Although the statute here involves furnishing minors with inappropriate material – a crime that bears some similarity to contributing to the delinquency of a minor, see Instruction 6-7:01 – the statute itself does not include a culpable mental state, and no appellate case has considered the issue. Therefore, the Committee has not included the mental state of “knowingly” in this instruction.

5. The term “patently offensive” is not defined for purposes of this section. Cf. Instruction F:258.7 (defining “patently offensive” for offenses involving obscenity).



## CHAPTER 7-7

### SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

<a href="#"><u>7-7:01</u></a>	SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION
<a href="#"><u>7-7:02.INT</u></a>	SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (TYPE OF CONDUCT)
<a href="#"><u>7-7:03.INT</u></a>	SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (WORK STATUS)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

## 7-7:01 SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION

The elements of the crime of sexual conduct in a correctional institution are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an employee, contract employee, or volunteer of a correctional institution or an individual who performed work or volunteer functions in a correctional institution, and
  4. engaged in sexual conduct,
  5. with a person who was in lawful custody in a correctional institution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sexual conduct in a correctional institution.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sexual conduct in a correctional institution.

### COMMENT

1. See § 18-7-701(1), C.R.S. 2020.
2. See Instruction F:75.5 (defining "correctional institution"); Instruction F:336.5 (defining "sexual conduct"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute

defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute provides for different classifications of offense depending on two separate criteria. The first is the type of sexual conduct, i.e., whether it involved (a) either sexual intrusion or sexual penetration, or (b) solely sexual contact. *See* § 18-7-701(3)–(5), C.R.S. 2020. The second is the defendant’s work status, i.e., whether the defendant was an employee of the correctional institution or was instead a volunteer. *See id.* The Committee has drafted separate interrogatories to address these issues. *See* Instruction 7-7:02.INT; Instruction 7-7:03.INT. The court, however, should only issue one or both of these interrogatories if the respective issues are subject to dispute. Additionally, the statute provides for the most severe form of punishment if both (a) the sexual conduct involved sexual intrusion and/or penetration, and (b) the defendant was an employee. § 18-7-701(3). It provides for an intermediate level of punishment if either (a) the sexual conduct involved solely sexual contact, but the defendant was an employee, § 18-7-701(4)(a), or (b) the sexual conduct involved sexual intrusion and/or penetration, but the defendant was a volunteer, § 18-7-701(4)(b). Finally, it provides for the least severe form of punishment if the sexual conduct involved solely sexual contact and the defendant was a volunteer. § 18-7-701(5).

4. The statute does not define “lawful custody.” If there is a dispute whether the alleged victim was “in lawful custody,” the court should consider whether the issue is a legal or factual matter. If the latter, the court should draft a supplemental instruction to guide the jury. *Cf. People v. Lanzieri*, 25 P.3d 1170, 1173 (Colo. 2001) (“Informalities or irregularities in a defendant’s confinement do not by themselves make custody unlawful for the purposes of” Colorado’s escape statute.); *People v. West*, 603 P.2d 967, 968 (Colo. App. 1979) (rejecting the defendant’s argument that the trial court erred “in not instructing the jury on the lawfulness of his confinement at a detention facility” because there was “no express requirement that persons convicted under [the statute at issue] be lawfully confined”).

## **7-7:02.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (TYPE OF CONDUCT)**

If you find the defendant not guilty of sexual conduct in a correctional institution, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual conduct in a correctional institution, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the sexual conduct involve more than simply sexual contact?  
(Answer “Yes” or “No”)

The sexual conduct involved more than simply sexual contact only if:

1. the sexual conduct included sexual intrusion or sexual penetration.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. See § 18-7-701(3)–(5), C.R.S. 2020.

2. See Instruction F:336.5 (defining “sexual conduct”); Instruction F:337 (defining “sexual contact”); Instruction F:340 (defining “sexual intrusion”); Instruction F:343 (defining “sexual penetration”).

3. If there is no dispute regarding the type of sexual conduct at issue, the court should not issue this interrogatory. See Instruction 7-7:01, Comment 3.

## **7-7:03.INT SEXUAL CONDUCT IN A CORRECTIONAL INSTITUTION – INTERROGATORY (WORK STATUS)**

If you find the defendant not guilty of sexual conduct in a correctional institution, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of sexual conduct in a correctional institution, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant work in a correctional institution, other than as a volunteer? (Answer “Yes” or “No”)

The defendant worked in a correctional institution, other than as a volunteer, only if:

1. the defendant was an employee or contract employee of a correctional institution or was an employee, contract employee, or individual who performed work functions in a correctional institution.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. *See* § 18-7-701(3)–(5), C.R.S. 2020.

2. See Instruction F:75.5 (defining “correctional institution”).
3. If there is no dispute regarding the defendant’s work status, the court should not issue this interrogatory. See Instruction 7-7:01, Comment 3.
4. The statutory subsections prompting this interrogatory provide for a more severe classification of offense if the sexual conduct “is committed by an employee or contract employee of a correctional institution or by an employee, contract employee, or individual who performs work functions in a correctional institution *or for the department of corrections, the department of human services, or a community corrections program.*” § 18-7-701(3), (4)(a) (emphasis added). Although the majority of this language appears in the statutory subsection that defines the actual crime of “sexual conduct in a correctional institution,” see § 18-7-701(1), that subsection makes no reference to an individual who performs work functions “for the department of corrections, the department of human services, or a community corrections program.” For this reason, the Committee has not included such language in its model interrogatory.



## **CHAPTER 7-8**

### **CRIMINAL INVASION OF PRIVACY**

[7-8:01](#)

### **CRIMINAL INVASION OF PRIVACY**

#### **CHAPTER COMMENTS**

1. The Committee added this chapter in 2015.

## 7-8:01 CRIMINAL INVASION OF PRIVACY

The elements of the crime of criminal invasion of privacy are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. observed or took a photograph of another person's intimate parts, in a situation where the person observed or photographed had a reasonable expectation of privacy,
  5. without that person's consent.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of criminal invasion of privacy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of criminal invasion of privacy.

### COMMENT

1. See § 18-7-801(1), C.R.S. 2020.
2. See Instruction F:186 (defining "intimate parts"); Instruction F:195 (defining "knowingly"); Instruction F:276.5 (defining "photograph" (criminal invasion of privacy)).

## CHAPTER 7-9

### UNLAWFUL DISTRIBUTION OF SUICIDE RECORDINGS

[7-9:01](#)

#### POSTING AN IMAGE OF SUICIDE OF A MINOR

#### CHAPTER COMMENTS

1. The Committee added this chapter in 2019 pursuant to new legislation. *See* Ch. 388, sec. 1, § 18-7-901, 2019 Colo. Sess. Laws 3455, 3455-56.

## 7-9:01 POSTING AN IMAGE OF SUICIDE OF A MINOR

The elements of the crime of posting an image of suicide of a minor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. posted or distributed through the use of social media or any website, or disseminated through other means,
5. an image of a minor attempting suicide, dying by suicide, or having died by suicide,
6. with the intent,
7. to harass, intimidate, or coerce any person, and
8. the posting or distribution resulted in serious emotional distress to any person, and
9. the defendant was the first or original person to post, distribute, or disseminate the image.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of posting an image of suicide of a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of posting an image of suicide of a minor.

## COMMENT

1. See § 18-7-901(1), (2), C.R.S. 2020.
2. See Instruction F:176.5 (defining “image”); Instruction F:185 (defining “intentionally” or “with intent”); Instruction F:346.5 (defining “social media”); *see also* Instruction F:229.3 (defining “minor” for purposes of obscenity, which is also housed within article 7 of the Criminal Code (Offenses Relating to Morals)).
3. See Instruction H:49.9 (affirmative defense of “valid purpose”).
4. The statute provides that this offense is a civil infraction *except* when “the person was the first or original person to post, distribute, or disseminate the image,” in which case the offense becomes a class 3 misdemeanor. § 18-7-901(2). Because civil infractions do not require jury instructions, rather than creating a separate interrogatory, the Committee has simply incorporated this language into the elements of the crime.



## CHAPTER 8-1

### OBSTRUCTION OF PUBLIC JUSTICE

- [8-1:01](#) OBSTRUCTING GOVERNMENTAL OPERATIONS
- [8-1:02](#) RESISTING ARREST (FORCE OR VIOLENCE)
- [8-1:03](#) RESISTING ARREST (ANY MEANS)
- [8-1:04.SP](#) RESISTING ARREST – SPECIAL INSTRUCTION  
(UNLAWFUL ARREST NOT A DEFENSE)
- [8-1:05](#) OBSTRUCTING A PEACE OFFICER, FIREFIGHTER,  
EMERGENCY MEDICAL SERVICES PROVIDER,  
RESCUE SPECIALIST, OR VOLUNTEER
- [8-1:06](#) OBSTRUCTING A PEACE OFFICER OR  
FIREFIGHTER (ANIMAL USED IN LAW  
ENFORCEMENT OR FIRE PREVENTION  
ACTIVITIES)
- [8-1:07.SP](#) OBSTRUCTING A PEACE OFFICER – SPECIAL  
INSTRUCTION (OFFICER’S ILLEGAL ACTION NOT  
A DEFENSE)
- [8-1:08](#) ACCESSORY TO CRIME
- [8-1:09.INT](#) ACCESSORY – INTERROGATORY (KNOWLEDGE  
OF CLASS ONE OR TWO FELONY OFFENSE OR  
CHARGE)
- [8-1:10.INT](#) ACCESSORY – INTERROGATORY (KNOWLEDGE  
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- [8-1:34](#) UNLAWFUL SALE OF PUBLIC SERVICES (SALE)
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- [8-1:36](#) UNLAWFUL SALE OF PUBLIC SERVICES (APPEND SERVICE)
- [8-1:37](#) UNLAWFUL SALE OF PUBLIC SERVICES (FALSE REPRESENTATION)

## 8-1:01 OBSTRUCTING GOVERNMENTAL OPERATIONS

The elements of the crime of obstructing governmental operations are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. obstructed, impaired, or hindered,
5. the performance of a governmental function by a public servant,
6. by using or threatening to use violence, force, or physical interference or obstacle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing governmental operations.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing governmental operations.

### COMMENT

1. See § 18-8-102(1), C.R.S. 2020.
2. See Instruction F:165 (defining “governmental function”); Instruction F:185 (defining “intentionally”); Instruction F:306 (defining “public servant”).

3. See Instruction H:50 (affirmative defenses of “public servant,” “arrest,” and “labor dispute”).

## 8-1:02 RESISTING ARREST (FORCE OR VIOLENCE)

The elements of the crime of resisting arrest (force or violence) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. prevented or attempted to prevent a peace officer, acting under color of his [her] official authority, from effecting an arrest of the defendant or another,
5. by using or threatening to use physical force or violence against the peace officer or another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of resisting arrest (force or violence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of resisting arrest (force or violence).

### COMMENT

1. See § 18-8-103(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:264 (defining “peace officer”); Instruction F:377 (defining “under color of his [her] official authority”).

3. See *People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) (“The general self-defense provision in section 18-1-704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18-1-707(1)(a), is being used by law enforcement officers or that its use is imminent. Section 18-8-103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used.” (footnote omitted)).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 8-1:03 RESISTING ARREST (ANY MEANS)

The elements of the crime of resisting arrest are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. prevented or attempted to prevent a peace officer, acting under color of his [her] official authority, from effecting an arrest of the defendant or another,
5. using any means, other than using or threatening to use physical force or violence against the peace officer or another, which created a substantial risk of causing bodily injury to the peace officer or another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of resisting arrest.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of resisting arrest.

### COMMENT

1. *See* § 18-8-103(1)(b), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); Instruction F:195 (defining “knowingly”); Instruction F:264 (defining “peace officer”); Instruction F:377 (defining “under color of his [her] official authority”).

3. See Instruction 8-1:02, Comment 3 (discussing self-defense as an affirmative defense to a charge of resisting arrest).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 8-1:04.SP RESISTING ARREST – SPECIAL INSTRUCTION (UNLAWFUL ARREST NOT A DEFENSE)

It is no defense to a charge of resisting arrest that the peace officer was attempting to make an arrest which in fact was unlawful, if he [she] was acting under color of his [her] official authority, and in attempting to make the arrest he [she] was not resorting to unreasonable or excessive force giving rise to the right of self-defense.

A peace officer acts “under color of his [her] official authority” when, in the regular course of assigned duties, he [she] is called upon to make, and does make, a judgment in good faith based upon surrounding facts and circumstances that an arrest should be made by him [her].

### COMMENT

1. See § 18-8-103(2), C.R.S. 2020.
2. See *People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) (“The general self-defense provision in section 18-1-704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18-1-707(1)(a), is being used by law enforcement officers or that its use is imminent. Section 18-8-103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used.” (footnote omitted)).

## 8-1:05 OBSTRUCTING A PEACE OFFICER, FIREFIGHTER, EMERGENCY MEDICAL SERVICES PROVIDER, RESCUE SPECIALIST, OR VOLUNTEER

The elements of the crime of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer] are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. by using or threatening to use violence, force, physical interference, or an obstacle,
5. obstructed, impaired, or hindered,
6. the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his [her] official authority; the prevention, control, or abatement of fire by a firefighter, acting under color of his [her] official authority; the administration of medical treatment or emergency assistance by an emergency medical service provider or rescue specialist, acting under color of his [her] official authority; or the administration of emergency care or emergency assistance by a volunteer, acting in good faith to render such care or assistance without compensation at the place of an emergency or accident.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer].

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a [peace officer] [firefighter] [emergency medical services provider] [rescue specialist] [volunteer].

#### COMMENT

1. See § 18-8-104(1)(a), C.R.S. 2020.
2. See Instruction F:120 (defining “emergency medical service provider”); Instruction F:195 (defining “knowingly”); Instruction F:264 (defining “peace officer”); Instruction F:314 (defining “rescue specialist”); Instruction F:378 (defining “under color of his [her] official authority”); see also F:157 (defining “firefighter,” for purposes of assault offenses).
3. See Instruction H:50.5 (affirmative defense of “obtained permission”).
4. Compare *Dempsey v. People*, 117 P.3d 800, 811 (Colo. 2005) (evidence sufficient to support conviction for obstructing; “although mere verbal opposition alone may not suffice, a combination of statements and acts by the defendant, including threats of physical interference or interposition of an obstacle can form the crime of obstruction”), with *Kaufman v. Higgs*, 697 F.3d 1297, 1302 (10th Cir. 2012) (distinguishing *Dempsey*, and holding that defendant could not be arrested for obstructing merely because he simply refused to speak to a police officer).
5. In 2018, the Committee added Comment 3 pursuant to new legislation, and it renumbered the subsequent comment. See Ch. 385, sec. 2, § 18-8-104(2.5), 2018 Colo. Sess. Laws 2309, 2310.

**8-1:06 OBSTRUCTING A PEACE OFFICER OR FIREFIGHTER  
(ANIMAL USED IN LAW ENFORCEMENT OR FIRE  
PREVENTION ACTIVITIES)**

The elements of the crime of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. by using or threatening to use violence, force, physical interference, or an obstacle,
5. obstructed, impaired, or hindered,
6. any animal being used in law enforcement or fire prevention activities.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a peace officer or firefighter (animal used in law enforcement or fire prevention activities).

COMMENT

1. See § 18-8-104(1)(b), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:264 (defining “peace officer”); *see also* F:157 (defining “firefighter,” for purposes of assault offenses).
3. See Instruction H:50.5 (affirmative defense of “obtained permission”).
4. In 2018, the Committee added Comment 3 pursuant to new legislation. See Ch. 385, sec. 2, § 18-8-104(2.5), 2018 Colo. Sess. Laws 2309, 2310.

## 8-1:07.SP OBSTRUCTING A PEACE OFFICER – SPECIAL INSTRUCTION (OFFICER’S ILLEGAL ACTION NOT A DEFENSE)

It is not a defense to a charge of obstructing a peace officer that the peace officer was acting in an illegal manner, if he [she] was acting under color of his [her] official authority.

A peace officer acts “under color of his or her official authority” if, in the regular course of assigned duties, he [she] makes a judgment in good faith based on surrounding facts and circumstances that he [she] must act to enforce the law or preserve the peace.

### COMMENT

1. See § 18-8-104(2), C.R.S. 2020.
2. See *People v. Barrus*, 232 P.3d 264, 269 (Colo. App. 2009) (“self-defense is an available defense against the charge of obstructing a peace officer when a defendant reasonably believes that unreasonable or excessive force is being used by the peace officer”); see also *People v. Fuller*, 781 P.2d 647, 650 (Colo. 1989) (“The general self-defense provision in section 18-1-704 therefore permits a person to defend himself when he reasonably believes that unreasonable or excessive force, as proscribed by section 18-1-707(1)(a), is being used by law enforcement officers or that its use is imminent. Section 18-8-103(2), concerning resisting arrest, simply establishes that this same rule applies when an arrest is unlawful, thus rejecting the common law tradition that a person could resist an unlawful arrest even when excessive force was not used.” (footnote omitted)).

## 8-1:08 ACCESSORY TO CRIME

The elements of the crime of accessory to crime are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime,
  5. rendered assistance to the other person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of accessory to crime.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of accessory to crime.

### COMMENT

1. See § 18-8-105(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:311 (defining "render assistance").
3. See *People v. Young*, 555 P.2d 1160, 1162 (Colo. 1976) ("The relevant standard for knowledge in regard to the accessory statute is whether defendant knew the principal had committed a crime. It is not necessary

for the defendant to have known that the crime committed was of a particular class.”).

4. See *Barreras v. People*, 636 P.2d 686, 689 (Colo. 1981) (section 18-8-105 applies to crimes that are defined outside of the criminal code).

## **8-1:09.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF CLASS ONE OR TWO FELONY OFFENSE OR CHARGE)**

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant know that the person had committed, been charged with, or been convicted of the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive]? (Answer “Yes” or “No”)

The defendant knew that the person had committed, had been charged with, or had been convicted of the crime[s] of [insert name(s) of felony offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-8-105(3), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

**8-1:10.INT ACCESSORY – INTERROGATORY (KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A CLASS ONE OR TWO FELONY)**

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant know that the person was suspected of or wanted for the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive]? (Answer “Yes” or “No”)

The defendant knew the person was a suspected of or wanted for the crime[s] of [insert name(s) of class one or two felony offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted was suspected of or wanted for the crime[s] of [insert name of class one or two felony offense(s); if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-8-105(4), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

**8-1:11.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF FELONY OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A FELONY)**

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant know that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s)]?  
(Answer “Yes” or “No”)

The defendant knew that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s)] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with, or was suspected or wanted for the crime[s] of [insert the name(s) of the relevant felony offense(s)]; if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place,

and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-8-105(5), C.R.S. 2020 (being an accessory to any felony other than a class one or two felony is a class five felony, except that being an accessory to a class six felony is a class six felony).
2. See, e.g., Instruction E:28 (special verdict form).
3. This interrogatory is suitable for use with any charge of being an accessory to crime in violation of section 18-8-105(5). However, because the offense level for being an accessory to a class three, class four, or class five felony is different from the offense level for being an accessory to a class six felony, use a separate interrogatory for the determination with respect to a class six felony in any case where the defendant is charged with being an accessory *both* to a class six felony *and* to a class three, class four, or class five felony.

**8-1:12.INT ACCESSORY – INTERROGATORY (KNOWLEDGE OF MISDEMEANOR OFFENSE OR CHARGE, OR KNOWLEDGE THAT THE PERSON WAS SUSPECTED OF OR WANTED FOR A MISDEMEANOR)**

If you find the defendant not guilty of accessory to crime, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of accessory to crime, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant know that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert name(s) of misdemeanor offense(s); if more than one, list in the disjunctive]? (Answer “Yes” or “No”)

The defendant knew that the person had committed, been charged with, been convicted of, or was suspected or wanted for the crime[s] of [insert name(s) of misdemeanor offense(s); if more than one, list in the disjunctive] only if:

1. the defendant knew that the person being assisted had committed, or had been convicted of, or was charged by pending information, indictment, or complaint with, or was suspected or wanted for the crime[s] of [insert name(s) misdemeanor offense(s); if more than one, list in the disjunctive].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-8-105(6), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 8-1:13 REFUSAL TO PERMIT INSPECTION (REFUSAL TO PRODUCE OR MAKE AVAILABLE)

The elements of the crime of refusal to permit inspection (refusal to produce or make available) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowing that a public servant was legally authorized to inspect property,
  4. refused to produce or make available the property for inspection at a reasonable hour.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to permit inspection (refusal to produce or make available).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to permit inspection (refusal to produce or make available).

### COMMENT

1. See § 18-8-106(1)(a), C.R.S. 2020.
2. See Instruction F:290 (defining "property"); Instruction F:306 (defining "public servant"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the

commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-8-106(2), C.R.S. 2020, defines a “legally authorized inspection” as “any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision.” Accordingly, in cases where there is a dispute concerning the lawfulness of the inspection, the court should resolve the issue(s) of law and draft a supplemental instruction explaining its conclusion(s).

## 8-1:14 REFUSAL TO PERMIT INSPECTION (REFUSAL WHEN AVAILABLE FOR INSPECTION)

The elements of the crime of refusal to permit inspection (refusal when available for inspection) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that a public servant was legally authorized to inspect property,
4. when the property was available for inspection,
5. refused to permit the inspection of at a reasonable hour.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to permit inspection (refusal when available for inspection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to permit inspection (refusal when available for inspection).

### COMMENT

1. See § 18-8-106(1)(b), C.R.S. 2020.
2. See Instruction F:290 (defining "property"); Instruction F:306 (defining "public servant"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the

commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-8-106(2), C.R.S. 2020, defines a “legally authorized inspection” as “any lawful search, sampling, testing, or other examination of property, in connection with the regulation of a business or occupation, that is authorized by statute or lawful regulatory provision.” Accordingly, in cases where there is a dispute concerning the lawfulness of the inspection, the court should resolve the issue(s) of law and draft a supplemental instruction explaining its conclusion(s).

## 8-1:15 REFUSING TO AID A PEACE OFFICER

The elements of the crime of refusing to aid a peace officer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was eighteen years of age or older, and
4. was commanded, by a person known to him [her] to be a peace officer,
5. to aid the peace officer in effecting or securing an arrest or preventing the commission of any offense by another, and
6. unreasonably refused or failed to aid the peace officer.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusing to aid a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusing to aid a peace officer.

### COMMENT

1. See § 18-8-107, C.R.S. 2020.
2. See Instruction F:263 (defining "peace officer").

## 8-1:16 COMPOUNDING (PROSECUTION)

The elements of the crime of compounding (prosecution) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. accepted or agreed to accept,
4. any pecuniary benefit,
5. as consideration,
6. for refraining from seeking prosecution of an offender.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compounding (prosecution).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compounding (prosecution).

### COMMENT

1. See § 18-8-108(1)(a), C.R.S. 2020.
2. See Instruction F:265.5 (defining "pecuniary benefit"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. See Instruction H:51 (affirmative defense of “restitution or indemnification”).

4. The term “consideration” is not defined in section 18-8-108. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

## 8-1:17 COMPOUNDING (REPORTING)

The elements of the crime of compounding (reporting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. accepted or agreed to accept,
4. any pecuniary benefit,
5. as consideration for,
6. refraining from reporting to law enforcement authorities the commission or suspected commission of any crime or information relating to a crime.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compounding (reporting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compounding (reporting).

### COMMENT

1. *See* § 18-8-108(1)(b), C.R.S. 2020.
2. *See* Instruction F:265.5 (defining “pecuniary benefit”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:51 (affirmative defense of “restitution or indemnification”).

4. The term “consideration” is not defined in section 18-8-108. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

## 8-1:18 CONCEALING DEATH

The elements of the crime of concealing death are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. concealed the death of another person, [including a fetus born dead,] and
4. thereby prevented a determination of the cause or circumstances of death.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of concealing death.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of concealing death.

### COMMENT

1. *See* § 18-8-109, C.R.S. 2020.
2. *See* Instruction F:20 (defining “another person”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 8-1:19 FALSE REPORT OF EXPLOSIVES, WEAPONS, OR HARMFUL SUBSTANCES

The elements of the crime of false report of explosives, weapons, or harmful substances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. reported to any other person that a bomb or other explosive, any chemical or biological agent, any poison or weapon, or any harmful radioactive substance had been placed in any public or private place or vehicle designed for the transportation of persons or property,
4. knowing that the report was false.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false report of explosives, weapons, or harmful substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false report of explosives, weapons, or harmful substances.

### COMMENT

1. See § 18-8-110, C.R.S. 2020.
2. See Instruction F:38 (defining "bomb"); Instruction F:303 (defining "public place").

## 8-1:20 FALSE REPORTING TO AUTHORITIES (CAUSING A FALSE ALARM)

The elements of the crime of false reporting to authorities (causing a false alarm) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused by any means, including but not limited to activation,
5. a false alarm of fire or other emergency or other a false emergency exit alarm to sound or to be transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency which deals with emergencies involving danger to life or property.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (causing a false alarm).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (causing a false alarm).

### COMMENT

1. See § 18-8-111(1)(a)(I)(A), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(a)(I)(A), 2018 Colo. Sess. Laws 2370, 2370.

**8-1:21.INT FALSE REPORTING TO AUTHORITIES  
(CAUSING A FALSE ALARM) – INTERROGATORY  
(DURING COMMISSION OF A CRIME)**

If you find the defendant not guilty of false reporting to authorities (causing a false alarm), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting to authorities (causing a false alarm), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the false reporting committed during another crime? (Answer “Yes” or “No”)

The false reporting was committed during another crime only if:

1. the defendant committed the false reporting to authorities during the commission of [insert the name(s) of the other criminal offense(s) if alleged in the charging document; if not, use the statutory phrase: “another criminal offense”].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-8-111(1)(b), C.R.S. 2020 (specifying that this sentence enhancement provision applies only to violations of the false alarm provisions in section 18-8-111(1)(a)).
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. Although section 18-8-111(1)(b) does not require that the other criminal offense(s) be specified, the Committee recommends that the offense(s) be identified if named in the charging document.
4. In 2018, the Committee modified the statutory citations in Comments 1 and 3 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(b), 2018 Colo. Sess. Laws 2370, 2371.

## 8-1:22 FALSE REPORTING TO AUTHORITIES (PREVENTING ALARM)

The elements of the crime of false reporting to authorities (preventing alarm) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. prevented by any means, including but not limited to deactivation,
5. a legitimate fire alarm, emergency exit alarm, or other emergency alarm from sounding or from being transmitted to or within an official or volunteer fire department, ambulance service, law enforcement agency, or any other government agency that deals with emergencies involving danger to life or property.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (preventing alarm).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (preventing alarm).

### COMMENT

1. See § 18-8-111(1)(a)(I)(B), C.R.S. 2020.

2. *See* Instruction F:195 (defining “knowingly”).
3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(a)(I)(B), 2018 Colo. Sess. Laws 2370, 2370.

## 8-1:23 FALSE REPORTING TO AUTHORITIES (DID NOT OCCUR)

The elements of the crime of false reporting to authorities (did not occur) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a report or caused the transmission of a report to law enforcement authorities,
5. of a crime or other incident within their official concern,
6. when he [she] knew the crime or other incident did not occur.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (did not occur).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (did not occur).

### COMMENT

1. See § 18-8-111(1)(a)(II), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(a)(II), 2018 Colo. Sess. Laws 2370, 2370.

## 8-1:24 FALSE REPORTING TO AUTHORITIES (PRETENDING)

The elements of the crime of false reporting to authorities (pretending) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a report or caused the transmission of a report to law enforcement authorities,
5. pretending to furnish information relating to an offense or other incident within their official concern,
6. when he [she] knew that he [she] had no such information, or knew that the information was false.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (pretending).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (pretending).

### COMMENT

1. *See* § 18-8-111(1)(a)(III), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

3. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(a)(III), 2018 Colo. Sess. Laws 2370, 2371.

## **8-1:25 FALSE REPORTING TO AUTHORITIES (FALSE IDENTIFYING INFORMATION)**

The elements of the crime of false reporting to authorities (false identifying information) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. provided false identifying information,
  5. to law enforcement authorities.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (false identifying information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting to authorities (false identifying information).

### COMMENT

1. See § 18-8-111(1)(a)(IV), C.R.S. 2020.
2. See Instruction F:175 (defining "identifying information"); Instruction F:195 (defining "knowingly").

3. *See also* § 18-8-802(2), C.R.S. 2020 (false reporting to authorities – excessive force); § 18-9-209(3), C.R.S. 2020 (false reporting of animal cruelty).

4. In 2018, the Committee modified the statutory citation in Comment 1 pursuant to a legislative amendment. *See* Ch. 401, sec. 1, § 18-8-111(1)(a)(IV), 2018 Colo. Sess. Laws 2370, 2371.

## 8-1:25.2 FALSE REPORTING OF AN EMERGENCY

The elements of the crime of false reporting of an emergency are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. committed an act that constituted [insert relevant offense from section 18-8-111(1)(a), C.R.S.], and
5. that act included a knowing false report of an imminent threat to the safety of a person or persons by use of a deadly weapon.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting of an emergency.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting of an emergency.

### COMMENT

1. See § 18-8-111(2)(a), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”).
3. See Instruction 8-1:25.3.SP (lack of intent not a defense).

4. If the defendant is not separately charged with a false reporting offense under section 18-8-111(1)(a), the court should provide the jury with the elemental instruction for the relevant offense, omitting the two concluding paragraphs that explain the burden of proof. The court should place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable), and it should provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

5. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 401, sec. 1, § 18-8-111(2)(a), 2018 Colo. Sess. Laws 2370, 2371.

## **8-1:25.3.SP FALSE REPORTING OF AN EMERGENCY – SPECIAL INSTRUCTION**

It is not a defense to a prosecution for false reporting of an emergency that the defendant or another person did not have the intent or capability of committing the threatened or reported act.

### COMMENT

1. *See* § 18-8-111(2)(d), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”).
3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 401, sec. 1, § 18-8-111(2)(d), 2018 Colo. Sess. Laws 2370, 2371-72.

## **8-1:25.4.INT FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (EVACUATION)**

If you find the defendant not guilty of false reporting of an emergency, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting of an emergency, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false reporting result in an evacuation? (Answer “Yes” or “No”)

The false reporting resulted in an evacuation only if:

1. the defendant’s reported threat caused the occupants of a building, place of assembly, or facility of public transportation,
2. to be evacuated or otherwise displaced.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-8-111(2)(b)(II)(A), C.R.S. 2020.

2. See Instruction F:40 (defining “building”); Instruction F:137 (defining “facility of public transportation”); *see, e.g.*, Instruction E:28 (special verdict form).

3. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 401, sec. 1, § 18-8-111(2)(b)(II)(A), 2018 Colo. Sess. Laws 2370, 2371.

## 8-1:25.6.INT FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (BODILY INJURY)

If you find the defendant not guilty of false reporting of an emergency, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting of an emergency, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false reporting result in injury? (Answer “Yes” or “No”)

The false reporting resulted in injury only if:

1. the defendant’s false reporting led to an emergency response, and
2. that emergency response resulted in bodily injury of another person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-8-111(2)(b)(II)(B), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).

3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 401, sec. 1, § 18-8-111(2)(b)(II)(B), 2018 Colo. Sess. Laws 2370, 2371.

## **8-1:25.8.INT FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (SERIOUS BODILY INJURY)**

If you find the defendant not guilty of false reporting of an emergency, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting of an emergency, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false reporting result in serious injury? (Answer “Yes” or “No”)

The false reporting resulted in serious injury only if:

1. the defendant’s false reporting led to an emergency response, and
2. that emergency response resulted in serious bodily injury of another person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-8-111(2)(b)(III), C.R.S. 2020.

2. See Instruction F:332 (defining “serious bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The Committee added this instruction in 2018 pursuant to new legislation. See Ch. 401, sec. 1, § 18-8-111(2)(b)(III), 2018 Colo. Sess. Laws 2370, 2371.

## 8-1:25.9.INT FALSE REPORTING OF AN EMERGENCY – INTERROGATORY (DEATH)

If you find the defendant not guilty of false reporting of an emergency, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of false reporting of an emergency, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the false reporting result in death? (Answer “Yes” or “No”)

The false reporting resulted in serious injury only if:

1. the defendant’s false reporting led to an emergency response, and
2. that emergency response resulted in the death of another person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-8-111(2)(b)(IV), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The Committee added this instruction in 2018 pursuant to new legislation. *See* Ch. 401, sec. 1, § 18-8-111(2)(b)(IV), 2018 Colo. Sess. Laws 2370, 2371.

## 8-1:26 IMPERSONATING A PEACE OFFICER

The elements of the crime of impersonating a peace officer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. falsely pretended to be a peace officer, and
4. performed an act in that pretended capacity.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impersonating a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impersonating a peace officer.

### COMMENT

1. *See* § 18-8-112(1), C.R.S. 2020.
2. *See* Instruction F:263 (defining “peace officer”).

## 8-1:27 IMPERSONATING A PUBLIC SERVANT

The elements of the crime of impersonating a public servant are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. falsely pretended to be a public servant, other than a peace officer, and
  4. performed any act in that pretended capacity.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impersonating a public servant.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impersonating a public servant.

### COMMENT

1. See § 18-8-113(1), C.R.S. 2020.
2. See Instruction F:263 (defining "peace officer"); Instruction F:306 (defining "public servant").

**8-1:28.SP IMPERSONATING A PUBLIC SERVANT – SPECIAL  
INSTRUCTION (FICTITIOUS OFFICE)**

It is no defense to a charge of impersonating a public servant that the office the defendant pretended to hold did not in fact exist.

COMMENT

1. *See* § 18-8-113(2), C.R.S. 2020.

## 8-1:29 ABUSE OF PUBLIC RECORDS (FALSITY)

The elements of the crime of abuse of public records (falsity) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a false entry in or falsely altered any public record.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (falsity).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (falsity).

### COMMENT

1. See § 18-8-114(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:304 (defining “public record”).

## 8-1:30 ABUSE OF PUBLIC RECORDS (IMPAIRMENT)

The elements of the crime of abuse of public records (impairment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that he [she] lacked the authority to do so,
4. knowingly,
5. destroyed, mutilated, concealed, removed, or impaired the availability of any public record.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (impairment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (impairment).

### COMMENT

1. See § 18-8-114(1)(b), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:304 (defining “public record”).

## 8-1:31 ABUSE OF PUBLIC RECORDS (REFUSAL)

The elements of the crime of abuse of public records (refusal) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that he [she] lacked the authority to retain the record,
4. refused to deliver up a public record in his [her] possession upon proper request of any person lawfully entitled to receive such record.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (refusal).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (refusal).

### COMMENT

1. *See* § 18-8-114(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:304 (defining “public record”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **8-1:32 ABUSE OF PUBLIC RECORDS (ALTERATION)**

The elements of the crime of abuse of public records (alteration) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing that he [she] had not been authorized by the custodian of the public record to do so,
4. knowingly,
5. altered any public record.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of public records (alteration).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of public records (alteration).

### COMMENT

1. *See* § 18-8-114(1)(d), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:304 (defining “public record”).

## 8-1:33 DISARMING A PEACE OFFICER

The elements of the crime of disarming a peace officer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. without justification, and
5. without consent,
6. removed the firearm or self-defense electronic control device, direct-contact stun device, or other similar device,
7. of a peace officer,
8. who was acting under color of his [her] official authority.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disarming a peace officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disarming a peace officer.

### COMMENT

1. See § 18-8-116(1), C.R.S. 2020.

2. See Instruction F:265 (defining “peace officer”); see also Instruction F:378 (defining “under color of his [her] official authority” for purposes of the offense of obstructing a peace officer).
3. See *People v. Fuller*, 781 P.2d 647, 651 (Colo. 1989) (the defense of self-defense applies to the offense of attempting to disarm a peace officer).

## 8-1:34 UNLAWFUL SALE OF PUBLIC SERVICES (SALE)

The elements of the crime of unlawful sale of public services (sale) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. reserved or obtained a government service or an appointment to receive a government service, and
  4. sold the service or appointment, and
  5. a government entity made the service or appointment publicly available without charge.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale of public services (sale).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale of public services (sale).

### COMMENT

1. See § 18-8-117(1)(a), C.R.S. 2020.
2. See Instruction F:164.5 (defining "government entity"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:51.5 (affirmative defense of “lawful purpose”).
4. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(1)(a), 2016 Colo. Sess. Laws 1014, 1014.

## 8-1:35 UNLAWFUL SALE OF PUBLIC SERVICES (INTENT TO SELL)

The elements of the crime of unlawful sale of public services (intent to sell) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to sell a government service or an appointment to receive a government service,
5. reserved or obtained the service or appointment, and
6. a government entity made the service or appointment publicly available without charge.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale of public services (intent to sell).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale of public services (intent to sell).

### COMMENT

1. See § 18-8-117(1)(b), C.R.S. 2020.
2. See Instruction F:164.5 (defining "government entity"); Instruction F:185 (defining "with intent").

3. *See* Instruction H:51.5 (affirmative defense of “lawful purpose”).
4. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(1)(b), 2016 Colo. Sess. Laws 1014, 1014.

## 8-1:36 UNLAWFUL SALE OF PUBLIC SERVICES (APPEND SERVICE)

The elements of the crime of unlawful sale of public services (append service) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. reserved or obtained a government service or an appointment to receive a government service, and
  4. appended the service or appointment to another good or service he [she] offered for sale, and
  5. a government entity made the service or appointment publicly available without charge.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale of public services (append service).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale of public services (append service).

### COMMENT

1. See § 18-8-117(1)(c), C.R.S. 2020.
2. See Instruction F:164.5 (defining "government entity"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may

nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:51.5 (affirmative defense of “lawful purpose”).

4. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(1)(c), 2016 Colo. Sess. Laws 1014, 1014.

## 8-1:37 UNLAWFUL SALE OF PUBLIC SERVICES (FALSE REPRESENTATION)

The elements of the crime of unlawful sale of public services (false representation) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. falsely represented to a potential customer that the defendant had obtained or secured a government service or an appointment to receive a government service, and
  4. attempted to sell the service or appointment, and
  5. a government entity made the service or appointment publicly available without charge.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale of public services (false representation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale of public services (false representation).

### COMMENT

1. See § 18-8-117(1)(d), C.R.S. 2020.
2. See Instruction F:164.5 (defining "government entity"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly

designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:51.5 (affirmative defense of “lawful purpose”).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 246, sec. 1, § 18-8-117(1)(d), 2016 Colo. Sess. Laws 1014, 1014.

## CHAPTER 8-2

### ESCAPE AND OFFENSES RELATING TO CUSTODY

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## 8-2:01 AIDING ESCAPE

The elements of the crime of aiding escape are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. aided, abetted, or assisted another person to escape, or to attempt to escape, from custody or confinement.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape.

### COMMENT

1. *See* § 18-8-201(1), C.R.S. 2020.
2. *See* Instruction F:23 (defining “assist” by referring to the definition of “render assistance” in Instruction F:311); Instruction F:129 (defining “escape” for purposes of this offense); Instruction F:195 (defining “knowingly”).
3. The penalty provisions of section 18-8-201(4)-(6), C.R.S. 2020, are based on the level of offense for which the defendant was held or convicted. This determination is a matter of law for the court to resolve.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempt” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## **8-2:02 AIDING ESCAPE FROM AN INSTITUTION FOR THE CARE AND TREATMENT OF PERSONS WITH BEHAVIORAL OR MENTAL HEALTH DISORDERS**

The elements of the crime of aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. aided the escape of a person who was an inmate of an institution for the care and treatment of persons with behavioral or mental health disorders, and
5. knew that the person aided was confined in the institution pursuant to a commitment pursuant to [insert the name of the relevant type of insanity or incompetency proceeding from Article 8 of Title 16].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders.

## COMMENT

1. *See* § 18-8-201.1, C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:226.5 (defining “mental health disorder”).
3. In 2017, pursuant to a legislative amendment, the Committee changed the phrase “mental illness” to “behavioral or mental health disorders,” and it added a cross-reference to Instruction F:226.5 in Comment 2. *See* Ch. 263, sec. 143, § 18-8-201.1, 2017 Colo. Sess. Laws 1249, 1307-08.

## 8-2:03 INDUCING PRISONERS TO ABSENT SELVES

The elements of the crime of inducing prisoners to absent selves are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. invited, enticed, solicited, or induced any prisoner in custody or confinement to absent himself [herself] from his [her] work, or substantially delayed or hindered a prisoner in his [her] work.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing prisoners to absent selves.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing prisoners to absent selves.

### COMMENT

1. *See* § 18-8-202, C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 8-2:04 INTRODUCING CONTRABAND IN THE FIRST DEGREE (INTRODUCTION INTO)

The elements of the crime of introducing contraband in the first degree (introduction into) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly and unlawfully,
  4. introduced, or attempted to introduce, a dangerous instrument, malt, vinous, or spirituous liquor, fermented malt beverage, controlled substance, or marijuana or marijuana concentrate,
  5. into a detention facility or at any location where an inmate was or was likely to be located,
  6. while the inmate was in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the first degree (introduction into).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the first degree (introduction into).

## COMMENT

1. See § 18-8-203(1)(a), C.R.S. 2020.
2. See Instruction F:69 (defining “contraband”); Instruction F:85 (defining “dangerous instrument”); Instruction F:96 (defining “detention facility”); Instruction F:148 (defining “fermented malt beverage”); Instruction F:195 (defining “knowingly”); Instruction F:205 (defining “malt liquor”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:390 (defining “vinous liquors”).
3. See *People v. Iversen*, 2013 COA 40, ¶ 25, 321 P.3d 573, 578 (“[W]e interpret section 18-8-203 as requiring only that a defendant know that he or she is introducing, or attempting to introduce, contraband into the detention facility; he or she need not know, in addition, that his or her conduct in introducing, or attempting to introduce, contraband into the detention facility, is unlawful (i.e., without legal excuse, justification, or authorization).”).
4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 8-2:05 INTRODUCING CONTRABAND IN THE FIRST DEGREE (MAKING WHILE CONFINED)

The elements of the crime of introducing contraband in the first degree (making while confined) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. while confined in a detention facility,
5. made any dangerous instrument, controlled substance, marijuana, or marijuana concentrate, or alcohol.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the first degree (making while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the first degree (making while confined).

### COMMENT

1. See § 18-8-203(1)(b), C.R.S. 2020.
2. See Instruction F:85 (defining "dangerous instrument"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate").

3. See *People v. Jamison*, 2018 COA 121, ¶ 49, 436 P.3d 569, 578 (holding that first-degree possession of contraband is a lesser included offense of first-degree introducing contraband by making).
4. In 2019, the Committee added Comment 3.

## 8-2:06 INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCTION INTO)

The elements of the crime of introducing contraband in the second degree (introduction into) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly and unlawfully,
  4. introduced or attempted to introduce contraband,
  5. into a detention facility.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (introduction into).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (introduction into).

### COMMENT

1. *See* § 18-8-204(1)(a), C.R.S. 2020.
2. *See* Instruction F:70 (defining “contraband”); Instruction F:96 (defining “detention facility”); Instruction F:195 (defining “knowingly”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the

inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

## 8-2:07 INTRODUCING CONTRABAND IN THE SECOND DEGREE (MAKING WHILE CONFINED)

The elements of the crime of introducing contraband in the second degree (making while confined) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly and unlawfully,
  4. while confined in a detention facility,
  5. made any contraband.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (making while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (making while confined).

### COMMENT

1. *See* § 18-8-204(1)(b), C.R.S. 2020.
2. *See* Instruction F:70 (defining “contraband”); Instruction F:96 (defining “detention facility”); Instruction F:195 (defining “knowingly”).

## 8-2:08 INTRODUCING CONTRABAND IN THE SECOND DEGREE (INTRODUCING WHILE CONFINED)

The elements of the crime of introducing contraband in the second degree (introducing while confined) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly and unlawfully,
  4. while confined in a detention facility,
  5. introduced or attempted to introduce contraband into a detention facility or at any location where an inmate was likely to be located,
  6. while such inmate was in the custody and under the jurisdiction of a political subdivision of the state of Colorado or the department of corrections, but not on parole.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of introducing contraband in the second degree (introducing while confined).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of introducing contraband in the second degree (introducing while confined).

### COMMENT

1. See § 18-8-204(1.5) C.R.S. 2020.

2. See Instruction F:70 (defining “contraband”); Instruction F:96 (defining “detention facility”); Instruction F:195 (defining “knowingly”).

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

## 8-2:09 POSSESSION OF CONTRABAND IN THE FIRST DEGREE

The elements of the crime of possession of contraband in the first degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while confined in a detention facility,
4. knowingly,
5. obtained or had in his [her] possession contraband or alcohol.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of contraband in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of contraband in the first degree.

### COMMENT

1. *See* § 18-8-204.1, C.R.S. 2020.
2. *See* Instruction F:69 (defining “contraband”); Instruction F:96 (defining “detention facility”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. Although section 18-8-204.1 incorporates the definition of contraband in section 18-8-203(1)(a), the definition based on that section that appears in

Instruction F:69 must be modified when it is used for this offense because the definition includes a “controlled substance,” whereas section 18-8-204.1 specifically excludes “contraband specified in section 18-18-405” (unlawful distribution, manufacturing, dispensing or sale of a controlled substance).

4. *See People v. Jamison*, 2018 COA 121, ¶ 49, 436 P.3d 569, 578 (holding that first-degree possession of contraband is a lesser included offense of first-degree introducing contraband by making).

5. + *See People v. Oliver*, 2020 COA 97, ¶ 63, 474 P.3d 207, 222 (holding that second-degree possession of contraband is a lesser included offense of first-degree possession of contraband).

6. In 2019, the Committee added Comment 4.

7. + In 2020, the Committee added Comment 5.

## **8-2:10.INT POSSESSION OF CONTRABAND IN THE FIRST DEGREE – INTERROGATORY (DANGEROUS INSTRUMENT)**

If you find the defendant not guilty of possession of contraband in the first degree (dangerous instrument), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of possession of contraband in the first degree (dangerous instrument), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the contraband a dangerous instrument? (Answer “Yes” or “No”)

The contraband was a dangerous instrument only if:

1. the contraband was a firearm, explosive device or substance (including ammunition), knife or sharpened instrument, poison, acid, bludgeon, or projective device, or any other device, instrument, material, or substance which was readily capable of causing or inducing fear of death or bodily injury, the use of which was not specifically authorized.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* §§ 18-8-203(4), 18-8-204.1(2), (3), C.R.S. 2020.
2. *See* Instruction F:85 (defining “dangerous instrument”); *see, e.g.*, Instruction E:28 (special verdict form).

## 8-2:11 POSSESSION OF CONTRABAND IN THE SECOND DEGREE

The elements of the crime of possession of contraband in the second degree are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. while confined in a detention facility,
  4. knowingly,
  5. obtained or possessed contraband.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of contraband in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of contraband in the second degree.

### COMMENT

1. *See* § 18-8-204.2(1), C.R.S. 2020.
2. *See* Instruction F:70 (defining "contraband"); Instruction F:96 (defining "detention facility"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").
3. Section 18-8-204.2(1) excludes possession that "is authorized by rule or regulation promulgated by the administrative head of the detention

facility.” However, the Committee has not drafted a model affirmative defense instruction. In a case where there is a dispute concerning whether the possession was “authorized,” the court may be able to resolve this issue as a matter of law and provide the jury with a supplemental instruction explaining its determination. However, if the issue of law turns on a factual issue, the factual question must be submitted to the jury by means of an interrogatory.

4. + *See People v. Oliver*, 2020 COA 97, ¶ 63, 474 P.3d 207, 222 (holding that second-degree possession of contraband is a lesser included offense of first-degree possession of contraband).

5. + In 2020, the Committee added Comment 4.

## 8-2:12 AIDING ESCAPE FROM CIVIL PROCESS

The elements of the crime of aiding escape from civil process are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. aided, abetted, or assisted,
  4. the escape of a person,
  5. who was in legal custody under civil process.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aiding escape from civil process.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aiding escape from civil process.

### COMMENT

1. See § 18-8-205, C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 8-2:13 ASSAULT DURING ESCAPE

The elements of the crime of assault during escape are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was confined in any lawful place of confinement within the state, and
4. while escaping or attempting to escape,
5. committed an assault,
6. with intent,
7. to commit bodily injury upon the person of another,
8. with a deadly weapon, or by any means of force likely to produce serious bodily injury.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault during escape.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault during escape.

### COMMENT

1. See § 18-8-206(1), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “with intent”); Instruction F:332 (defining “serious bodily injury”); Instruction 8-2:15 (escape).

3. The felony classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. See § 18-8-206(1)(a)–(d), C.R.S. 2020; see also § 18-8-210, C.R.S. 2020 (persons in custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. See *Massey v. People*, 649 P.2d 1070 (Colo. 1982) (“The classification of the defendant’s past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged.”). However, “[e]vidence of a prior conviction is an essential element of the offense of escape.” *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

## 8-2:14 HOLDING HOSTAGES

The elements of the crime of holding hostages are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in lawful custody or confinement within the state, and
4. while escaping or attempting to escape,
5. held any person hostage or by force or threat of force held any person against his [her] will.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of holding hostages.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of holding hostages.

### COMMENT

1. See § 18-8-207, C.R.S. 2020.
2. See *People v. Williams*, 611 P.2d 973, 975 (Colo. 1980) (“The crime of ‘holding hostages’ includes as an essential element the general intent crime of ‘escape.’ No additional mental state is specified for the crime of ‘holding hostages.’ That crime, as well as the crime of ‘escape,’ is one of general rather than specific intent.”).
3. In a case where there is a dispute concerning whether the “custody or confinement” was “lawful,” the court should resolve this question of law

and provide the jury with a supplemental instruction explaining its determination. However, if the issue of law turns on a factual question, the factual determination must be submitted to the jury by means of an interrogatory.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. In 2015, the Committee removed Comment 2 (which had cited to Instruction G2:01), renumbered the subsequent comments, and added Comment 4.

## 8-2:15 ESCAPE (FOLLOWING CONVICTION)

The elements of the crime of escape (following conviction) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in custody or confinement,
4. following conviction for the crime of [insert name of offense(s)],  
and
5. knowingly,
6. escaped from custody or confinement.
- [7. and that the defendant's conduct was not legally authorized by  
the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (following conviction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (following conviction).

### COMMENT

1. See § 18-8-208(1), (2), (4), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The felony classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. See § 18-8-208(1), (2), (4), C.R.S. 2020; see also § 18-8-210, C.R.S. 2020 (persons in custody or confinement for unclassified offenses). This

determination is a matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) (“The classification of the defendant’s past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged.”). However, “[e]vidence of a prior conviction is an essential element of the offense of escape.” *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).

5. Section 18-8-208(11), C.R.S. 2020, which was enacted in 2013, provides as follows:

+ If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106(1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203(3), is housed in a staff secure facility as defined in section 19-1-103(101.5), or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b), then the person is not in custody or confinement for purposes of this section.

It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

6. + In 2020, the Committee updated the statutory quotation in Comment 5 pursuant to a legislative amendment. *See* Ch. 9, sec. 8, § 18-8-

208(11), 2020 Colo. Sess. Laws 23, 26-27.

## 8-2:16 ESCAPE (HELD OR CHARGED)

The elements of the crime of escape (held or charged) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in custody or confinement,
4. while being held for or charged with, but not convicted of [insert name(s) of offense(s)], and
5. knowingly,
6. escaped from custody or confinement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (held or charged).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (held or charged).

### COMMENT

1. See § 18-8-208(3), (5), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. See § 18-8-208(3), (5) C.R.S. 2020; see also § 18-8-210, C.R.S. 2020 (persons in custody or confinement for unclassified offenses). This determination is a

matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) (“The classification of the defendant’s past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged.”). However, “[e]vidence of a prior conviction is an essential element of the offense of escape.” *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).

5. *See People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996) (“effecting an arrest, in the sense of establishing physical control over the arrestee, is required before a person is ‘in custody’ for the purposes of [section 18-8-208(3) of] the escape statute”).

6. Section 18-8-208(11), C.R.S. 2020, which was enacted in 2013, provides as follows:

+ If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106(1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203(3), is housed in a staff secure facility as defined in section 19-1-103(101.5), or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b), then the person is not in custody or confinement for purposes of this section.

It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the

Committee has not drafted a special instruction to explain the concept to the jury.

7. + In 2020, the Committee updated the statutory quotation in Comment 6 pursuant to a legislative amendment. *See* Ch. 9, sec. 8, § 18-8-208(11), 2020 Colo. Sess. Laws 23, 26–27.

## 8-2:17 ESCAPE (STAFF SECURE FACILITY)

The elements of the crime of escape (staff secure facility) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had been committed to the division of youth services in the department of human services for a delinquent act, and
4. was over eighteen years of age, and
5. escaped from a staff secure facility, other than a state-operated locked facility.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (staff secure facility).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (staff secure facility).

### COMMENT

1. See § 18-8-208(4.5), C.R.S. 2020.
2. See Instruction F:352 (defining "staff secure facility").
3. Section 18-8-208(4.5), enacted in 2013, is the only provision of the escape statute that does not include as an element the mens rea of "knowingly." See generally *People v. Lanzieri*, 25 P.3d 1170, 1172 (Colo. 2001) ("Thus, the crime of escape consists of the following essential elements: (1) a voluntary act; (2) which constitutes a departure from one of the forms of

lawful custody or confinement specified in the escape statute; (3) by a prisoner; and (4) committed ‘knowingly,’ i.e., with an awareness on the part of the prisoner that his or her conduct is of the nature proscribed.”). Although the model instruction tracks the language of the statute, it may be appropriate to impute a mens rea. *See* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

4. In 2017, the Committee changed the phrase “youth corrections” to “youth services” pursuant to a legislative amendment. *See* Ch. 381, sec. 26, § 18-8-208(4.5), 2017 Colo. Sess. Laws 1954, 1972.

## 8-2:18 ESCAPE (COMMITMENT)

The elements of the crime of escape (commitment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while being confined pursuant to a[n] [insert the name of the relevant type of insanity or incompetency proceeding from Article 8 of Title 16] commitment that had been ordered at a proceeding in which the defendant had been charged with [insert name of offense(s)], and
4. knowingly,
5. escaped from confinement.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (commitment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (commitment).

### COMMENT

1. See § 18-8-208(6), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The classification levels for this offense are based on the classification level of the underlying offense for which the defendant was being held. See § 18-8-208(6)(a)–(c), C.R.S. 2020; see also § 18-8-210, C.R.S. 2020 (persons in

custody or confinement for unclassified offenses). This determination is a matter of law for the court to resolve. *See Massey v. People*, 649 P.2d 1070 (Colo. 1982) (“The classification of the defendant’s past offense was a question of law, and the court is justified in taking judicial notice when the facts upon which the legal conclusion is based are unchallenged.”). However, “[e]vidence of a prior conviction is an essential element of the offense of escape.” *People v. McKnight*, 626 P.2d 678, 683 (Colo. 1981).

4. *See also People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).

5. *See* Instruction H:52 (defining the affirmative defense of “voluntary return,” which is available only as against a charge of escape from commitment in violation of section 18-8-208(6)).

6. Section 18-8-208(11), C.R.S. 2020, which was enacted in 2013, provides as follows:

+ If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106(1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203(3), is housed in a staff secure facility as defined in section 19-1-103(101.5), or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b), then the person is not in custody or confinement for purposes of this section.

It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the

Committee has not drafted a special instruction to explain the concept to the jury.

7. + In 2020, the Committee updated the statutory quotation in Comment 6 pursuant to a legislative amendment. *See* Ch. 9, sec. 8, § 18-8-208(11), 2020 Colo. Sess. Laws 23, 26–27.

## 8-2:19.INT ESCAPE (COMMITMENT) – INTERROGATORY (LEAVING COLORADO)

If you find the defendant not guilty of escape (commitment), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of escape (commitment), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant leave Colorado? (Answer “Yes” or “No”)

The defendant left Colorado only if:

1. in the escape the defendant traveled outside of Colorado.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-8-208(6), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 8-2:20 ESCAPE (EXTRADITION)

The elements of the crime of escape (extradition) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in custody or confinement,
4. pursuant to [insert a description of the relevant fugitive extradition proceeding, from Article 19 of Title 16], and
5. knowingly,
6. escaped from custody or confinement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of escape (extradition).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of escape (extradition).

### COMMENT

1. See § 18-8-208(8), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. See also *People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or

confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

4. *See People v. Thornton*, 929 P.2d 729, 733 (Colo. 1996) ("effecting an arrest, in the sense of establishing physical control over the arrestee, is required before a person is 'in custody' for the purposes of the escape statute").

5. Section 18-8-208(11), C.R.S. 2020, which was enacted in 2013, provides as follows:

+ If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106(1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203(3), is housed in a staff secure facility as defined in section 19-1-103(101.5), or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b), then the person is not in custody or confinement for purposes of this section.

It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

6. + In 2020, the Committee updated the statutory quotation in Comment 5 pursuant to a legislative amendment. *See* Ch. 9, sec. 8, § 18-8-208(11), 2020 Colo. Sess. Laws 23, 26-27.

## 8-2:21 ATTEMPT TO ESCAPE (FOLLOWING CONVICTION)

The elements of the crime of attempt to escape (following conviction) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in custody or confinement,
4. following conviction of [insert name(s) of offense(s)], and
5. knowingly,
6. attempted to escape from custody or confinement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to escape (following conviction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to escape (following conviction).

### COMMENT

1. See § 18-8-208.1(1), (3), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction G2:01 (criminal attempt).
3. See also *People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a

conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).

4. + Section 18-8-208.1(1.5) provides as follows:

If a person is serving a direct sentence to a community corrections program pursuant to section 18-1.3-301, or is transitioning from the department of corrections to a community corrections program, or is placed in an intensive supervision program pursuant to section 17-27.5-101, or is participating in a work release or home detention program pursuant to section 18-1.3-106(1.1), intensive supervision program or any other similar authorized supervised or unsupervised absence from a detention facility as defined in section 18-8-203(3), is housed in a staff secure facility as defined in section 19-1-103(101.5), or is placed in a community corrections program for purposes of obtaining residential treatment as a condition of probation pursuant to section 18-1.3-204(2.2) or 18-1.3-301(4)(b), then the person is not in custody or confinement for purposes of this section.

It appears that the question of whether this section applies to a particular defendant is a matter of law for the court to resolve. Therefore, the Committee has not drafted a special instruction to explain the concept to the jury.

5. + In 2020, the Committee added Comment 4 pursuant to a legislative amendment. *See* Ch. 9, sec. 9, § 18-8-208.1(1.5), 2020 Colo. Sess. Laws 23, 27.

**8-2:22 ATTEMPT TO ESCAPE (FOLLOWING CONVICTION;  
COMMUNITY CORRECTIONS OR INTENSIVE  
SUPERVISION PAROLE)**

COMMENT

1. + This instruction had been based on section 18-8-208.1(1.5), C.R.S., which previously created a separate attempt to escape crime for defendants in supervision programs. In 2020, the legislature amended subsection (1.5), which no longer creates a separate crime; instead, it provides that persons do not qualify as “in custody” for the crime of attempt to escape in certain situations. *See* Ch. 9, sec. 9, § 18-8-208.1(1.5), 2020 Colo. Sess. Laws 23, 27. Accordingly, in 2020, the Committee deleted this instruction and addressed subsection (1.5) in Comment 4 of Instruction 8-2:21.

Furthermore, the Committee notes that this legislation became effective on March 6, 2020. *See* Ch. 9, sec. 16, at 43. Therefore, if the charges involve conduct allegedly committed before that date, the court should use the 2019 version of this instruction.

## **8-2:23 ATTEMPT TO ESCAPE (HELD OR CHARGED)**

The elements of the crime of attempt to escape (held or charged) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was in custody or confinement,
4. while being held for or charged with, but not convicted of [insert name(s) of offense(s)], and
5. knowingly,
6. attempted to escape from custody or confinement.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to escape (held or charged).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to escape (held or charged).

### COMMENT

1. See § 18-8-208.1(2), (4), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction G2:01 (criminal attempt).
3. See also *People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (“the placement of the mental state ‘knowingly’ after the element of ‘following a

conviction of a felony' and before the element of 'escapes from custody or confinement' evidences the General Assembly's intent to limit the culpable mental state only to the conduct element of the offense").

## **8-2:24.SP ATTEMPT TO ESCAPE – SPECIAL INSTRUCTION (+ STAFF SECURE FACILITY)**

+ A person held in a staff secure facility is deemed to be in custody or confinement.

### COMMENT

1. *See* + § 18-8-208.1(7), C.R.S. 2020.
2. *See* + Instruction F:352 (defining “staff secure facility”).
3. + In 2020, pursuant to a legislative repeal, the Committee removed language in this instruction referring to conditional release. *See* Ch. 9, sec. 9, § 18-8-208.1(6), 2020 Colo. Sess. Laws 23, 27. The Committee also removed the prior Comment 3.

## **+ 8-2:24.2 UNAUTHORIZED ABSENCE (LEAVING WITHOUT PERMISSION)**

The elements of the crime of unauthorized absence (leaving without permission) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. was serving a direct sentence to a community corrections program, and]
- [3. was transitioning from the department of corrections to a community corrections program or placed in an intensive supervision program, and]
- [3. was participating in a work release or home detention program, intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility, and]
- [3. was housed in a staff secure facility, and]
4. knowingly,
5. left or failed to return to his or her residential or facility location without permission of the supervising agency and in violation of the terms and conditions of supervision.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized absence (leaving without permission).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized absence (leaving without permission).

#### COMMENT

1. See § 18-8-208.2(1)(a), C.R.S. 2020.
2. See F:59 (defining “community corrections program”); Instruction F:96 (defining “detention facility”); Instruction F:195 (defining “knowingly”); Instruction F:352 (defining “staff secure facility”).
3. If necessary, the court should draft supplemental instructions explaining intensive supervision programs, *see* § 17-27.5-101, C.R.S. 2020, or home detention programs, *see* § 18-1.3-106(1.1), C.R.S. 2020.
4. See *People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (holding that, for an analogous statute criminalizing escape, “the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).
5. + In 2020, the Committee added this instruction pursuant to new legislation. See Ch. 9, sec. 10, § 18-8-208.2(1)(a), 2020 Colo. Sess. Laws 23, 27-28.

## **+ 8-2:24.4 UNAUTHORIZED ABSENCE (TAMPERING WITH MONITORING DEVICE)**

The elements of the crime of unauthorized absence (tampering with monitoring device) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. was serving a direct sentence to a community corrections program, and]
- [3. was transitioning from the department of corrections to a community corrections program or placed in an intensive supervision program, and]
- [3. was participating in a work release or home detention program, intensive supervision program, or any other similar authorized supervised or unsupervised absence from a detention facility, and]
- [3. was housed in a staff secure facility, and]
4. knowingly,
5. removed or tampered with an electronic monitoring device required by the supervising agency to be worn by the defendant in order to monitor his or her location, without permission, and
6. with the intent,
7. to avoid arrest, prosecution, monitoring, or other legal process.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized absence (tampering with monitoring device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized absence (tampering with monitoring device).

#### COMMENT

1. See § 18-8-208.2(1)(b), C.R.S. 2020.
2. See F:59 (defining “community corrections program”); Instruction F:96 (defining “detention facility”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:352 (defining “staff secure facility”).
3. If necessary, the court should draft supplemental instructions explaining intensive supervision programs, *see* § 17-27.5-101, C.R.S. 2020, or home detention programs, *see* § 18-1.3-106(1.1), C.R.S. 2020.
4. See *People v. Benzor*, 100 P.3d 542, 543 (Colo. App. 2004) (holding that, for an analogous statute criminalizing escape, “the placement of the mental state ‘knowingly’ after the element of ‘following a conviction of a felony’ and before the element of ‘escapes from custody or confinement’ evidences the General Assembly’s intent to limit the culpable mental state only to the conduct element of the offense”).
5. See *People v. Gregory*, 2020 COA 162, ¶ 6, 479 P.3d 76, 79 (holding that the new crime of unauthorized absence “applies retroactively to cases being prosecuted as of the effective date of the new statute”).
6. + In 2020, the Committee added this instruction pursuant to new legislation. See Ch. 9, sec. 10, § 18-8-208.2(1)(b), 2020 Colo. Sess. Laws 23, 27–28.

**+ 8-2:24.6.INT UNAUTHORIZED ABSENCE –  
INTERROGATORY (TYPE OF CRIME)**

If you find the defendant not guilty of unauthorized absence, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unauthorized absence, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the unauthorized absence from a sentence for [insert appropriate crime(s) found in either section 24-4.1-302(1), C.R.S. 2020, or section 18-1.3-406, C.R.S. 2020]? (Answer “Yes” or “No”)

The prosecution has the burden to prove that the unauthorized absence was from a sentence for [insert appropriate crime(s)] beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-8-208.2(2)(a), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. The court should only give this interrogatory where the prosecution is seeking to escalate the conviction to a felony. See § 18-8-208.2(2)(a), (b).

4. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 9, sec. 10, § 18-8-208.2(2)(a), 2020 Colo. Sess. Laws 23, 28.

## **+ 8-2:24.8.INT UNAUTHORIZED ABSENCE – INTERROGATORY (PROTECTION ORDER)**

If you find the defendant not guilty of unauthorized absence, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of unauthorized absence, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant knowingly violate a permanent or temporary protection order during the commission of unauthorized absence?  
(Answer “Yes” or “No”)

The prosecution has the burden to prove the knowing violation of a protection order beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-8-208.2(2)(c), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form); *see* Instruction F:195 (defining “knowingly”); Instruction F:294 (defining “protection order”).
3. The statute requires that the protection order have been issued pursuant to one of four provisions of the Colorado Revised Statutes: sections 18-1-1001(1), 13-14-103, 13-14-104.5, or 13-14-106. This is a matter of law for the court to determine.

4. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 9, sec. 10, § 18-8-208.2(2)(c), 2020 Colo. Sess. Laws 23, 28.

## 8-2:25 ACTIVE PARTICIPATION IN A RIOT

The elements of the crime of active participation in a riot are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was confined in any detention facility within the state, and
  4. with two or more other persons,
  5. actively participated in violent conduct that created grave danger of, or did cause, damage to property or injury to other persons, and
  6. substantially obstructed the performance of institutional functions, or commanded, induced, entreated, or otherwise attempted to persuade others to engage in such conduct.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of active participation in a riot.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of active participation in a riot.

### COMMENT

1. *See* § 18-8-211(1), C.R.S. 2020.
2. *See* Instruction F:97 (defining “detention facility”); *see also* Instruction F:36 (defining “bodily injury”); *see also Webster’s Third New International*

*Dictionary 759* (2002) (defining “entreat” as meaning “beg” or “prevail upon by pleading”).

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

## **8-2:26.INT ACTIVE PARTICIPATION IN A RIOT – INTERROGATORY (DEADLY WEAPON OR DESTRUCTIVE DEVICE)**

If you find the defendant not guilty of active participation in a riot, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of active participation in a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant's participation involve the use or represented use of a deadly weapon or destructive device? (Answer "Yes" or "No")

The defendant's participation involved the use or represented use of a deadly weapon or destructive device only if:

1. he [she] employed, in the course of such participation, a deadly weapon, destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or, in the course of such participation, he [she] represented verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-8-211(2)(a), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:94 (defining “destructive device”); *see, e.g.*, Instruction E:28 (special verdict form).

## **8-2:27 DISOBEYING AN ORDER RELATED TO A RIOT IN A DETENTION FACILITY**

The elements of the crime of disobeying an order related to a riot in a detention facility are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was confined in any detention facility within the state, and
4. during a riot, or when a riot was impending,
5. intentionally,
6. disobeyed an order of a detention officer to move, disperse, or refrain from specified activities in the immediate vicinity of the riot or impending riot.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disobeying an order related to a riot in a detention facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disobeying an order related to a riot in a detention facility.

### COMMENT

1. See § 18-8-211(3), C.R.S. 2020.

2. See Instruction F:97 (defining “detention facility”); Instruction F:185 (defining “intentionally”).

## 8-2:28 VIOLATION OF BAIL BOND CONDITIONS

The elements of the crime of violation of bail bond conditions are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was released on a bail bond of any kind, and
4. before, during, or after the time that he [she] was released, he [she] was accused by complaint, information, indictment, or delinquency petition of [insert name(s) of offense(s)] arising from the conduct for which he [she] was arrested, and
5. knowingly,
6. failed to appear for trial or other proceedings in the case in which the bail bond was filed, or violated a condition of the bail bond.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of bail bond conditions.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of bail bond conditions.

### COMMENT

1. See § 18-8-212(1), (2), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

3. See *People v. Luna*, 2013 COA 67, ¶ 17, 410 P.3d 475, 478 (“in order to prove that a defendant violated section 18-8-212(1), the prosecution must prove beyond a reasonable doubt that the terms of the bond were in effect at the time of the alleged illegal conduct”).

4. + See *People v. Donald*, 2020 CO 24, ¶ 37, 461 P.3d 4, 10 (“[T]o establish a violation of bail bond conditions, the prosecution must prove that the defendant had actual knowledge of the bond condition, not merely that he or she should have known of the condition.”).

5. + In 2020, the Committee added Comment 4.

## **8-2:29 UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (NON-RESIDENT)**

The elements of the crime of unauthorized residency by an adult offender from another state (non-resident) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. in order to stay in Colorado, was required to have the permission of the compact administrator, or a designated deputy of the compact administrator, of the interstate compact for adult offender supervision, and
  4. was not a resident of Colorado, and
  5. had not been accepted by the compact administrator of the interstate compact for adult offender supervision, and
  6. was found residing in Colorado.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized residency by an adult offender from another state (non-resident).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized residency by an adult offender from another state (non-resident).

### COMMENT

1. See § 18-8-213(1)(a), C.R.S. 2020.

## **8-2:30 UNAUTHORIZED RESIDENCY BY AN ADULT OFFENDER FROM ANOTHER STATE (RESIDENT)**

The elements of the crime of unauthorized residency by an adult offender from another state (resident) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in order to stay in Colorado, was required to have the permission of the compact administrator, or a designated deputy of the compact administrator, of the interstate compact for adult offender supervision, and
4. was a resident of Colorado, and
5. had not been accepted by the compact administrator of the interstate compact for adult offender supervision, and
6. was found residing in Colorado more than ninety days after his [her] transfer from the receiving state.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized residency by an adult offender from another state (resident).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized residency by an adult offender from another state (resident).

## COMMENT

1. *See* § 18-8-213(1)(b), C.R.S. 2020.

## CHAPTER 8-3

### BRIBERY AND CORRUPT INFLUENCES

<a href="#"><u>8-3:01</u></a>	BRIBERY (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:02</u></a>	BRIBERY (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:03.SP</u></a>	BRIBERY – SPECIAL INSTRUCTION (LACK OF QUALIFICATION NOT A DEFENSE)
<a href="#"><u>8-3:04</u></a>	COMPENSATION FOR PAST OFFICIAL BEHAVIOR (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:05</u></a>	COMPENSATION FOR PAST OFFICIAL BEHAVIOR (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:06</u></a>	SOLICITING UNLAWFUL COMPENSATION
<a href="#"><u>8-3:07</u></a>	TRADING IN PUBLIC OFFICE (OFFERING OR CONFERRING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:08</u></a>	TRADING IN PUBLIC OFFICE (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)
<a href="#"><u>8-3:09</u></a>	ATTEMPT TO INFLUENCE A PUBLIC SERVANT
<a href="#"><u>8-3:10</u></a>	DESIGNATION OF SUPPLIER
<a href="#"><u>8-3:11</u></a>	FAILING TO DISCLOSE A CONFLICT OF INTEREST

### CHAPTER COMMENTS

1. The Committee added this chapter in 2015.

### **8-3:01 BRIBERY (OFFERING OR CONFERRING A PECUNIARY BENEFIT)**

The elements of the crime of bribery (offering or conferring a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant,
4. with the intent,
5. to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his [her] official capacity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribery (offering or conferring a pecuniary benefit).

#### COMMENT

1. See § 18-8-302(1)(a), C.R.S. 2020.
2. See Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)).

## 8-3:02 BRIBERY (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)

The elements of the crime of bribery (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while a public servant,
4. solicited, accepted, or agreed to accept any pecuniary benefit,
5. upon an agreement or understanding that his [her] vote, opinion, judgment, exercise of discretion, or other action as a public servant would thereby be influenced.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribery (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribery (soliciting or accepting a pecuniary benefit).

### COMMENT

1. *See* § 18-8-302(1)(b), C.R.S. 2020.
2. *See* Instruction F:265.7 (defining “pecuniary benefit” (bribery and corrupt influences)); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an

offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

### **8-3:03.SP BRIBERY – SPECIAL INSTRUCTION (LACK OF QUALIFICATION NOT A DEFENSE)**

It is not a defense to a bribery charge that the person sought to be influenced was not qualified to act in the desired way, whether because he [she] had not yet assumed office, lacked jurisdiction, or for any other reason.

#### COMMENT

1. *See* § 18-8-302(2), C.R.S. 2020.

### **8-3:04 COMPENSATION FOR PAST OFFICIAL BEHAVIOR (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)**

The elements of the crime of compensation for past official behavior (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. solicited, accepted, or agreed to accept any pecuniary benefit,
4. as compensation for giving, as a public servant, a decision, opinion, recommendation, or vote favorable to another or for otherwise exercising a discretion in his [her] favor,
5. whether or not he [she] in so doing violated his [her] duty.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compensation for past official behavior (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compensation for past official behavior (soliciting or accepting a pecuniary benefit).

#### COMMENT

1. *See* § 18-8-303(1)(a), C.R.S. 2020.
2. *See* Instruction F:265.7 (defining “pecuniary benefit” (bribery and corrupt influences)); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no

culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-8-303(1)(a). The Committee notes, however, that this “whether or not” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he did not violate any of his duties as an affirmative defense.

## **8-3:05 COMPENSATION FOR PAST OFFICIAL BEHAVIOR (OFFERING OR CONFERRING A PECUNIARY BENEFIT)**

The elements of the crime of compensation for past official behavior (offering or conferring a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant,
4. as compensation to that public servant for giving a decision, opinion, recommendation, or vote favorable to another or for exercising a discretion in that other person's favor,
5. whether or not that public servant in so doing violated his [her] duty.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of compensation for past official behavior (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of compensation for past official behavior (offering or conferring a pecuniary benefit).

### COMMENT

1. See § 18-8-303(1)(b), C.R.S. 2020.

2. See Instruction F:265.7 (defining “pecuniary benefit” (bribery and corrupt influences)); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The Committee has included the fifth element because its language appears in the statute. See § 18-8-303(1)(a)–(b). The Committee notes, however, that this “whether or not” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that the public servant did not violate any of his duties as an affirmative defense.

## 8-3:06 SOLICITING UNLAWFUL COMPENSATION

The elements of the crime of soliciting unlawful compensation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. requested a pecuniary benefit for the performance of an official action,
5. knowing that he [she] was required to perform without compensation or at a level of compensation lower than that requested.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of soliciting unlawful compensation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of soliciting unlawful compensation.

### COMMENT

1. See § 18-8-304, C.R.S. 2020.
2. See Instruction F:265.7 (defining “pecuniary benefit” (bribery and corrupt influences)); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)).

## 8-3:07 TRADING IN PUBLIC OFFICE (OFFERING OR CONFERRING A PECUNIARY BENEFIT)

The elements of the crime of trading in public office (offering or conferring a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer any pecuniary benefit upon a public servant or party officer,
4. upon an agreement or understanding that he [she] or a particular person would or might be appointed to a public office or designated or nominated as a candidate for public office.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trading in public office (offering or conferring a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trading in public office (offering or conferring a pecuniary benefit).

### COMMENT

1. See § 18-8-305(1)(a), C.R.S. 2020.
2. See Instruction F:258.5 (defining "party officer"); Instruction F:265.7 (defining "pecuniary benefit" (bribery and corrupt influences)); Instruction

F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:52.3 (affirmative defense of “customary contribution”).

## 8-3:08 TRADING IN PUBLIC OFFICE (SOLICITING OR ACCEPTING A PECUNIARY BENEFIT)

The elements of the crime of trading in public office (soliciting or accepting a pecuniary benefit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. while a public servant or party officer,
4. solicited, accepted, or agreed to accept any pecuniary benefit from another,
5. upon an agreement or understanding that a particular person would or might be appointed to a public office or designated or nominated as a candidate for public office.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trading in public office (soliciting or accepting a pecuniary benefit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trading in public office (soliciting or accepting a pecuniary benefit).

### COMMENT

1. *See* § 18-8-305(1)(b), C.R.S. 2020.
2. *See* Instruction F:258.5 (defining “party officer”); Instruction F:265.7 (defining “pecuniary benefit” (bribery and corrupt influences)); Instruction

F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:52.3 (affirmative defense of “customary contribution”).

## 8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

The elements of the crime of attempt to influence a public servant are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- + 3. with the intent,
4. to alter or affect any public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him [her] or the agency or body of which he [she] is a member,
5. attempted to influence the public servant by means of deceit or by threat of violence or economic reprisal against any person or property,
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of attempt to influence a public servant.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of attempt to influence a public servant.

### COMMENT

1. See § 18-8-306, C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:306.5 (defining "public servant" (bribery and corrupt influences)).

3. See *People v. Riley*, 2015 COA 152, ¶ 29, 380 P.3d 157, 164 (holding that, because there is no criminal offense in Colorado of *actually* influencing a public servant, courts should not define “attempt” pursuant to section 18-2-101(1), C.R.S. 2020, for the crime of *attempting* to influence a public servant).
4. See *People v. Janousek*, 871 P.2d 1189, 1196 (Colo. 1994) (“[N]either ‘deceit’ nor ‘economic reprisal’ is defined in [section 18-8-306]. Both words, however, are terms of common usage, and people of ordinary intelligence need not guess at their meaning.”); *People v. Beck*, 187 P.3d 1125, 1128 (Colo. App. 2008) (“Actual influence is not required. Rather, [section 18-8-306] is aimed at attempts to influence public servants in their official capacities to improperly alter or affect the performance of their official duties.”); *People v. Stanley*, 170 P.3d 782, 786-87 (Colo. App. 2007) (Pursuant to First Amendment jurisprudence, section 18-8-306 “must be interpreted to limit criminal culpability to statements constituting ‘true threats.’”).
5. + See *Hoggard v. People*, 2020 CO 54, ¶¶ 17-18, 20 n.6, 465 P.3d 34, 39-40 (holding that, where the trial court’s instruction tracked the language of the statute but did not apply the mental state of “with the intent” to every element of the crime, any error was not plain because the instruction comported with both the 1983 model instructions in effect at the time of trial and the holding of *People v. Norman*, 703 P.2d 1261 (Colo. 1985); declining to address “whether the General Assembly intended to limit the application of the mental state of ‘with the intent’ to only certain elements of the crime”).
6. In 2017, the Committee replaced the prior Comment 3 with the existing comment citing to *People v. Riley*.
7. + Although *Hoggard* declined to decide whether the mental state of “with the intent” applies to all elements of the crime, in 2020, the Committee chose to revise this instruction such that the element of “with the intent” appears first. See Chapter A, Culpable Mental States. The Committee also added Comment 5.

## 8-3:10 DESIGNATION OF SUPPLIER

The elements of the crime of designation of supplier are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. required or directed a bidder or contractor to deal with a particular person,
5. in procuring any goods or service required in submitting a bid to or fulfilling a contract with any government.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of designation of supplier.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of designation of supplier.

### COMMENT

1. *See* § 18-8-307(1), C.R.S. 2020.
2. *See* Instruction F:162 (defining “government”); Instruction F:165 (defining “governmental function”); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the

material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:52.5 (affirmative defense of “scope of authority”).

## 8-3:11 FAILING TO DISCLOSE A CONFLICT OF INTEREST

The elements of the crime of failing to disclose a conflict of interest are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. exercised any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction,
5. without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employed the public servant of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he [she] was about to act in his [her] official capacity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failing to disclose a conflict of interest.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failing to disclose a conflict of interest.

### COMMENT

1. See § 18-8-308(1), C.R.S. 2020.

2. See Instruction F:162 (defining “government”); Instruction F:281.5 (defining “potential conflicting interest”); Instruction F:306.5 (defining “public servant” (bribery and corrupt influences)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## CHAPTER 8-4

### ABUSE OF PUBLIC OFFICE

<a href="#"><u>8-4:01</u></a>	MISUSE OF OFFICIAL INFORMATION (PECUNIARY INTEREST)
<a href="#"><u>8-4:02</u></a>	MISUSE OF OFFICIAL INFORMATION (SPECULATE OR WAGER)
<a href="#"><u>8-4:03</u></a>	MISUSE OF OFFICIAL INFORMATION (AID, ADVISE, OR ENCOURAGE)
<a href="#"><u>8-4:04</u></a>	OFFICIAL OPPRESSION (SUBJECTING ANOTHER TO MISTREATMENT)
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<a href="#"><u>8-4:11</u></a>	ISSUING A FALSE CERTIFICATE
<a href="#"><u>8-4:12</u></a>	EMBEZZLEMENT OF PUBLIC PROPERTY
<a href="#"><u>8-4:13</u></a>	DESIGNATION OF INSURER

### CHAPTER COMMENTS

1. Section 18-8-409, C.R.S. 2020, provides as follows: “A person who violates a rule or regulation promulgated by any judicial nominating commission shall not be subject to criminal prosecution.” However, the Committee has not drafted a model affirmative defense instruction.
2. The Committee added this chapter in 2016.

## 8-4:01 MISUSE OF OFFICIAL INFORMATION (PECUNIARY INTEREST)

The elements of the crime of misuse of official information (pecuniary interest) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. in contemplation of official action by himself [herself] or by a governmental unit with which he [she] was associated or in reliance on information to which he [she] had access in his [her] official capacity and which had not been made public,
5. acquired a pecuniary interest in any property, transaction, or enterprise which might be affected by such information or official action.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misuse of official information (pecuniary interest).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of misuse of official information (pecuniary interest).

### COMMENT

1. See § 18-8-402(1)(a), C.R.S. 2020.

2. See Instruction F:162 (defining “government” (general definition)); Instruction F:306.5 (defining “public servant” (abuse of public office)); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 8-4:02 MISUSE OF OFFICIAL INFORMATION (SPECULATE OR WAGER)

The elements of the crime of misuse of official information (speculate or wager) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. in contemplation of official action by himself [herself] or by a governmental unit with which he [she] was associated or in reliance on information to which he [she] had access in his [her] official capacity and which had not been made public,
5. speculated or wagered on the basis of such information or official action.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misuse of official information (speculate or wager).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of misuse of official information (speculate or wager).

### COMMENT

1. See § 18-8-402(1)(b), C.R.S. 2020.
2. See Instruction F:162 (defining “government” (general definition)); Instruction F:306.5 (defining “public servant” (abuse of public office)); see

*also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 8-4:03 MISUSE OF OFFICIAL INFORMATION (AID, ADVISE, OR ENCOURAGE)

The elements of the crime of misuse of official information (aid, advise, or encourage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. in contemplation of official action by himself [herself] or by a governmental unit with which he [she] was associated or in reliance on information to which he [she] had access in his [her] official capacity and which had not been made public,
5. with intent,
6. to confer on any person a special pecuniary benefit,
7. [aided, advised, or encouraged another to acquire a pecuniary interest in any property, transaction, or enterprise which might be affected by such information or official action] [aided, advised, or encouraged another to speculate or wager on the basis of such information or official action].
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misuse of official information (aid, advise, or encourage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of misuse of official information (aid, advise, or encourage).

## COMMENT

1. *See* § 18-8-402(1)(c), C.R.S. 2020.
2. *See* Instruction F:162 (defining “government” (general definition)); Instruction F:185 (defining “with intent”); Instruction F:265.7 (defining “pecuniary benefit” (abuse of public office)); Instruction F:306.5 (defining “public servant” (abuse of public office)).

## 8-4:04 OFFICIAL OPPRESSION (SUBJECTING ANOTHER TO MISTREATMENT)

The elements of the crime of official oppression (subjecting another to mistreatment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. while acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity,
5. with actual knowledge,
6. that his [her] conduct was illegal,
7. subjected another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, or lien.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of official oppression (subjecting another to mistreatment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of official oppression (subjecting another to mistreatment).

### COMMENT

1. See § 18-8-403(1)(a), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

## 8-4:05 OFFICIAL OPPRESSION (DENY COUNSEL)

The elements of the crime of official oppression (deny counsel) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant who had legal authority and jurisdiction of any person legally restrained of his [her] liberty, and
4. while acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity,
5. with actual knowledge,
6. that his [her] conduct was illegal,
7. denied the person restrained the reasonable opportunity to consult in private with a licensed attorney-at-law, after the person had expressed a desire to consult with such attorney,
8. when there was no danger of imminent escape.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of official oppression (deny counsel).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of official oppression (deny counsel).

## COMMENT

1. *See* § 18-8-403(1)(b), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

## 8-4:06 FIRST DEGREE OFFICIAL MISCONDUCT (COMMIT ACT)

The elements of the crime of first degree official misconduct (commit act) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. with intent,
5. to obtain a benefit for himself [herself] or another or maliciously to cause harm to another, he [she],
6. knowingly,
7. committed an act relating to his [her] office but constituting an unauthorized exercise of his [her] official function.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree official misconduct (commit act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree official misconduct (commit act).

### COMMENT

1. See § 18-8-404(1)(a), C.R.S. 2020.

2. See Instruction F:30.5 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

3. + See *People v. Berry*, 2020 CO 14, ¶¶ 23–24, 457 P.3d 597, 602–03 (holding that this crime should be “broadly construed” such that, where the defendant obtained firearms “because of the opportunity afforded by his office as a sheriff’s deputy,” he committed an act “relating to his office” within the meaning of the statute).

4. + In 2020, the Committee added Comment 3.

## 8-4:07 FIRST DEGREE OFFICIAL MISCONDUCT (REFRAIN FROM DUTY)

The elements of the crime of first degree official misconduct (refrain from duty) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. with intent,
5. to obtain a benefit for himself [herself] or another or maliciously to cause harm to another, he [she],
6. knowingly,
7. refrained from performing a duty imposed upon him [her] by law.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree official misconduct (refrain from duty).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree official misconduct (refrain from duty).

### COMMENT

1. See § 18-8-404(1)(b), C.R.S. 2020.

2. See Instruction F:30.5 (defining “benefit” (abuse of public office)); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).
3. The court should draft a special instruction explaining the relevant legal duty. Further, where the existence of the legal duty turns on a factual issue, the factual question must be submitted to the jury for determination.

## 8-4:08 FIRST DEGREE OFFICIAL MISCONDUCT (VIOLATE STATUTE)

The elements of the crime of first degree official misconduct (violate statute) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. with intent,
5. to obtain a benefit for himself [herself] or another or maliciously to cause harm to another, he [she],
6. knowingly,
7. violated [insert a description of the relevant statute, rule, or regulation] relating to his [her] office.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of first degree official misconduct (violate statute).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of first degree official misconduct (violate statute).

### COMMENT

1. See § 18-8-404(1)(c), C.R.S. 2020.

2. See Instruction F:30.5 (defining “benefit” (abuse of public office)); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

## 8-4:09 SECOND DEGREE OFFICIAL MISCONDUCT (REFRAIN FROM DUTY)

The elements of the crime of second degree official misconduct (refrain from duty) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. knowingly, and
5. arbitrarily and capriciously,
6. refrained from performing a duty imposed upon him [her] by law.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree official misconduct (refrain from duty).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree official misconduct (refrain from duty).

### COMMENT

1. See § 18-8-405(1)(a), C.R.S. 2020.
2. See Instruction F:195(defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

3. The court should draft a special instruction explaining the relevant legal duty. Further, where the existence of the legal duty turns on a factual issue, the factual question must be submitted to the jury for determination.

4. Section 42-4-1304(8), C.R.S. 2020, which discusses the Department of Public Health and Environment's rules regarding blood samples obtained from vehicle operators, provides that "[f]ailure to perform the required duties as prescribed by this section and by the administrative regulations and procedures resulting therefrom shall be deemed punishable under section 18-8-405." However, the Committee has not drafted model instructions.

5. In 2019, the Committee added Comment 4.

## 8-4:10 SECOND DEGREE OFFICIAL MISCONDUCT (VIOLATE STATUTE)

The elements of the crime of second degree official misconduct (violate statute) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. knowingly, and
5. arbitrarily and capriciously,
6. violated [insert description of statute, or lawfully adopted rule or regulation] relating to his [her] office.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of second degree official misconduct (violate statute).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of second degree official misconduct (violate statute).

### COMMENT

1. See § 18-8-405(1)(b), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).

## 8-4:11 ISSUING A FALSE CERTIFICATE

The elements of the crime of issuing a false certificate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant authorized by law to make and issue official certificates or other official written instruments, and
4. made and issued such an instrument containing a statement which he [she] knew to be false.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of issuing a false certificate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of issuing a false certificate.

### COMMENT

1. See § 18-8-406, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).
3. See *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993) (“It is clear that a sheriff cannot fully perform his functions without the implied power to make official certificates. As such, he is ‘authorized by law to make and issue official certificates,’ and falls within the ambit of the statute.”).

## 8-4:12 EMBEZZLEMENT OF PUBLIC PROPERTY

The elements of the crime of embezzlement of public property are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. lawfully or unlawfully,
5. came into possession of any public moneys or public property of whatever description, being the property of the state or of any political subdivision of the state, and
6. knowingly,
7. converted any of such public moneys or property to his [her] own use or to any use other than the public use authorized by law.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of embezzlement of public property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of embezzlement of public property.

### COMMENT

1. *See* § 18-8-407(1), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:306.5 (defining “public servant” (abuse of public office)).
3. See *People v. Gallegos*, 260 P.3d 15, 23 (Colo. App. 2010) (holding that evidence of the sheriff-defendant’s use of county vehicles and personnel to transport inmates to his home, where they performed work on the sheriff’s home, satisfied the “public moneys or public property” element of the embezzlement charge in the indictment).
4. The court may need to draft a special instruction to identify the “public use authorized by law.” See *People v. Morise*, 859 P.2d 247, 249 (Colo. App. 1993) (“[E]ven if defendant’s implied explanation for his use of the credit card, that he obtained cash advances to attempt to buy musical equipment, was accepted, such use would nevertheless be one not authorized by the district’s policy and would, therefore, be a use ‘other than the public use authorized by law’ within the meaning of § 18-8-407.”).
5. The Committee has included the fourth element because its language appears in the statute. See § 18-8-407(1). The Committee notes, however, that this “lawfully or unlawfully” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he came into possession of money or property lawfully as an affirmative defense.
6. + See *People v. Berry*, 2020 CO 14, ¶ 18, 457 P.3d 597, 601 (holding that this crime only applies to property *owned* by the state or a political subdivision).
7. + In 2020, the Committee added Comment 6.

## 8-4:13 DESIGNATION OF INSURER

The elements of the crime of designation of insurer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a public servant, and
4. directly or indirectly,
5. required or directed a bidder on any public building or construction contract which was about to be or had been competitively bid to obtain from a particular insurer, agent, or broker any surety bond or contract of insurance required in such bid or contract or required by any law, ordinance, or regulation.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of designation of insurer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of designation of insurer.

### COMMENT

1. See § 18-8-408(1), C.R.S. 2020.
2. See Instruction F:306.5 (defining “public servant” (abuse of public office)); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that

offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-8-408(4), C.R.S. 2020, provides: “Nothing in this section shall be construed to prevent any such public servant acting on behalf of the government from exercising the right to approve or reject a surety bond or contract of insurance as to its form or sufficiency or the lack of financial capability of an insurer selected by a bidder.” It is unclear whether this provision establishes an affirmative defense.

4. The crime of designation of insurer only applies to contracts entered into on or after July 1, 1977. § 18-8-408(5), C.R.S. 2020.

5. The Committee has included the fourth element because its language appears in the statute. *See* § 18-8-408(1). The Committee notes, however, that this “directly or indirectly” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he acted indirectly as an affirmative defense.



## CHAPTER 8-5

### PERJURY AND RELATED OFFENSES

[8-5:01](#)

PERJURY IN THE FIRST DEGREE

[8-5:02.SP](#)

PERJURY IN THE FIRST DEGREE – SPECIAL INSTRUCTION (KNOWLEDGE OF MATERIALITY NOT AN ELEMENT; MISTAKEN BELIEF NOT A DEFENSE)

[8-5:03](#)

PERJURY IN THE SECOND DEGREE

[8-5:04](#)

FALSE SWEARING

[8-5:05.SP](#)

PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (INCONSISTENT STATEMENTS)

[8-5:06.SP](#)

PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (IRREGULARITIES NO DEFENSE)

## 8-5:01 PERJURY IN THE FIRST DEGREE

The elements of the crime of perjury in the first degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. in any official proceeding,
5. made a materially false statement,
6. which he [she] did not believe to be true,
7. under an oath required or authorized by law.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of perjury in the first degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of perjury in the first degree.

### COMMENT

1. See § 18-8-502(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:220 (defining “materially false statement”); Instruction F:245 (defining “oath” and “required or authorized by law”); Instruction F:250 (defining “official proceeding”).

3. See Instruction H:53 (affirmative defense of retraction).
4. See *People v. Ellsworth*, 15 P.3d 1111, 1116 (Colo. App. 2000) (defendant charged with perjury in the first degree was not entitled to a jury instruction explaining the “two-witness” rule established by section 18-8-506, C.R.S. 2020; the applicability of the rule is a question of law to be decided by the trial court upon a motion for acquittal or for a directed verdict, or by an appellate court upon review for sufficiency of the evidence).

**8-5:02.SP PERJURY IN THE FIRST DEGREE – SPECIAL  
INSTRUCTION (KNOWLEDGE OF MATERIALITY NOT  
AN ELEMENT; MISTAKEN BELIEF NOT A DEFENSE)**

Knowledge of the materiality of the statement is not an element of perjury in the first degree, and a mistaken belief that the statement was not material is not a defense.

COMMENT

1. *See* § 18-8-502(2), C.R.S. 2020.

## 8-5:03 PERJURY IN THE SECOND DEGREE

The elements of the crime of perjury in the second degree are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. other than in an official proceeding,
4. with an intent,
5. to mislead a public servant in the performance of his [her] duty,
6. made a materially false statement,
7. which he [she] did not believe to be true,
8. under an oath required or authorized by law.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of perjury in the second degree.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of perjury in the second degree.

### COMMENT

1. See § 18-8-503(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:220 (defining “materially false statement”); Instruction F:245 (defining “oath”

and “required or authorized by law”); Instruction F:250 (defining “official proceeding”); Instruction F:306 (defining “public servant”).

3. + Section 42-6-144, C.R.S. 2020, provides that a person applying for a certificate of title (or similar document) who “swears or affirms willfully and falsely in a matter material to any issue, point, or subject matter in question . . . is guilty of perjury in the second degree.” However, the Committee has not drafted model instructions.

4. + In 2020, the Committee added Comment 3.

## 8-5:04 FALSE SWEARING

The elements of the crime of false swearing are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a materially false statement,
5. which he [she] did not believe to be true,
6. under an oath required or authorized by law.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false swearing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false swearing.

### COMMENT

1. See § 18-8-504(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:220 (defining “materially false statement”); Instruction F:245 (defining “oath” and “required or authorized by law”).

## **8-5:05.SP PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (INCONSISTENT STATEMENTS)**

Where a person charged with perjury or false swearing has made inconsistent material statements under oath, it is not necessary for the prosecution to prove which statement was false provided that it proves that one or the other statement was false, and not believed by the defendant to be true.

### COMMENT

1. *See* § 18-8-505(1), C.R.S. 2020 (specifying that both statements must have “been made within the period of statute of limitations”).
2. The question of whether a statement was made within the statute of limitations will, in most cases, be an issue of law for the court to resolve. However, it may be necessary to draft an interrogatory if the applicability of the statute of limitations depends on the resolution of a factual dispute concerning the date on which a statement was allegedly made.

**8-5:06.SP PERJURY AND FALSE SWEARING – SPECIAL INSTRUCTION (IRREGULARITIES NO DEFENSE)**

It is no defense to the charge of [perjury in the first degree] [perjury in the second degree] [false swearing] that:

[the defendant was not competent, for reasons other than mental disability or immaturity, to make the false statement alleged.]

[the statement was inadmissible under the law of evidence.]

[the oath was administered or taken in an irregular manner.]

[the person administering the oath lacked authority to do so, if the taking of the oath was required by law.]

COMMENT

1. *See* § 18-8-509(1), C.R.S. 2020.
2. If necessary, the court should draft a supplemental instruction explaining its resolution of any threshold legal issue(s) related to the above factors.



## CHAPTER 8-6

### OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

<a href="#"><u>8-6:01</u></a>	BRIBE-RECEIVING BY A WITNESS (FALSE OR WITHHELD TESTIMONY)
<a href="#"><u>8-6:02</u></a>	BRIBE-RECEIVING BY A WITNESS (ATTEMPT TO AVOID LEGAL PROCESS)
<a href="#"><u>8-6:03</u></a>	BRIBE-RECEIVING BY A WITNESS (ABSENTING)
<a href="#"><u>8-6:04</u></a>	BRIBING A JUROR
<a href="#"><u>8-6:05</u></a>	BRIBE-RECEIVING BY A JUROR
<a href="#"><u>8-6:06</u></a>	INTIMIDATING A JUROR
<a href="#"><u>8-6:07</u></a>	JURY-TAMPERING (INFLUENCE)
<a href="#"><u>8-6:08</u></a>	JURY-TAMPERING (SELECTION)
<a href="#"><u>8-6:09.INT</u></a>	JURY-TAMPERING (CLASS ONE FELONY) – INTERROGATORY
<a href="#"><u>8-6:10</u></a>	TAMPERING WITH PHYSICAL EVIDENCE (IMPAIR)
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<a href="#"><u>8-6:11.5</u></a>	TAMPERING WITH A DECEASED HUMAN BODY
<a href="#"><u>8-6:12</u></a>	SIMULATING LEGAL PROCESS
<a href="#"><u>8-6:13</u></a>	FAILURE TO OBEY A JURY SUMMONS
<a href="#"><u>8-6:14</u></a>	WILLFUL MISREPRESENTATION OF MATERIAL FACT ON A JUROR QUESTIONNAIRE
<a href="#"><u>8-6:15</u></a>	WILLFUL HARASSMENT OF A JUROR BY AN EMPLOYER
<a href="#"><u>8-6:16</u></a>	RETALIATION AGAINST A JUDGE
<a href="#"><u>8-6:17</u></a>	RETALIATION AGAINST A PROSECUTOR (CREDIBLE THREAT)
<a href="#"><u>8-6:18</u></a>	RETALIATION AGAINST A PROSECUTOR (ACT OF HARM OR INJURY)

## 8-6:01 BRIBE-RECEIVING BY A WITNESS (FALSE OR WITHHELD TESTIMONY)

The elements of the crime of witness bribery (false or withheld testimony) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and
4. intentionally,
5. solicited, accepted, agreed to accept,
6. any benefit,
7. upon an agreement or understanding that he [she] would testify falsely or unlawfully withhold testimony.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (false or withheld testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (false or withheld testimony).

### COMMENT

1. See § 18-8-603(1)(a), C.R.S. 2020.

2. See Instruction F:31 (defining “benefit”); Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:365 (defining “testimony”).

3. Although the caption of the statutory section labels the offense “bribe-receiving by a witness,” this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as “witness bribery.”

## 8-6:02 BRIBE-RECEIVING BY A WITNESS (ATTEMPT TO AVOID LEGAL PROCESS)

The elements of the crime of witness bribery (attempt to avoid legal process) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and
4. intentionally,
5. solicited, accepted, agreed to accept,
6. any benefit,
7. upon an agreement or understanding that he [she] would attempt to avoid legal process summoning him [her] to testify.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (attempt to avoid legal process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (attempt to avoid legal process).

### COMMENT

1. See § 18-8-603(1)(b), C.R.S. 2020.

2. See Instruction F:31 (defining “benefit”); Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:365 (defining “testimony”).
3. Although the caption of the statutory section labels the offense “bribe-receiving by a witness,” this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as “witness bribery.”
4. The term “legal process” is not defined by statute. See *Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “A summons or writ, esp. to appear or respond in court.”).
5. In the absence of case law on point, the Committee takes no position on whether the word “attempt” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
6. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

## 8-6:03 BRIBE-RECEIVING BY A WITNESS (ABSENTING)

The elements of the crime of witness bribery (absenting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a witness or believed that he [she] was to be called as a witness in any official proceeding, and
4. intentionally,
5. solicited, accepted, agreed to accept,
6. any benefit,
7. upon an agreement or understanding that he [she] would attempt to absent himself [herself] from an official proceeding to which he [she] had been legally summoned.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of witness bribery (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of witness bribery (absenting).

### COMMENT

1. See § 18-8-603(1)(c), C.R.S. 2020.
2. See Instruction F:31 (defining "benefit"); Instruction F:185 (defining "intentionally"); Instruction F:250 (defining "official proceeding").

3. Although the caption of the statutory section labels the offense “bribe-receiving by a witness,” this is a misnomer because receipt of a bribe is not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as “witness bribery.”
4. In the absence of case law on point, the Committee takes no position on whether the word “attempt” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
5. In 2015, the Committee added Comment 4.

## 8-6:04 BRIBING A JUROR

The elements of the crime of bribing a juror are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to influence a juror's vote, opinion, decision, or other action as a juror,
5. offered, conferred, or agreed to confer,
6. any benefit,
7. upon a juror.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a juror.

### COMMENT

1. See § 18-8-606(1), C.R.S. 2020.
2. See Instruction F:31 (defining "benefit"); Instruction F:185 (defining "with intent"); Instruction F:192 (defining "juror").

## 8-6:05 BRIBE-RECEIVING BY A JUROR

The elements of the crime of juror bribery are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. solicited, accepted, or agreed to accept,
5. any benefit,
6. upon an agreement or understanding that his [her] vote, opinion, decision, or other action as a juror would thereby be influenced.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of juror bribery.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of juror bribery.

### COMMENT

1. *See* § 18-8-607(1), C.R.S. 2020.
2. *See* Instruction F:30 (defining “benefit”); Instruction F:185 (defining “intentionally”); Instruction F:192 (defining “juror”).
3. Although the caption of the statutory section labels the offense “bribe-receiving by a juror,” this is a misnomer because receipt of a bribe is

not an element of the offense when the charge is based on the solicitation of a bribe, or an agreement to accept a bribe. Accordingly, the instruction refers to the offense as “juror bribery.”

## 8-6:06 INTIMIDATING A JUROR

The elements of the crime of intimidating a juror are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. attempted,
5. by use of a threat of harm or injury to any person or property,
6. to influence a juror's vote, opinion, decision, or other action as a juror.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intimidating a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intimidating a juror.

### COMMENT

1. *See* § 18-8-608(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining "intentionally"); Instruction F:192 (defining "juror").
3. In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal

attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

## 8-6:07 JURY-TAMPERING (INFLUENCE)

The elements of the crime of jury-tampering (influence) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to influence a juror's vote, opinion, decision, or other action in a case,
5. attempted, directly or indirectly, to communicate with a juror,
6. other than as a part of the proceedings in the trial of the case.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of jury-tampering (influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of jury-tampering (influence).

### COMMENT

1. *See* § 18-8-609(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent"); Instruction F:192 (defining "juror").
3. In the absence of case law on point, the Committee takes no position on whether the word "attempted" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal

attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. *See People v. Iannicelli*, 2019 CO 80, ¶¶ 36, 50, 449 P.3d 387, 394, 396 (holding that the definition of “juror” in section 18-8-601(1), C.R.S. 2020, applies to the crime of jury tampering; further holding that the crime “extends only to attempts to communicate with jurors about a specifically identifiable case”).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

6. In 2019, the Committee added Comment 4.

## 8-6:08 JURY-TAMPERING (SELECTION)

The elements of the crime of jury-tampering (selection) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. participated in the fraudulent processing or selection of jurors or prospective jurors.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of jury-tampering (selection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of jury-tampering (selection).

### COMMENT

1. See § 18-8-609(1.5) C.R.S. 2020.
2. See Instruction F:192 (defining "juror"); Instruction F:195 (defining "knowingly").

## 8-6:09.INT JURY-TAMPERING (CLASS ONE FELONY) – INTERROGATORY

If you find the defendant not guilty of jury-tampering, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of jury-tampering, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the jury-tampering in a class one felony trial? (Answer “Yes” or “No”)

The jury-tampering was in a class one felony trial only if:

1. The defendant committed the jury-tampering in a trial for [insert name(s) of class one felony offense(s)].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-8-609(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 8-6:10 TAMPERING WITH PHYSICAL EVIDENCE (IMPAIR)

The elements of the crime of tampering with physical evidence (impair) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. believed that an official proceeding was pending or was about to be instituted, and
4. acting without legal right or authority,
5. destroyed, mutilated, concealed, removed, or altered physical evidence,
6. with intent to impair its verity or availability in the pending or prospective official proceeding.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with physical evidence (impair).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with physical evidence (impair).

### COMMENT

1. See § 18-8-610(1)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:250 (defining “official proceeding”); Instruction F:277 (defining “physical evidence”).

## 8-6:11 TAMPERING WITH PHYSICAL EVIDENCE (INTRODUCE)

The elements of the crime of tampering with physical evidence (introduce) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. believed that an official proceeding was pending or was about to be instituted, and
4. acting without legal right or authority,
5. knowingly,
6. made, presented or offered any false or altered physical evidence,
7. with intent that it be introduced in the pending or prospective official proceeding.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with physical evidence (introduce).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with physical evidence (introduce).

### COMMENT

1. See § 18-8-610(1)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:250 (defining “official proceeding”); Instruction F:277 (defining “physical evidence”).

## 8-6:11.5 TAMPERING WITH A DECEASED HUMAN BODY

The elements of the crime of tampering with a deceased human body are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. believed that an official proceeding was pending, in progress, or about to be instituted, and
4. acting without legal right or authority,
5. willfully,
6. destroyed, mutilated, concealed, removed, or altered a human body, part of a human body, or human remains,
7. with intent,
8. to impair its or their appearance or availability in the official proceedings.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a deceased human body.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a deceased human body.

## COMMENT

1. *See* § 18-8-610.5(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:195 (defining “willfully”); Instruction F:250 (defining “official proceeding”).
3. + Section 18-8-610.5(3)(a) provides that a defendant may not be convicted of both this crime and abuse of a corpse, *see* Instructions 13:01 and 13:02, “if the act arises out of a single incident.” Subsection (3)(b) provides that, if a defendant is charged with both crimes, the court should proceed pursuant to section 18-1-408, C.R.S. (prosecution of multiple counts for same act).
4. The Committee added this instruction in 2016 pursuant to new legislation. *See* Ch. 72, sec. 1, § 18-8-610.5(1), 2016 Colo. Sess. Laws 191, 191.
5. + In 2020, the Committee added Comment 3 pursuant to new legislation. *See* Ch. 100, sec. 1, § 18-8-610.5(3), 2020 Colo. Sess. Laws 387, 387.

## 8-6:12 SIMULATING LEGAL PROCESS

The elements of the crime of simulating legal process are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. delivered or caused to be delivered to another,
5. a request for the payment of money on behalf of any creditor including himself [herself] which in form and substance simulated any legal process issued by any court of this state.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of simulating legal process.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of simulating legal process.

### COMMENT

1. See § 18-8-611(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The term “legal process” is not defined by statute. See *Black's Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “A summons or writ, esp. to appear or respond in court.”).

## 8-6:13 FAILURE TO OBEY A JURY SUMMONS

The elements of the crime of failure to obey a juror summons are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. received a summons to serve as a [trial] [grand] juror, and
5. failed to obey the summons,
6. without justifiable excuse.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to obey a juror summons.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to obey a juror summons.

### COMMENT

1. See § 18-8-612(1), C.R.S. 2020.
2. See Instruction F:192 (defining "juror"); Instruction F:195 (defining "knowingly").

## 8-6:14 WILLFUL MISREPRESENTATION OF MATERIAL FACT ON A JUROR QUESTIONNAIRE

The elements of the crime of willful misrepresentation of material fact on a juror questionnaire are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. made a misrepresentation of a material fact,
5. when he [she] provided information on a juror questionnaire.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of willful misrepresentation of material fact on a juror questionnaire.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of willful misrepresentation of material fact on a juror questionnaire.

### COMMENT

1. See § 18-8-613(1), C.R.S. 2020.
2. See Instruction F:192 (defining "juror"); Instruction F:195 (defining "willfully").

## **8-6:15 WILLFUL HARASSMENT OF A JUROR BY AN EMPLOYER**

The elements of the crime of willful harassment of a juror by an employer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. deprived an employed juror of employment or any incidents or benefits of employment, or harassed, threatened, or coerced an employee because the employee received a juror summons, responded to a juror summons, performed any obligation or election of juror service as a trial juror or grand juror, or exercised his [her] her right to [insert description of right exercised under the "Colorado Uniform Jury Selection and Service Act", Article 71 of Title 13].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of willful harassment of a juror by an employer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of willful harassment of a juror by an employer.

### COMMENT

1. See § 18-8-614(1), C.R.S. 2020.

2. See Instruction F:30 (defining “benefit”); Instruction F:192 (defining “juror”); Instruction F:195 (defining “willfully”).

## 8-6:16 RETALIATION AGAINST A JUDGE

The elements of the crime of retaliation against a judge are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. made a credible threat directly to a judge, or to another person if the defendant intended that the communication would be relayed to the judge, or to a person whom the defendant knew was required by statute or ethical rule to report the communication to the judge; or committed an act constituting the crime of harassment, or an act of harm or injury upon a person or property, which action was directed against or committed upon the judge, a member of the judge's family, a person in close relationship to the judge, or a person residing in the same household with the judge,
4. as retaliation or retribution against a judge who was serving in a legal matter assigned to the judge that involved the defendant or a person on whose behalf the defendant was acting.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a judge.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a judge.

### COMMENT

1. See § 18-8-615(1), C.R.S. 2020.

2. See Instruction F:77 (defining “credible threat”); Instruction F:191 (defining “judge”); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. It may be necessary to draft a supplemental instruction explaining the relevant principles of law related to a person’s duty to report. See *People v. Berry*, 292 P.3d 954, 958 (Colo. App. 2011) (“to violate [section 18-8-615(1)(b)(II)(B)] by making a threat to a person who has the duty to report that threat to the judge, an individual making a threat must know that that person is under such a duty”).

3. The reference to the “crime of harassment” is necessary to satisfy the constitutional requirement recognized in *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

## 8-6:17 RETALIATION AGAINST A PROSECUTOR (CREDIBLE THREAT)

The elements of the crime of retaliation against a prosecutor (credible threat) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. as retaliation or retribution against a prosecutor,
5. made a credible threat,
6. [directly to the prosecutor] [to a person other than the prosecutor whom the defendant intended to relay the communication to the prosecutor] [to a person who was required by statute or ethical rule to report the communication to the prosecutor or to the court], and
7. the threat was directed against [an elected district attorney] [a prosecutor who had served or was serving in a legal matter assigned to the prosecutor involving the defendant or a person on whose behalf the defendant was acting] [a member of the prosecutor's family, a person in close relationship to the prosecutor, or a person residing in the same household with the prosecutor].
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a prosecutor (credible threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of retaliation against a prosecutor (credible threat).

#### COMMENT

1. See § 18-8-616(1)(a)-(b), C.R.S. 2020.
2. See Instruction F:77 (defining “credible threat”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:291.5 (defining “prosecutor”).
3. It may be necessary to draft a supplemental instruction explaining the relevant principles of law related to a person’s duty to report. See *People v. Berry*, 292 P.3d 954, 958 (Colo. App. 2011) (interpreting the statute prohibiting retaliation against a judge, section 18-8-615, C.R.S. 2020, and holding that, “to violate the statute by making a threat to a person who has the duty to report that threat to the judge, an individual making a threat must know that that person is under such a duty”).
4. The Committee added this instruction in 2015. See Ch. 239, sec. 1, § 18-8-616(1)(a)-(b), 2015 Colo. Sess. Laws 884, 884-85.

## **8-6:18 RETALIATION AGAINST A PROSECUTOR (ACT OF HARM OR INJURY)**

The elements of the crime of retaliation against a prosecutor (act of harm or injury) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. committed an act of harm or injury upon a person or property,
  4. as retaliation or retribution against a prosecutor, and
  5. the act of harm or injury was directed against or committed upon [an elected district attorney] [a prosecutor who had served or was serving in a legal matter assigned to the prosecutor involving the defendant or a person on whose behalf the defendant was acting] [a member of the prosecutor's family, a person in close relationship to the prosecutor, or a person residing in the same household with the prosecutor].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a prosecutor (act of harm or injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a prosecutor (act of harm or injury).

## COMMENT

1. See § 18-8-616(1)(a), C.R.S. 2020.
2. See Instruction F:291.5 (defining “prosecutor”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The Committee added this instruction in 2015. *See* Ch. 239, sec. 1, § 18-8-616(1)(a), 2015 Colo. Sess. Laws 884, 884.



## CHAPTER 8-7

### VICTIMS AND WITNESSES PROTECTION

<a href="#"><u>8-7:01</u></a>	BRIBING A WITNESS OR VICTIM (TESTIMONY)
<a href="#"><u>8-7:02</u></a>	BRIBING A WITNESS OR VICTIM (PROCESS)
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## 8-7:01 BRIBING A WITNESS OR VICTIM (TESTIMONY)

The elements of the crime of bribing a witness or victim (testimony) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer,
4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,
5. with intent,
6. to influence the witness or victim to testify falsely or unlawfully withhold any testimony.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (testimony).

### COMMENT

1. See § 18-8-703(1)(a), C.R.S. 2020.

2. See Instruction F:31 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).

## 8-7:02 BRIBING A WITNESS OR VICTIM (PROCESS)

The elements of the crime of bribing a witness or victim (process) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer,
4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,
5. with intent,
6. to induce the witness or victim to avoid legal process summoning him [her] to testify.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (process).

### COMMENT

1. See § 18-8-703(1)(b), C.R.S. 2020.

2. See Instruction F:31 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).

3. The term “legal process” is not defined by statute. See *Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “[a] summons or writ, esp. to appear or respond in court.”).

## 8-7:03 BRIBING A WITNESS OR VICTIM (ABSENTING)

The elements of the crime of bribing a witness or victim (absenting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, conferred, or agreed to confer,
4. any benefit upon a witness, or a victim, or a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or upon a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, or a person residing in the same household as the witness or victim,
5. with intent,
6. to induce the witness or victim to absent himself [herself] from an official proceeding.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bribing a witness or victim (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bribing a witness or victim (absenting).

### COMMENT

1. See § 18-8-703(1)(c), C.R.S. 2020.

2. See Instruction F:31 (defining “benefit”); Instruction F:185 (defining “with intent”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).

## 8-7:04 INTIMIDATING A WITNESS OR VICTIM

The elements of the crime of intimidating a witness or victim are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,
4. directed to or committed upon a witness in any criminal or civil proceeding, a victim of any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness in any criminal or civil proceeding or a victim of any crime, a member of the witness's family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,
5. intentionally,
6. attempted to, or did: influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intimidating a witness or victim.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intimidating a witness or victim.

#### COMMENT

1. See § 18-8-704(1), C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).
3. In *People v. Rester*, 36 P.3d 98, 101 (Colo. App. 2001), a division of the court of appeals held that the trial court acted within its discretion, and in accordance with the supreme court’s holding in *People v. Proctor*, 570 P.2d 540 (Colo. 1977), by providing the jury with a supplemental instruction explaining that, for purposes of section 18-8-704(1)(a), the term “unlawfully” referred only to: “the time when the testimony is to be actually withheld, not to the time of the contact. That is, there is no requirement under the law that the victim is under legal summons or subpoena at the time the contact is made.”
4. The reference to the “crime of harassment” is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).
5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

6. The term “legal process” is not defined by statute. *See Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “[a] summons or writ, esp. to appear or respond in court.”).

7. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

8. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 7.

9. In 2018, the Committee modified the fourth element pursuant to a legislative amendment. *See* Ch. 162, sec. 1, § 18-8-704(1), 2018 Colo. Sess. Laws 1127, 1127.

## **8-7:05 AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (ARMED WITH A DEADLY WEAPON)**

The elements of the crime of aggravated intimidation of a witness or victim (armed with a deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,
4. directed to or committed upon a witness or a victim to any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,
5. intentionally,
6. attempted to, or did: influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony, and
7. during the act of intimidating, he [she] was armed with a deadly weapon with the intent, if resisted, to kill, maim, or wound the person being intimidated or any other person.
- [8. and that the defendant's conduct was not legally authorized by

the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated intimidation of a witness or victim (armed with a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated intimidation of a witness or victim (armed with a deadly weapon).

#### COMMENT

1. See § 18-8-705(1)(a), C.R.S. 2020 (incorporating section 18-8-704(1), C.R.S. 2020).
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).
3. The reference to the “crime of harassment” is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).
4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

5. The term “legal process” is not defined by statute. *See Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “A summons or writ, esp. to appear or respond in court.”).

6. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

7. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 6.

## **8-7:06 AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM (USE OF A DEADLY WEAPON)**

The elements of the crime of aggravated intimidation of a witness or victim (use of a deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. by use of a threat, or by committing the crime of harassment, or by committing an act of harm or injury to any person or property,
4. directed to or committed upon a witness or a victim to any crime, a person the defendant believed had been or was to be called or who would have been called to testify as a witness or a victim, a member of the witness' family, a member of the victim's family, a person in close relationship to the witness or victim, a person residing in the same household with the witness or victim, or any person who had reported a crime or who might have been called to testify as a witness to or victim of any crime,
5. intentionally,
6. attempted to, or did, influence the witness or victim to testify falsely or unlawfully withhold any testimony; induce the witness or victim to avoid legal process summoning him [her] to testify; induce the witness or victim to absent himself [herself] from an official proceeding; or inflict such harm or injury prior to such testimony or expected testimony, and
7. during the act of intimidating, he [she] knowingly wounded the person being intimidated or any other person with a deadly weapon, or by the use of force, threats, or intimidation with a deadly weapon knowingly put the person being intimidated or any other person in reasonable fear of death or bodily injury.

- [8. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated intimidation of a witness or victim (use of a deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated intimidation of a witness or victim (use of a deadly weapon).

#### COMMENT

1. See § 18-8-705(1)(b), C.R.S. 2020 (incorporating section 18-8-704(1), C.R.S. 2020).
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).
3. The reference to the “crime of harassment” is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).
4. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

5. The term “legal process” is not defined by statute. *See Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “A summons or writ, esp. to appear or respond in court.”).

6. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

7. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 6.

## **8-7:07.SP AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM – SPECIAL INSTRUCTION (DEADLY WEAPON)**

Possession of any article used or fashioned in a manner to lead any person reasonably to believe it to be a deadly weapon, or any verbal or other representation by the person that he [she] was so armed, gives rise to a permissible inference that the person was armed with a deadly weapon.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. *See* § 18-8-705(2), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”).
3. Although the statute speaks in terms of “prima facie evidence,” the concept should be explained as a permissible inference. *See People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing a “prima facie” proof provision as establishing a permissible inference); *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 8-7:08 RETALIATION AGAINST A WITNESS OR VICTIM

The elements of the crime of retaliation against a witness or victim are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. used a threat, an act constituting the crime of harassment, or an act of harm or injury upon any person or property,
  4. directed to, or committed upon, a witness in any criminal or civil proceeding, a victim of any crime, an individual whom the defendant believed had been or would be called to testify as a witness in any criminal or civil proceeding or a victim of any crime, a member of the witness's family, a member of the victim's family, an individual in close relationship to the witness or victim, or an individual residing in the same household with the witness or victim,
  5. as retaliation or retribution against the witness or victim.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a witness or victim.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a witness or victim.

### COMMENT

1. See § 18-8-706(1), C.R.S. 2020.

2. See Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).
3. The term “threat” is not defined by statute. See *People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999) (“Colorado caselaw defines threat and provides a basis for presuming that the General Assembly intended to use this definition, and we find support for this definition in other sources. Our analysis of the constitutionality of section 18-8-706 also suggests that threat should be interpreted in a narrow fashion. Thus, we construe threat in section 18-8-706 to mean an expression of an intent or statement of purpose to commit harm or injury to another’s person, property, or rights through the commission of unlawful acts.”).
4. The reference to the “crime of harassment” is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).
5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.
6. See *People v. Johnson*, 2017 COA 11, ¶ 30, 446 P.3d 826, 831 (“[W]e conclude that section 18-8-706 applies only to retaliation against witnesses or victims because of their relationship to criminal, and not civil, proceedings.”).
7. In 2018, the Committee modified the fourth element pursuant to a legislative amendment. See Ch. 162, sec. 2, § 18-8-706(1), 2018 Colo. Sess. Laws 1127, 1127–28.
8. In 2019, the Committee added Comment 6.

## 8-7:09 RETALIATION AGAINST A JUROR

The elements of the crime of retaliation against a juror are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. used a threat, an act constituting the crime of harassment, or an act of harm or injury upon any person or property,
  4. directed to, or committed upon, a juror who had served for a criminal or civil trial involving the defendant or a person or persons on whose behalf the defendant was acting, a member of the juror's family, an individual in close relationship to the juror, or an individual residing in the same household with the juror,
  5. as retaliation or retribution against the juror.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retaliation against a juror.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retaliation against a juror.

### COMMENT

1. See § 18-8-706.5, C.R.S. 2020.
2. See Instruction F:192 (defining "juror"); Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment).

3. The term “threat” is not defined by statute. *See People v. Hickman*, 988 P.2d 628, 637 (Colo. 1999) (“Colorado caselaw defines threat and provides a basis for presuming that the General Assembly intended to use this definition, and we find support for this definition in other sources. Our analysis of the constitutionality of section 18-8-706 also suggests that threat should be interpreted in a narrow fashion. Thus, we construe threat in section 18-8-706 to mean an expression of an intent or statement of purpose to commit harm or injury to another’s person, property, or rights through the commission of unlawful acts.”).

4. The reference to the “crime of harassment” is included to comply with *People v. Hickman*, 988 P.2d 628, 643 (Colo. 1999) (holding that the phrase “act of harassment,” as it appeared in section 18-8-706 before that statute was amended to include an explicit reference to the offense of harassment, was unconstitutionally overbroad).

5. If the defendant is not charged with harassment, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 9-1:33, 9-1:34, 9-1:35, 9-1:36 (harassment). Place the elemental instruction for harassment immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for harassment.

## 8-7:10 TAMPERING WITH A WITNESS OR VICTIM (TESTIMONY)

The elements of the crime of tampering with a witness or victim (testimony) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. attempted,
5. without bribery or threats,
6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,
7. to testify falsely or unlawfully withhold any testimony.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (testimony).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (testimony).

### COMMENT

1. See § 18-8-707(1)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).

3. See *People v. Cunefare*, 102 P.3d 302, 306-07 (Colo. 2004) (“Because the language of the intimidation statute is substantially similar to the language [of section 18-8-707], we hold that the same principles apply here. Reading the introductory portion of the statute together with subsection (1)(a), we interpret ‘testimony’ and ‘unlawfully withhold’ to protect statements that may be offered in the future, not just those already sworn or received as evidence. Accordingly, under subsection (1)(a), the witness or victim need not be under subpoena or legal summons at the time of the contact, and the defendant need not succeed in interfering with actual testimony of the victim or witness.”); see also Instruction 8-7:04, Comment 3 (discussing precedent interpreting the term “unlawfully” for purposes of the offense of intimidating a witness or victim).

4. See *People v. Brooks*, 2017 COA 80, ¶ 14, 454 P.3d 270, 274 (“[T]he concept of attempt is built into the tampering statute – the crime is completed when a defendant ‘intentionally attempts’ to tamper with a victim or witness. . . . We conclude that no [crime for attempted tampering] exists because it would be illogical to recognize a crime premised on an attempt to attempt . . .”).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.

6. In 2019, the Committee revised Comment 4 by citing to *Brooks*.

## 8-7:11 TAMPERING WITH A WITNESS OR VICTIM (ABSENTING)

The elements of the crime of tampering with a witness or victim (absenting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. attempted,
5. without bribery or threats,
6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,
7. to absent himself [herself] from any official proceeding to which he [she] had been legally summoned.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (absenting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (absenting).

## COMMENT

1. See § 18-8-707(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).
3. See *People v. Yascavage*, 101 P.3d 1090, 1096 (Colo. 2004) (the term “legally summoned,” as used in section 18-8-707(1)(b), “means some action taken by the official tribunal that obligates a witness to appear at an official proceeding”; “neither subsection (1)(a) nor subsection (1)(c) require such legal process in order to trigger the crime. Only subsection (1)(b) requires that element.”).
4. See *People v. Brooks*, 2017 COA 80, ¶ 14, 454 P.3d 270, 274 (“[T]he concept of attempt is built into the tampering statute – the crime is completed when a defendant ‘intentionally attempts’ to tamper with a victim or witness. . . . We conclude that no [crime for attempted tampering] exists because it would be illogical to recognize a crime premised on an attempt to attempt . . .”).
5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.
6. In 2019, the Committee revised Comment 4 by citing to *Brooks*.

## 8-7:12 TAMPERING WITH A WITNESS OR VICTIM (PROCESS)

The elements of the crime of tampering with a witness or victim (process) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. attempted,
5. without bribery or threats,
6. to induce a witness, a victim, a person the defendant believed was to be called to testify as a witness or victim in any official proceeding, or a person the defendant believed might be called to testify as a witness or victim of any crime,
7. to avoid legal process summoning him [her] to testify.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a witness or victim (process).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a witness or victim (process).

### COMMENT

1. See § 18-8-707(1)(c), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:250 (defining “official proceeding”); Instruction F:388 (defining “victim”); Instruction F:393 (defining “witness”).
3. The term “legal process” is not defined by statute. See *Black’s Law Dictionary* 1399 (10th ed. 2014) (defining “process” as “A summons or writ, esp. to appear or respond in court.”).
4. See *People v. Brooks*, 2017 COA 80, ¶ 14, 454 P.3d 270, 274 (“[T]he concept of attempt is built into the tampering statute – the crime is completed when a defendant ‘intentionally attempts’ to tamper with a victim or witness. . . . We conclude that no [crime for attempted tampering] exists because it would be illogical to recognize a crime premised on an attempt to attempt . . .”).
5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 4.
6. In 2019, the Committee revised Comment 4 by citing to *Brooks*.



## CHAPTER 8-8

### OFFENSES RELATING TO USE OF FORCE BY PEACE OFFICERS

<a href="#"><u>8-8:01</u></a>	FAILURE TO REPORT EXCESSIVE FORCE
<a href="#"><u>8-8:01.5+</u></a>	FAILURE TO INTERVENE
<a href="#"><u>8-8:01.6.SP+</u></a>	FAILURE TO INTERVENE – SPECIAL INSTRUCTION (CHAIN OF COMMAND)
<a href="#"><u>8-8:02</u></a>	FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE)
<a href="#"><u>8-8:03.SP</u></a>	FAILURE TO REPORT EXCESSIVE FORCE AND FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE) – SPECIAL INSTRUCTION (EXCESSIVE FORCE; INCAPABLE OF RESISTING)

### CHAPTER COMMENTS

1. Section 18-8-803(1), C.R.S. 2020, provides as follows:

Subject to the provisions of section 18-1-707, a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

The Committee views this provision as stating a principle of law for the court to apply. Accordingly, the Committee has not drafted a model instruction embodying it.

## 8-8:01 FAILURE TO REPORT EXCESSIVE FORCE

The elements of the crime of failure to report excessive force are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a peace officer, and
4. in pursuance of his [her] law enforcement duties,
5. witnessed another peace officer, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control,
6. use physical force which exceeded the degree of physical force permitted, and
7. the defendant did not, within ten days of the occurrence of the use of such force, submit a written report, to his [her] immediate supervisor, that included the date, time, and place of the occurrence, the identity (if known) and description of the participants, and a description of the events and the force used.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to report excessive force.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to report excessive force.

## COMMENT

1. *See* § 18-8-802(1)(a)-(c), C.R.S. 2020.
2. *See* Instruction F:263 (defining “peace officer”).
3. The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant principles by which the jury is to make its determination concerning “the degree of physical force permitted.” *See* Instructions H:19, H:20, H:25, H:26, + H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2020, that explain when it is lawful for a peace officer to use physical force, including deadly physical force).
4. It may be necessary to draft a supplemental instruction explaining what other types of written reports satisfy the requirements of this statute. *See* § 18-8-802(1)(b), C.R.S. 2020 (“A copy of an arrest report or other similar report required as a part of a peace officer’s duties can be substituted for the report required by this section, so long as it includes such information.”).
5. + In 2020, pursuant to new legislation, the Committee deleted cross-references to Instructions H:27.SP and H:28.SP in Comment 3. *See* Instruction H:27.SP, Comment 1 (explaining that the Committee eliminated that instruction pursuant to new legislation); Instruction H:28.SP, Comment 1 (same).

## + 8-8:01.5 FAILURE TO INTERVENE

The elements of the crime of failure to intervene are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a peace officer, and
4. did not intervene to prevent or stop another peace officer from using physical force, and
5. such force exceeded the degree of force permitted, if any, by law, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to intervene.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to intervene.

### COMMENT

1. See § 18-8-802(1.5)(a), (d), C.R.S. 2020.
2. See Instruction F:263 (defining "peace officer"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction 8-8:01.6.SP (chain of command – special instruction).

4. The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant principles by which the jury is to make its determination concerning “the degree of force permitted.” See Instructions H:19, H:20, H:25, H:26, H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2020, that explain when it is lawful for a peace officer to use physical force, including deadly physical force).

5. Subsection (1.5)(b) provides that a peace officer who does intervene must report the intervention to his or her supervisor. However, subsection (1.5)(d) makes clear that the crime at issue in subsection (1.5) is failure to *intervene*, rather than failure to report such intervention. Therefore, the Committee has not included this reporting language in its instruction.

6. + The Committee added this instruction in 2020 pursuant to new legislation. See Ch. 110, sec. 6, § 18-8-802(1.5)(a), (d), 2020 Colo. Sess. Laws 445, 455.

## **+ 8-8:01.6.SP FAILURE TO INTERVENE – SPECIAL INSTRUCTION (CHAIN OF COMMAND)**

A peace officer cannot raise as a defense to the crime of failure to intervene that he or she did not intervene because of chain of command.

### COMMENT

1. See § 18-8-802(1.5)(a), C.R.S. 2020.
2. See Instruction F:263 (defining “peace officer”).
3. Section 18-8-802(1.5)(a) provides as follows:

A peace officer shall intervene to prevent or stop another peace officer from using physical force that exceeds the degree of force permitted . . . in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control, *without regard for chain of command*.

(Emphasis added.) The Committee has interpreted the “without regard for chain of command” language to mean that a peace officer’s duty to intervene applies regardless of whether the other peace officer outranks him or her. The court should only give this instruction where chain of command is at issue in the case.

4. + The Committee added this instruction in 2020 pursuant to new legislation. See Ch. 110, sec. 6, § 18-8-802(1.5)(a), 2020 Colo. Sess. Laws 445, 455.

## 8-8:02 FALSE REPORTING TO AUTHORITIES (EXCESSIVE FORCE)

The elements of the crime of false reporting to authorities (excessive force) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a peace officer, and
4. knowingly,
5. in pursuance of his [her] law enforcement duties,
6. witnessed another peace officer, in pursuance of the other peace officer's law enforcement duties in carrying out an arrest of any person, placing any person under detention, taking any person into custody, booking any person, or in the process of crowd control or riot control,
7. use physical force which exceeded the degree of physical force permitted, and
8. the defendant made a materially false statement when describing the occurrence in a written report to his [her] immediate supervisor, or in an arrest report or other similar report required as part of his [her] duties.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting to authorities (excessive force).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of false reporting to authorities (excessive force).

#### COMMENT

1. *See* § 18-8-802(2), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:220 (defining “materially false statement”); Instruction F:263 (defining “peace officer”).
3. The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant principles by which the jury is to make its determination concerning “the degree of physical force permitted.” *See* Instructions H:19, H:20, H:25, H:26, + H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, C.R.S. 2020, that explain when it is lawful for a peace officer to use physical force, including deadly physical force).
4. + In 2020, pursuant to new legislation, the Committee deleted cross-references to Instructions H:27.SP and H:28.SP in Comment 3. *See* Instruction H:27.SP, Comment 1 (explaining that the Committee eliminated that instruction pursuant to new legislation); Instruction H:28.SP, Comment 1 (same).

**8-8:03.SP FAILURE TO REPORT EXCESSIVE FORCE AND  
FALSE REPORTING TO AUTHORITIES (EXCESSIVE  
FORCE) – SPECIAL INSTRUCTION (EXCESSIVE FORCE;  
INCAPABLE OF RESISTING)**

“Excessive force” means physical force which exceeds the degree of physical force permitted pursuant to these instructions.

Evidence that a peace officer continued to apply physical force in excess of the force permitted by these instructions to a person who had been rendered incapable of resisting arrest gives rise to a permissible inference of excessive force.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 18-8-803(2), C.R.S. 2020.
2. The Committee has not drafted a model instruction defining “excessive force.” The court should draft a supplemental instruction, tailored to the facts of the case, explaining the relevant provisions of section 18-1-707, C.R.S. 2020. *See* Instructions H:19, H:20, H:25, H:26, + H:29.SP (affirmative defense instructions, pursuant to section 18-1-707, that explain when it is lawful for a peace officer to use reasonable physical force, including deadly physical force). *See also* Instructions 8-1:02 and 8-1:03 (resisting arrest).
3. + In 2020, pursuant to new legislation, the Committee deleted cross-references to Instructions H:27.SP and H:28.SP in Comment 2. *See*

Instruction H:27.SP, Comment 1 (explaining that the Committee eliminated that instruction pursuant to new legislation); Instruction H:28.SP, Comment 1 (same).

## CHAPTER 9-1

### OFFENSES AGAINST PUBLIC PEACE AND ORDER

<a href="#"><u>9-1:01</u></a>	INCITING A RIOT (INCITE OR URGE)
<a href="#"><u>9-1:02</u></a>	INCITING A RIOT (FURTHERANCE)
<a href="#"><u>9-1:03.INT</u></a>	INCITING A RIOT – INTERROGATORY (INJURY OR DAMAGE)
<a href="#"><u>9-1:04</u></a>	ARMING RIOTERS (SUPPLY)
<a href="#"><u>9-1:05</u></a>	ARMING RIOTERS (TEACH)
<a href="#"><u>9-1:06</u></a>	ENGAGING IN A RIOT
<a href="#"><u>9-1:07.INT</u></a>	ENGAGING IN A RIOT – INTERROGATORY
<a href="#"><u>9-1:08.SP</u></a>	INCITING OR ENGAGING IN A RIOT – SPECIAL INSTRUCTION (ATTEMPT, CONSPIRACY, AND SOLICITATION)
<a href="#"><u>9-1:09</u></a>	DISOBEDIENCE OF A PUBLIC SAFETY ORDER UNDER RIOT CONDITIONS
<a href="#"><u>9-1:10</u></a>	DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE)
<a href="#"><u>9-1:11</u></a>	DISORDERLY CONDUCT (UNREASONABLE NOISE)
<a href="#"><u>9-1:12.INT</u></a>	DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE; UNREASONABLE NOISE) – INTERROGATORY (FUNERAL)
<a href="#"><u>9-1:13</u></a>	DISORDERLY CONDUCT (FIGHTING IN PUBLIC)
<a href="#"><u>9-1:14</u></a>	DISORDERLY CONDUCT (DISCHARGE OF A FIREARM IN A PUBLIC PLACE)
<a href="#"><u>9-1:15</u></a>	DISORDERLY CONDUCT (DEADLY WEAPON; DISPLAY OR REPRESENTATION)
<a href="#"><u>9-1:16</u></a>	OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (ACT)
<a href="#"><u>9-1:17</u></a>	OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (DISOBEYING A REASONABLE REQUEST OR ORDER)
<a href="#"><u>9-1:18.INT</u></a>	OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY – INTERROGATORY (FUNERAL)
<a href="#"><u>9-1:19</u></a>	DISRUPTING A LAWFUL ASSEMBLY
<a href="#"><u>9-1:20.INT</u></a>	DISRUPTING A LAWFUL ASSEMBLY –

	<b>INTERROGATORY</b>
<a href="#"><u>9-1:21</u></a>	<b>TARGETED RESIDENTIAL PICKETING (ROUTE OR LOCATION)</b>
<a href="#"><u>9-1:22</u></a>	<b>TARGETED RESIDENTIAL PICKETING (SIGN OR PLACARD)</b>
<a href="#"><u>9-1:23</u></a>	<b>INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (MOVEMENT, USE, OR INGRESS AND EGRESS)</b>
<a href="#"><u>9-1:24</u></a>	<b>INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (IMPEDED)</b>
<a href="#"><u>9-1:25</u></a>	<b>INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (REFUSING OR FAILING TO LEAVE)</b>
<a href="#"><u>9-1:26</u></a>	<b>INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (CREDIBLE THREAT)</b>
<a href="#"><u>9-1:27</u></a>	<b>INTERFERENCE AT A PUBLIC BUILDING (DENIED)</b>
<a href="#"><u>9-1:28</u></a>	<b>INTERFERENCE AT A PUBLIC BUILDING (IMPEDED)</b>
<a href="#"><u>9-1:29</u></a>	<b>REFUSING OR FAILING TO LEAVE A PUBLIC BUILDING</b>
<a href="#"><u>9-1:30</u></a>	<b>IMPEDING PROCEEDINGS IN A PUBLIC BUILDING</b>
<a href="#"><u>9-1:31</u></a>	<b>INTRUSION IN A PUBLIC BUILDING</b>
<a href="#"><u>9-1:32</u></a>	<b>PICKETING IN A PUBLIC BUILDING</b>
<a href="#"><u>9-1:33</u></a>	<b>HARASSMENT (PHYSICAL CONTACT)</b>
<a href="#"><u>9-1:34</u></a>	<b>HARASSMENT (OBSCENE)</b>
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## 9-1:01 INCITING A RIOT (INCITE OR URGE)

The elements of the crime of inciting a riot (incite or urge) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. incited or urged a group of five or more persons,
4. to engage in a current or impending riot.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inciting a riot (incite or urge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inciting a riot (incite or urge).

### COMMENT

1. See § 18-9-102(1)(a), C.R.S. 2020.
2. See Instruction F:324 (defining "riot").
3. See *People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to inciting a riot).

## 9-1:02 INCITING A RIOT (FURTHERANCE)

The elements of the crime of inciting a riot (furtherance) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. gave commands, instructions, or signals,
  4. to a group of five or more persons,
  5. in furtherance of a riot.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inciting a riot (furtherance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inciting a riot (furtherance).

### COMMENT

1. See § 18-9-102(1)(b), C.R.S. 2020.
2. See Instruction F:324 (defining "riot").
3. See *People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to inciting a riot).

## 9-1:03.INT INCITING A RIOT – INTERROGATORY (INJURY OR DAMAGE)

If you find the defendant not guilty of inciting a riot, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of inciting a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the inciting cause injury or damage? (Answer “Yes” or “No”)

The inciting caused injury or damage only if:

1. the inciting of a riot resulted in injury to a person or damage to property.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-102(3), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); see, e.g., Instruction E:28 (special verdict form).

## 9-1:04 ARMING RIOTERS (SUPPLY)

The elements of the crime of arming rioters (supply) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. supplied a deadly weapon or destructive device,
  5. for use in a riot.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of arming rioters (supply).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of arming rioters (supply).

### COMMENT

1. See § 18-9-103(1)(a), C.R.S. 2020.
2. See Instruction F:88 (defining "deadly weapon"); Instruction F:94 (defining "destructive device"); Instruction F:324 (defining "riot").

## 9-1:05 ARMING RIOTERS (TEACH)

The elements of the crime of arming rioters (teach) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. taught another to prepare or use a deadly weapon or destructive device,
4. with intent,
5. that any such thing be used in a riot.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of arming rioters (teach).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of arming rioters (teach).

### COMMENT

1. *See* § 18-9-103(1)(b), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:94 (defining “destructive device”); Instruction F:185 (defining “with intent”); Instruction F:324 (defining “riot”).

## 9-1:06 ENGAGING IN A RIOT

The elements of the crime of engaging in a riot are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. engaged in a riot.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of engaging in a riot.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of engaging in a riot.

### COMMENT

1. See § 18-9-104(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:324 (defining “riot”); see also *People v. Bridges*, 620 P.2d 1, 3 (Colo. 1980) (“We conclude that the mental state ‘knowingly’ is implied by the statute and is required for the offense of engaging in a riot.”).
3. See *People v. Mullins*, 209 P.3d 1147, 1150 (Colo. App. 2008) (self-defense is an affirmative defense to engaging in a riot).

## 9-1:07.INT ENGAGING IN A RIOT – INTERROGATORY

If you find the defendant not guilty of engaging in a riot, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of engaging in a riot, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant's engagement aggravated? (Answer "Yes" or "No")

The defendant's engagement was aggravated only if:

1. in the course of rioting,
2. the defendant employed a deadly weapon, a destructive device, or any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon; or represented verbally or otherwise that he [she] was armed with a deadly weapon.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-104(1), C.R.S. 2020.

2. See Instruction F:88 (defining “deadly weapon”); Instruction F:94 (defining “destructive device”); see, e.g., Instruction E:28 (special verdict form).

3. See *People v. Rivas*, 77 P.3d 882, 888 (Colo. App. 2003) (the General Assembly did not intend that a culpable mental state apply to the sentence enhancing factors for the offense of engaging in a riot).

**9-1:08.SP INCITING OR ENGAGING IN A RIOT – SPECIAL  
INSTRUCTION (ATTEMPT, CONSPIRACY, AND  
SOLICITATION)**

A person may be convicted of attempt, conspiracy, or solicitation to incite or engage in a riot only if he [she] engaged in the prohibited conduct with respect to a current or impending riot.

COMMENT

1. *See* § 18-9-102(2), C.R.S. 2020.

## 9-1:09 DISOBEDIENCE OF A PUBLIC SAFETY ORDER UNDER RIOT CONDITIONS

The elements of the crime of disobedience of a public safety order under riot conditions are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. during a riot or when a riot was impending,
5. disobeyed a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disobedience of a public safety order under riot conditions.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disobedience of a public safety order under riot conditions.

### COMMENT

1. See § 18-9-105, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:305 (defining “public safety order”); Instruction F:324 (defining “riot”).

3. See Instruction H:54 (affirmative defense of “news reporter or media person”).

## 9-1:10 DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE)

The elements of the crime of disorderly conduct (coarse and obviously offensive) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. made a coarse and obviously offensive utterance, gesture, or display,
5. in a public place, and
6. the utterance, gesture, or display tended to incite an immediate breach of the peace.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (coarse and obviously offensive).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (coarse and obviously offensive).

### COMMENT

1. See § 18-9-106(1)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:303 (defining “public place”); Instruction F:308 (defining “recklessly”).

## 9-1:11 DISORDERLY CONDUCT (UNREASONABLE NOISE)

The elements of the crime of disorderly conduct (unreasonable noise) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. made unreasonable noise,
5. in a public place or near a private residence that he [she] had no right to occupy.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (unreasonable noise).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (unreasonable noise).

### COMMENT

1. See § 18-9-106(1)(c), C.R.S. 2020.
2. See Instruction F:185 (defining "intentionally"); Instruction F:195 (defining "knowingly"); Instruction F:303 (defining "public place"); Instruction F:308 (defining "recklessly").

**9-1:12.INT DISORDERLY CONDUCT (COARSE AND  
OBVIOUSLY OFFENSIVE; UNREASONABLE NOISE) –  
INTERROGATORY (FUNERAL)**

If you find the defendant not guilty of disorderly conduct ([coarse and obviously offensive] [unreasonable noise]), you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of ([coarse and obviously offensive] [unreasonable noise]), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant disorderly at a funeral? (Answer “Yes” or “No”)

The defendant was disorderly at a funeral only if:

1. he [she] committed the offense with intent to disrupt, impair, or interfere with a funeral, or with intent to cause severe emotional distress to a person attending a funeral.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. *See* § 18-9-106(3)(a), C.R.S. 2020.

2. See Instruction F:159 (defining “funeral”); see, e.g., Instruction E:28 (special verdict form).

3. Cf. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

## 9-1:13 DISORDERLY CONDUCT (FIGHTING IN PUBLIC)

The elements of the crime of disorderly conduct (fighting in public) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. fought with another,
5. in a public place,
6. while not engaged in an amateur or professional contest of athletic skill.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (fighting in public).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (fighting in public).

### COMMENT

1. *See* § 18-9-106(1)(d), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:303 (defining “public place”); Instruction F:308 (defining “recklessly”).

## **9-1:14 DISORDERLY CONDUCT (DISCHARGE OF A FIREARM IN A PUBLIC PLACE)**

The elements of the crime of disorderly conduct (discharge of a firearm in a public place) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally, knowingly, or recklessly,
  4. discharged a firearm,
  5. in a public place, and
  6. he [she] was not a peace officer, and was not engaged in lawful target practice, hunting, or the ritual discharge of blank ammunition cartridges as an attendee at a funeral for a deceased person who was a veteran of the armed forces of the United States.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (discharge of a firearm in a public place).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (discharge of a firearm in a public place).

### COMMENT

1. See § 18-9-106(1)(e), C.R.S. 2020.

2. See Instruction F:154 (defining “firearm”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:303 (defining “public place”); Instruction F:308 (defining “recklessly”).

## **9-1:15 DISORDERLY CONDUCT (DEADLY WEAPON; DISPLAY OR REPRESENTATION)**

The elements of the crime of disorderly conduct (deadly weapon; display or representation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. displayed a deadly weapon, or displayed any article used or fashioned in a manner to cause a person to reasonably believe that the article was a deadly weapon, or represented verbally or otherwise that he [she] was armed with a deadly weapon,
5. in a public place, and
6. in a manner calculated to alarm, and
7. the defendant was not a peace officer.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disorderly conduct (deadly weapon; display or representation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disorderly conduct (deadly weapon; display or representation).

## COMMENT

1. *See* § 18-9-106(1)(f), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:303 (defining “public place”); Instruction F:308 (defining “recklessly”).

## 9-1:16 OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (ACT)

The elements of the crime of obstructing a highway or other passageway (act) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally, knowingly, or recklessly,
  4. without legal privilege,
  5. obstructed a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public had access, or any other place used for the passage of persons, vehicles, or conveyances, and
  6. the obstruction arose from the defendant's acts alone, or the acts of the defendant and the acts of others.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a highway or other passageway (act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a highway or other passageway (act).

### COMMENT

1. See § 18-9-107(1)(a), C.R.S. 2020.

2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:247 (defining “obstruct”); Instruction F:308 (defining “recklessly”).

## **9-1:17 OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY (DISOBEYING A REASONABLE REQUEST OR ORDER)**

The elements of the crime of obstructing a highway or other passageway (disobeying a reasonable request or order to move) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. without legal privilege,
5. disobeyed a reasonable request or order to move,
6. issued by a person the defendant knew was a peace officer, a firefighter, or a person with authority to control the use of the premises,
7. to prevent obstruction of a highway or passageway, or to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstructing a highway or other passageway (disobeying a reasonable request or order to move).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstructing a highway or other passageway (disobeying a reasonable request or order to move).

## COMMENT

1. See § 18-9-107(1)(b), C.R.S. 2020.
2. See Instruction F:157 (defining “firefighter”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:247 (defining “obstruct”); Instruction F:263 (defining “peace officer”); Instruction F:308 (defining “recklessly”); Instruction F:324 (defining “riot”); *see also* Instructions F:283, F:284 (alternative definitions of “premises,” for purposes of burglary and trespass offenses).
3. Section 18-9-107(1)(b) does not define the term “passageway.”

## **9-1:18.INT OBSTRUCTING A HIGHWAY OR OTHER PASSAGEWAY – INTERROGATORY (FUNERAL)**

If you find the defendant not guilty of obstructing a highway or other passageway, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of obstructing a highway or other passageway, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant obstruct a funeral? (Answer “Yes” or “No”)

The defendant obstructed a funeral only if:

1. he [she] knowingly obstructed [the entrance into, or exit from, a funeral or funeral site] [a highway, or other passageway, where a funeral procession was taking place].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-107(3), C.R.S. 2020.

2. See Instruction F:159 (defining “funeral”); Instruction F:160 (defining “funeral site”); Instruction F:195 (defining “knowingly”); Instruction F:247 (defining “obstruct”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The term “funeral procession” is not defined by statute.

## 9-1:19 DISRUPTING A LAWFUL ASSEMBLY

The elements of the crime of disrupting a lawful assembly are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to prevent or disrupt any lawful meeting, procession, or gathering,
5. significantly obstructed or interfered with the meeting, procession, or gathering,
6. by physical action, verbal utterance, or any other means.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of disrupting a lawful assembly.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of disrupting a lawful assembly.

### COMMENT

1. See § 18-9-108(1), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. See *Dempsey v. People*, 117 P.3d 800, 807-08 (Colo. 2005) (holding that the disrupting statute was not unconstitutional, as applied, because it focuses on conduct, not speech).

## 9-1:20.INT DISRUPTING A LAWFUL ASSEMBLY – INTERROGATORY

If you find the defendant not guilty of disrupting a lawful assembly, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of disrupting a lawful assembly, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the crime of disrupting a lawful assembly by disrupting a funeral? (Answer “Yes” or “No”)

The defendant committed the crime of disrupting a lawful assembly by disrupting a funeral only if:

1. defendant knew the meeting, procession, or gathering was a funeral.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-108(2), C.R.S. 2020.
2. See Instruction F:159 (defining “funeral”); see, e.g., Instruction E:28 (special verdict form).

## **9-1:21 TARGETED RESIDENTIAL PICKETING (ROUTE OR LOCATION)**

The elements of the crime of targeted residential picketing (route or location) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in targeted picketing, and
4. did so in a manner other than by marching, without stopping in front or on either side of a residence, over a route that proceeded a distance that extended beyond three adjacent structures to one side of the targeted residence along the one-way length and three adjacent structures to the other side of the targeted residence along the one-way length or three hundred feet to one side of the targeted residence along the one-way length and three hundred feet to the other side of the targeted residence along the one-way length, whichever distance was shorter, and
5. had previously been ordered by a peace officer or law enforcement official to move, disperse, or take other appropriate action, by means of a warning that included an indication of the required distances that persons engaging in picketing must march, and
6. failed to promptly comply with the warning.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of targeted residential picketing (route or location).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of targeted residential picketing (route or location).

#### COMMENT

1. See § 18-9-108.5(3)(a), C.R.S. 2020.
2. See Instruction F:316 (defining “residence”); Instruction F:362 (defining “targeted picketing”).
3. Section 18-9-108.5(4), C.R.S. 2020, provides as follows:

Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

It appears that, rather than establishing an independent basis for criminal liability, this provision was enacted to provide a basis for a police officer to require that a protestor move his [her] vehicle. Accordingly, the Committee has not drafted a model instruction embodying this provision.

4. Cf. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

## 9-1:22 TARGETED RESIDENTIAL PICKETING (SIGN OR PLACARD)

The elements of the crime of targeted residential picketing (sign or placard) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. engaged in targeted picketing, and
  4. held, carried, or otherwise displayed on his [her] person a sign or placard that was greater in size than six square feet, or more than one sign or placard,
  5. while he [she] was on a street or sidewalk in a residential area, and
  6. had previously been ordered by a peace officer or law enforcement official to move, disperse, or take other appropriate action, by means of a warning that included an indication of the necessary conditions for signs or placards, and
  7. failed to promptly comply with the warning.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of targeted residential picketing (sign or placard).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of targeted residential picketing (sign or placard).

## COMMENT

1. See § 18-9-108.5(3)(b), C.R.S. 2020.
2. See Instruction F:316 (defining “residence”); Instruction F:362 (defining “targeted picketing”).
3. Section 18-9-108.5(4), C.R.S. 2020, provides as follows:

Vehicles or trailers used in targeted picketing shall not park within three residences or three hundred feet of a residence that is the subject of targeted picketing. There is a presumption that a vehicle or trailer is used in targeted picketing when signage is affixed to the vehicle containing content related to the targeted picketing.

It appears that, rather than establishing an independent basis for criminal liability, this provision was enacted to provide a basis for a police officer to require that a protestor move his [her] vehicle. Accordingly, the Committee has not drafted a model instruction embodying this provision.

4. Cf. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

## **9-1:23 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (MOVEMENT, USE, OR INGRESS AND EGRESS)**

The elements of the crime of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. was on or near the premises or facilities of any educational institution, and
5. denied to students, school officials, employees, and invitees,
6. lawful freedom of movement on the premises; or lawful use of the property or facilities of the institution; or the right of lawful ingress and egress to the institution's physical facilities.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (movement, use, or ingress and egress).

## COMMENT

1. See § 18-9-109(1)(a)-(c), C.R.S. 2020.
2. See Instruction F:195 (defining “willfully”).
3. See Instruction H:55 (affirmative defense of “lawful assembly”).
4. The fifth element uses a conjunction in order to be consistent with the language of the statute (i.e., “students, school officials, employees, and invitees”). However, this may be a legislative drafting error since the name of the offense is a disjunctive list.
5. Likewise, the sixth element uses a conjunction in order to be consistent with the language of the statute (i.e., “ingress and egress”). However, it is unclear whether the General Assembly intended to require proof that the defendant’s conduct resulted in a denial of both ingress and egress (or it may be the case that the General Assembly was of the view that the denial of either necessarily results in a denial of both).
6. See *People v. Moore*, 2013 COA 86, ¶ 13, 338 P.3d 348, 350 (“we interpret the phrase ‘public official or employee’ in section 18-9-110(2) to apply only to a victim who is either an official or an employee of a public entity. Contrary to the trial court’s reading, the adjective ‘public’ modifies both ‘official[’] and [’]employee.’”).
7. In 2015, the Committee added Comment 6, citing to *People v. Moore*, *supra*.

## **9-1:24 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (IMPEDED)**

The elements of the crime of interference with staff, faculty, or students of educational institutions (impeded) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. was on the premises of any educational institution, or at or in any building or other facility being used by any educational institution, and
5. impeded the staff or faculty of the institution in the lawful performance of their duties, or impeded a student of the institution in the lawful pursuit of his [her] educational activities,
6. through the use of restraint, abduction, coercion or intimidation, or when force or violence were present or threatened.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (impeded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (impeded).

## COMMENT

1. *See* § 18-9-109(2), C.R.S. 2020.
2. *See* Instruction F:195 (defining “willfully”).
3. *See* Instruction H:55 (affirmative defense of “lawful assembly”).
4. *See People in the Interest of C.F.*, 2012 COA 75, ¶¶ 15–20, 279 P.3d 1231, 1235-36 (holding, in a case involving a bomb threat communicated by telephone, that section 18-9-102(2) requires proof that the defendant was at the institution when he interfered with school operations).

## **9-1:25 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (REFUSING OR FAILING TO LEAVE)**

The elements of the crime of interference with staff, faculty, or students of educational institutions (refusing or failing to leave) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. willfully,
  4. refused or failed to leave the property of or any building or facility used by any educational institution,
  5. upon being requested to do so by the chief administrative officer, his [her] designee charged with maintaining order on the school premises and in its facilities, or a dean of the educational institution, and
  6. the defendant was committing, threatened to commit, or incited others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (refusing or failing to leave).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institutions (refusing or failing to leave).

## COMMENT

1. *See* § 18-9-109(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “willfully”).
3. *See* Instruction H:55 (affirmative defense of “lawful assembly”).

## **9-1:26 INTERFERENCE WITH STAFF, FACULTY, OR STUDENTS OF EDUCATIONAL INSTITUTIONS (CREDIBLE THREAT)**

The elements of the crime of interference with staff, faculty, or students of educational institutions (credible threat) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made or conveyed to another person a credible threat to cause death, or to cause bodily injury with a deadly weapon,
  5. against a person the defendant knew or believed to be a student, school official, employee of an educational institution, or an invitee who was on the premises of an educational institution.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with staff, faculty, or students of educational institutions (credible threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with staff, faculty, or students of educational institution (credible threat).

### COMMENT

1. See § 18-9-109(6)(a), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:78 (defining “credible threat”); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”).

## 9-1:27 INTERFERENCE AT A PUBLIC BUILDING (DENIED)

The elements of the crime of interference at a public building (denied) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owned, operated, or controlled by the federal government, and
5. denied to any public official, public employee, or invitee on such premises the lawful rights of such official, employee or invitee to enter, to use the facilities of, or to leave any such public building.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference at a public building (denied).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference at a public building (denied).

### COMMENT

1. See § 18-9-110(1), C.R.S. 2020.

2. See Instruction F:195 (defining “willfully”); Instruction F:298 (defining “public building”).
3. See *People v. Rediger*, 2018 CO 32, ¶ 21, 416 P.3d 893, 899 (holding that, for the purposes of section 18-9-110(1), the term “public employee” means “a person who works in the service of a governmental entity under an express or implied contract of hire, under which the governmental entity has the right to control the details of the person’s work performance”).
4. In 2019, the Committee added Comment 3.

## 9-1:28 INTERFERENCE AT A PUBLIC BUILDING (IMPEDED)

The elements of the crime of interference at a public building (impeded) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owner, operated, or controlled by the federal government, and
5. impeded any public official or public employee in the lawful performance of duties or activities,
6. through the use of restraint, abduction, coercion, or intimidation, or by force and violence or threat thereof.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference at a public building (impeded).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference at a public building (impeded).

### COMMENT

1. See § 18-9-110(2), C.R.S. 2020.

2. See Instruction F:195 (defining “willfully”); Instruction F:298 (defining “public building”).

## 9-1:29 REFUSING OR FAILING TO LEAVE A PUBLIC BUILDING

The elements of the crime of refusing or failing to leave a public building are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. was at or in any public building owned, operated, or controlled by the state, or any of the political subdivisions of the state, or at any building owner, operated, or controlled by the federal government, and
5. refused or failed to leave the public building,
6. upon being requested to do so by the chief administrative officer or his [her] designee charged with maintaining order in the public building, and
7. the defendant committed, was committing, threatened to commit, or incited others to commit any act which did, or would have if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the public building.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusing or failing to leave a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusing or failing to leave a

public building.

#### COMMENT

1. *See* § 18-9-110(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “willfully”); Instruction F:298 (defining “public building”).

## 9-1:30 IMPEDING PROCEEDINGS IN A PUBLIC BUILDING

The elements of the crime of impeding proceedings in a public building are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. at any meeting or session conducted by any judicial, legislative, or administrative body or official at or in any public building,
5. impeded, disrupted, or hindered the normal proceedings of such meeting or session,
6. by any act of intrusion into the chamber or other areas designated for the use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any member of such body or official engaged in the performance of duties at such meeting or session.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of impeding proceedings in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of impeding proceedings in a public building.

### COMMENT

1. See § 18-9-110(4), C.R.S. 2020.

2. See Instruction F:195 (defining “willfully”); Instruction F:298 (defining “public building”).

## 9-1:31 INTRUSION IN A PUBLIC BUILDING

The elements of the crime of intrusion in a public building are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. intruded into the chamber or other areas designated for the use of any executive body or official at or in any public building, and
5. impeded, disrupted, or hindered the normal proceedings of such body or official.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intrusion in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intrusion in a public building.

### COMMENT

1. See § 18-9-110(5), C.R.S. 2020.
2. See Instruction F:195 (defining "willfully"); Instruction F:298 (defining "public building").

## 9-1:32 PICKETING IN A PUBLIC BUILDING

The elements of the crime of picketing in a public building are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. picketed, either alone or in concert with another,
4. inside any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, was located, or in which the legislative office of any member of the general assembly was located, or in which a legislative hearing or meeting was being, or was to be, conducted.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of picketing in a public building.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of picketing in a public building.

### COMMENT

1. See § 18-9-110(6), C.R.S. 2020.
2. See Instruction F:298 (defining "public building"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Cf. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (picketers near the funeral of a member of the military killed in the line of duty could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy; picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, and they conducted their picketing peacefully, without interfering with the funeral).

## 9-1:33 HARASSMENT (PHYSICAL CONTACT)

The elements of the crime of harassment (physical contact) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
5. struck, shoved, kicked, or otherwise touched a person, or subjected him [her] to physical contact.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (physical contact).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (physical contact).

### COMMENT

1. See § 18-9-111(1)(a), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. The terms "annoy" and "alarm" are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike

with fear; fill with anxiety as to threaten danger or harm.”); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) (“In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words ‘annoy’ and ‘alarm,’ but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.”).

## 9-1:34 HARASSMENT (OBSCENE)

The elements of the crime of harassment (obscene) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. with intent,
  4. to harass, annoy, or alarm another person,
  5. in a public place,
  6. directed obscene language at, or made an obscene gesture to, another person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (obscene).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (obscene).

### COMMENT

1. See § 18-9-111(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:246 (defining "obscene"); Instruction F:303 (defining "public place").
3. The terms "annoy" and "alarm" are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961),

'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

## 9-1:35 HARASSMENT (FOLLOW)

The elements of the crime of harassment (follow) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
5. followed a person in or about a public place.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (follow).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (follow).

### COMMENT

1. See § 18-9-111(1)(c), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:303 (defining "public place").
3. The terms "annoy" and "alarm" are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) ("According to *Webster's New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), 'annoy' means 'to irritate with a nettling or exasperating effect.' 'Nettling' means 'to arouse displeasure, impatience, or anger in: provoke, vex.' 'Alarm' means 'to arouse to a sense of danger; to put on the alert; to strike

with fear; fill with anxiety as to threaten danger or harm.'"); *see also People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) ("In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words 'annoy' and 'alarm,' but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.").

## 9-1:36 HARASSMENT (COMMUNICATION)

The elements of the crime of harassment (communication) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
- [5. directly or indirectly initiated communication with a person or directed language toward another person, anonymously or otherwise,
6. by telephone, telephone network, data network, text message, instant message, computer, computer network, computer system, or other interactive electronic medium,
7. in a manner intended to harass or threaten bodily injury or property damage.]
- [5. made any comment, request, suggestion, or proposal by telephone, computer, computer network, computer system, or other interactive electronic medium,
6. that was obscene.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (communication).

## COMMENT

1. See § 18-9-111(1)(e), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”); Instruction F:246 (defining “obscene”); Instruction F:303 (defining “public place”).
3. The terms “annoy” and “alarm” are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) (“According to *Webster’s New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), ‘annoy’ means ‘to irritate with a nettling or exasperating effect.’ ‘Nettling’ means ‘to arouse displeasure, impatience, or anger in: provoke, vex.’ ‘Alarm’ means ‘to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.’”); see also *People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) (“In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words ‘annoy’ and ‘alarm,’ but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.”).
4. + See *People in Interest of R.D.*, 2020 CO 44, ¶¶ 2, 4, 464 P.3d 717, 721-22 (considering whether a juvenile’s statements were “true threats,” and thus not protected by the First Amendment in a proceeding for violating section 18-9-111(1)(e); holding that, “[i]n determining whether a statement is a true threat, a reviewing court must examine the words used, but it must also consider the context in which the statement was made,” including the following non-exhaustive factors: (1) the statement’s role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement’s intended or foreseeable recipient(s)).

5. In 2015, the Committee modified the fifth and sixth elements to reflect legislative amendments. *See* Ch. 120, sec. 1, § 18-9-111(1)(e), 2015 Colo. Sess. Laws 364, 364.

6. + In 2020, the Committee added Comment 4.

**9-1:37.SP HARASSMENT – SPECIAL INSTRUCTION  
(LOCATION OF COMMUNICATION)**

Any act of harassment involving [insert a description of the relevant language from section 18-9-111(1)(e)] may be deemed to have occurred or to have been committed either at the place at which the telephone call, electronic mail, or other electronic communication was made, or at the place where it was received.

COMMENT

1. *See* § 18-9-111(3), C.R.S. 2020.

## 9-1:38 HARASSMENT (TELEPHONE)

The elements of the crime of harassment (telephone) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
5. made a telephone call or caused a telephone to ring repeatedly,
6. whether or not a conversation ensued,
7. with no purpose of legitimate conversation.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (telephone).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (telephone).

### COMMENT

1. See § 18-9-111(1)(f), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:246 (defining "obscene"); Instruction F:303 (defining "public place").

3. See *People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) (“‘Repeatedly’ is a word of such common understanding that its meaning is not vague. It simply means in the context of this statute that the defendant use insulting, taunting or challenging language more than one time.”).

4. The terms “annoy” and “alarm” are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) (“According to *Webster’s New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), ‘annoy’ means ‘to irritate with a nettling or exasperating effect.’ ‘Nettling’ means ‘to arouse displeasure, impatience, or anger in: provoke, vex.’ ‘Alarm’ means ‘to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.’”); see also *People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) (“In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words ‘annoy’ and ‘alarm,’ but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.”).

## 9-1:39 HARASSMENT (REPEATED COMMUNICATION)

The elements of the crime of harassment (repeated communication) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
5. made repeated communications,
6. at inconvenient hours,
7. that invaded the privacy of another and interfered in the use and enjoyment of another's home, private residence, or private property.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (repeated communication).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (repeated communication).

### COMMENT

1. *See* § 18-9-111(1)(g), C.R.S. 2020.
2. *See* Instruction F:185 (defining "with intent").

3. See *People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) (“‘Repeatedly’ is a word of such common understanding that its meaning is not vague. It simply means in the context of this statute that the defendant use insulting, taunting or challenging language more than one time.”).

4. The terms “annoy” and “alarm” are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) (“According to *Webster’s New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), ‘annoy’ means ‘to irritate with a nettling or exasperating effect.’ ‘Nettling’ means ‘to arouse displeasure, impatience, or anger in: provoke, vex.’ ‘Alarm’ means ‘to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.’”); see also *People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) (“In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words ‘annoy’ and ‘alarm,’ but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.”).

## 9-1:40 HARASSMENT (PROVOCATION)

The elements of the crime of harassment (provocation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to harass, annoy, or alarm another person,
5. repeatedly insulted, taunted, challenged, or made communications in offensively coarse language to another,
6. in a manner likely to provoke a violent or disorderly response.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of harassment (provocation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of harassment (provocation).

### COMMENT

1. See § 18-9-111(1)(h), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. See *People ex rel. VanMeveren v. County Court In and For Larimer County*, 551 P.2d 716, 720 (Colo. 1976) ("'Repeatedly' is a word of such common understanding that its meaning is not vague. It simply means in

the context of this statute that the defendant use insulting, taunting or challenging language more than one time.”).

4. The terms “annoy” and “alarm” are not defined by statute. See *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975) (“According to *Webster’s New International Dictionary of the English Language*, (3d ed. Unabridged, 1961), ‘annoy’ means ‘to irritate with a nettling or exasperating effect.’ ‘Nettling’ means ‘to arouse displeasure, impatience, or anger in: provoke, vex.’ ‘Alarm’ means ‘to arouse to a sense of danger; to put on the alert; to strike with fear; fill with anxiety as to threaten danger or harm.’”); see also *People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988) (“In fact, we found the previous section 18-9-111(1)(e) overbroad in *Bolles* not because of the mere presence of the words ‘annoy’ and ‘alarm,’ but because these words were applied to *all* forms of communication, which obviously contained no particularized standards to limit the scope of the offense.”).

## 9-1:41.INT HARASSMENT – INTERROGATORY

If you find the defendant not guilty of harassment, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of harassment, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the harassment with prohibited bias?  
(Answer “Yes” or “No”)

The defendant committed the harassment with prohibited bias only if:

1. he [she] committed the harassment with the intent to intimidate or harass another person because of that person’s actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-9-111(2), C.R.S. 2020.
2. *See* Instruction F:342 (defining “sexual orientation”); *see, e.g.*, Instruction E:28 (special verdict form).

3. For harassment on the basis of physical or mental disability, the statute refers to section 18-9-121(5), C.R.S. (bias-motivated crimes). That statute in turn incorporates the definition of “person with a disability” from section 18-6.5-102(11), C.R.S. *See* Instruction F:273 (defining “person with a disability” pursuant to section 18-6.5-102(11)).

4. In 2017, pursuant to a legislative amendment, the Committee added (1) the terms “physical or mental disability” and “sexual orientation” to the interrogatory, (2) the cross-reference to Instruction F:342 in Comment 2, and (3) Comment 3. *See* Ch. 185, sec. 1, § 18-9-111(2), 2017 Colo. Sess. Laws 677, 677.

## 9-1:42 LOITERING

The elements of the crime of loitering are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to interfere with or disrupt the school program or interfere with or endanger schoolchildren,
5. loitered in a school building, on school grounds, or within one hundred feet of school grounds,
6. when persons under the age of eighteen were present in the building or on the grounds,
7. without having any reason or relationship involving custody of, or responsibility for, a pupil, or any other specific, legitimate reason for being there, and
8. after being asked to leave by a school administrator or his [her] representative, or by a peace officer.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of loitering.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of loitering.

## COMMENT

1. *See* § 18-9-112(2), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:201 (defining “loiter”).
3. *See* Instruction H:56 (affirmative defense of “lawful assembly”).

## 9-1:43 DESECRATION OF VENERATED OBJECTS

The elements of the crime of desecration of venerated objects are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. desecrated any public monument or public structure, or desecrated in a public place any other object of veneration by the public.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of desecration of venerated objects.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of desecration of venerated objects.

### COMMENT

1. *See* § 18-9-113(1)(a), C.R.S. 2020.
2. *See* Instruction F:93 (defining “desecrate”); Instruction F:195 (defining “knowingly”).

## 9-1:44 DESECRATION OF A PLACE OR WORSHIP OR BURIAL OF HUMAN REMAINS

The elements of the crime of desecration of a place of worship or burial of human remains are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. desecrated any place of worship or burial of human remains.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of desecration of a place or worship or burial of human remains.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of desecration of a place or worship or burial of human remains.

### COMMENT

1. See § 18-9-113(1)(b), C.R.S. 2020.
2. See Instruction F:93 (defining “desecrate”); Instruction F:195 (defining “knowingly”).
3. Section 18-9-113(1)(b) specifies that the disturbance of an unmarked human burial is subject to prosecution under section 24-80-1305, C.R.S. 2020. The Committee has not drafted a model instruction for that offense.

## 9-1:45 HINDERING TRANSPORTATION

The elements of the crime of hindering transportation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and without lawful authority,
4. forcibly stopped and hindered the operation of any vehicle used in providing transportation services of any kind to the public, or to any person, association, or corporation.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hindering transportation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hindering transportation.

### COMMENT

1. See § 18-9-114, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

## 9-1:46 ENDANGERING PUBLIC TRANSPORTATION (TAMPER)

The elements of the crime of endangering public transportation (tamper) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. tampered with a facility of public transportation,
5. to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material,
6. which would result in the creation of a substantial risk of death or serious bodily injury to anyone.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (tamper).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (tamper).

### COMMENT

1. See § 18-9-115(1)(a), C.R.S. 2020.

2. See Instruction F:137 (defining “facility of public transportation”); Instruction F:185 (defining “with intent”); Instruction F:299 (defining “public conveyance”); Instruction F:332 (defining “serious bodily injury”).
3. If the defendant is not charged with theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. See Instructions 4-4:01 to 4-4:05. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

## 9-1:47 ENDANGERING PUBLIC TRANSPORTATION (CRIME)

The elements of the crime of endangering public transportation (crime) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent of committing the crime of [insert name(s) of offense(s)] on a public conveyance,
4. stopped or boarded a public conveyance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (crime).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (crime).

### COMMENT

1. See § 18-9-115(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:299 (defining "public conveyance").

## 9-1:48 ENDANGERING PUBLIC TRANSPORTATION (THREAT)

The elements of the crime of endangering public transportation (threat) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. on a public conveyance,
5. threatened any operator, crew member, attendant, or passenger,
6. with death or imminent serious bodily injury; or with a deadly weapon or with words or actions intended to induce belief that he [she] was armed with a deadly weapon.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (threat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (threat).

### COMMENT

1. See § 18-9-115(1)(c), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:299 (defining “public conveyance”); Instruction F:332 (defining “serious bodily injury”).

## 9-1:49 ENDANGERING PUBLIC TRANSPORTATION (BODILY INJURY)

The elements of the crime of endangering public transportation (bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. on a public conveyance,
- [4. knowingly or recklessly,
5. caused bodily injury to another person.]
- [4. with criminal negligence,
5. caused bodily injury to another person by means of a deadly weapon.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering public transportation (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering public transportation (bodily injury).

### COMMENT

1. See § 18-9-115(1)(d)(I), (II), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:79 (defining “criminal negligence”); Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:299 (defining “public conveyance”); Instruction F:308 (defining “recklessly”); Instruction F:332 (defining “serious bodily injury”).

## 9-1:50 ENDANGERING UTILITY TRANSMISSION

The elements of the crime of endangering utility transmission are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. tampered with a facility of utility transmission,
5. to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material,
6. which would interrupt performance of utility transmission or result in a creation of a substantial risk of death or serious bodily injury to anyone.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of endangering utility transmission.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of endangering utility transmission.

### COMMENT

1. See § 18-9-115(1.5), C.R.S. 2020.
2. See Instruction F:138 (defining "facility of utility transmission"); Instruction F:185 (defining "with intent"); Instruction F:332 (defining "serious bodily injury"); Instruction F:384 (defining "utility").

3. If the defendant is not charged with theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instructions 4-4:01 to 4-4:05. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

## 9-1:51 VIOLATION OF A RESTRAINING ORDER RELATED TO PUBLIC CONVEYANCES

The elements of the crime of violation of a restraining order related to public conveyances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. violated a court order specifically restraining him [her] from traveling in or on a particular public conveyance.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of violation of a restraining order related to public conveyances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of violation of a restraining order related to public conveyances.

### COMMENT

1. See § 18-9-115.5, C.R.S. 2020.
2. See Instruction F:299 (defining "public conveyance"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. Section 18-9-115.5, C.R.S. 2020, specifies that the statute applies only to restraining orders issued pursuant to C.R.C.P. 65.

## 9-1:52 PROJECTING MISSILES AT A VEHICLE

The elements of the crime of projecting a missile at a vehicle are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. projected any missile,
  5. at or against any vehicle or equipment designed for the transportation of persons or property,
  6. other than a bicycle.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of projecting a missile at a vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of projecting a missile at a vehicle.

### COMMENT

1. See § 18-9-116(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:230 (defining “missile”).
3. If the defendant is charged with projecting missiles at both a vehicle and a bicyclist, use a separate instruction for each count (with

corresponding separate verdict forms). This is necessary because the offenses have different penalty classifications.

4. + *See People v. Kern*, 2020 COA 96, ¶ 35, 474 P.3d 197, 204 (holding that littering is not a lesser included offense of projecting a missile at a vehicle).

5. + In 2020, the Committee added Comment 4.

## 9-1:53 PROJECTING MISSILES AT A BICYCLIST

The elements of the crime of projecting a missile at a bicyclist are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. projected any missile,
  5. at or against any bicyclist.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of projecting a missile at a bicyclist.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of projecting a missile at a bicyclist.

### COMMENT

1. *See* § 18-9-116(2), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:230 (defining “missile”).
3. If the defendant is charged with projecting missiles at both a vehicle and a bicyclist, use a separate instruction for each count (with corresponding separate verdict forms). This is necessary because the offenses have different penalty classifications.

## 9-1:54 VEHICULAR ELUDING

The elements of the crime of vehicular eluding are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. while operating a motor vehicle,
5. eluded or attempted to elude,
6. a peace officer who was also operating a motor vehicle, and
7. the defendant knew, or reasonably should have known, that he [she] was being pursued by the peace officer, and
8. operated his [her] vehicle in a reckless manner.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of vehicular eluding.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of vehicular eluding.

### COMMENT

1. See § 18-9-116.5(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:236 (defining “motor vehicle”); Instruction F:308 (defining “recklessly”).

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. *See People v. Dominguez*, 2019 COA 78, ¶ 64, 454 P.3d 364, 374 (holding that reckless driving is a lesser included offense of vehicular eluding).

5. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

6. In 2019, the Committee added Comment 4.

## 9-1:55.INT VEHICULAR ELUDING – INTERROGATORY (BODILY INJURY OR DEATH)

If you find the defendant not guilty of vehicular eluding, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of vehicular eluding, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the eluding result in [bodily injury] [death]? (Answer “Yes” or “No”)

The eluding resulted in [bodily injury] [death] only if:

1. the vehicular eluding resulted in [bodily injury] [death] to another person.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-116.5(2)(a), C.R.S. 2020.
2. See Instruction F:36 (defining “bodily injury”); see, e.g., Instruction E:28 (special verdict form).

3. If the defendant is charged with causing the death of one person and causing injury to another, use separate copies of this interrogatory (with separate places to answer on the verdict form). Similarly, use separate copies of this interrogatory in cases where there is a dispute concerning whether the eluding caused death, or merely bodily injury.

## 9-1:56 UNLAWFUL CONDUCT ON PUBLIC PROPERTY

The elements of the crime of unlawful conduct on public property are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. entered or remained in any public building or on any public property, or conducted himself [herself] in or on any public building or on any public property,
4. in violation of any order, rule, or regulation concerning [insert a description of subject matter from section 18-9-117(1)(a)-(g), or “any authority granted by any other law”], limiting or prohibiting the use or activities or conduct in such public building or on such public property,
5. that was issued by an officer or agency having the power of control, management, or supervision of the building or property, and
6. notice of the limitation or prohibition was prominently posted at all public entrances to the building or property, or defendant was actually first given notice of the limitation or prohibition by the person by the officer or agency, including any agent thereof, or by any law enforcement officer who had jurisdiction or authority for enforcement.
- [7. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful conduct on public property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of unlawful conduct on public property.

#### COMMENT

1. *See* § 18-9-117(1), (2), C.R.S. 2020.
2. *See* Instruction F:298 (defining “public building”).
3. Section 18-9-117(1) contains a non-exhaustive list of the relevant types of orders, rules, and regulations. In a case in which there is a dispute concerning whether an officer or agency had authority to promulgate a particular order, rule, or regulation, the court should resolve the issue as a matter of law. Accordingly, the current version of the model instruction does not include the “under authority granted by law” language that previously appeared as an element in COLJI-Crim. 30:29 (1983).

## 9-1:57.INT UNLAWFUL CONDUCT ON PUBLIC PROPERTY – INTERROGATORY

If you find the defendant not guilty of unlawful conduct on public property, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful conduct on public property, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant violate an order, rule, or regulation concerning a funeral or funeral procession? (Answer “Yes” or “No”)

The defendant violated an order, rule, or regulation concerning a funeral or funeral procession only if:

1. the defendant violated an order, rule, or regulation prohibiting activities or conduct within public buildings or on public property which might interfere with, impair, or disrupt a funeral or funeral procession.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-9-117(1)(c), (3)(c), C.R.S. 2020.

2. See Instruction F:159 (defining “funeral”); *see, e.g.*, Instruction E:28 (special verdict form).

## 9-1:58 FIREARMS, EXPLOSIVES, OR INCENDIARY DEVICES IN FACILITIES OF PUBLIC TRANSPORTATION

The elements of the crime of [firearm] [explosive or incendiary device] in a facility of public transportation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without legal authority,
4. had any loaded firearm or explosive or incendiary device in his [her] possession in any facility of public transportation, or carried or brought any loaded firearm or explosive or incendiary device into, or caused any loaded firearm or explosive or incendiary device to be carried or brought into, any facility of public transportation.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of [firearm] [explosive or incendiary device] in a facility of public transportation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of [firearm] [explosive or incendiary device] in a facility of public transportation.

### COMMENT

1. See § 18-9-118, C.R.S. 2020.

2. See Instruction F:134 (defining “explosive or incendiary device”); Instruction F:137 (defining “facility of public transportation”); Instruction F:154 (defining “firearm”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

**9-1:59 FAILURE OR REFUSAL TO LEAVE PREMISES OR  
PROPERTY UPON REQUEST OF A PEACE OFFICER  
(NONCOMPLIANCE)**

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (noncompliance) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and
5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,
6. who had probable cause to believe a crime was occurring and that the defendant constituted a danger to himself [herself] or others.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (noncompliance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (noncompliance).

## COMMENT

1. See § 18-9-119(2), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”).
3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) the defendant constituted a danger to himself [herself] or others. See generally *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) (“In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.” (citation omitted)).

**9-1:60 FAILURE OR REFUSAL TO LEAVE PREMISES OR  
PROPERTY UPON REQUEST OF A PEACE OFFICER  
(ANOTHER PERSON; NO DEADLY WEAPON)**

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and
5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,
6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and
7. in the same criminal episode,
8. knowingly,
9. held another person hostage or confined or detained another person without his [her] consent,
10. without proper legal authority, and
11. without the use of a deadly weapon.
- [12. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; no deadly weapon).

#### COMMENT

1. See § 18-9-119(3), C.R.S. 2020.
2. See Instruction F:172 (defining “hold hostage”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”).
3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. See generally *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) (“In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.”).

**9-1:61 FAILURE OR REFUSAL TO LEAVE PREMISES OR  
PROPERTY UPON REQUEST OF A PEACE OFFICER (BELIEF  
AS TO DEADLY WEAPON)**

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and
5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,
6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and
7. in the same criminal episode,
8. recklessly or knowingly,
9. caused a peace officer to believe that he [she] possessed a deadly weapon.
- [10. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (belief as to deadly weapon).

#### COMMENT

1. See § 18-9-119(4), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:281 (defining “possession”); Instruction F:308 (defining “recklessly”).
3. Although section 18-9-119(4) contains a single element that is to be added to the elements in either section 18-9-119(2) or section 18-9-119(3), section 18-9-119(3), in turn, incorporates and builds on section 18-9-119(2). Therefore, because it would be illogical for a prosecutor charging a violation of section 18-9-119(4) to needlessly assume the burden of proving the three additional elements which section 18-9-119(3) engrafts to section 18-9-119(2), the above model instruction does not include the three additional elements from section 18-9-119(3).
4. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. See generally *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) (“In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.”).

**9-1:62 FAILURE OR REFUSAL TO LEAVE PREMISES OR  
PROPERTY UPON REQUEST OF A PEACE OFFICER  
(ANOTHER PERSON; DEADLY WEAPON)**

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. barricaded or refused police entry to any premises or property through use of, or threatened use of, force, and
5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,
6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and
7. in the same criminal episode,
8. knowingly,
9. held another person hostage or confined or detained another person,
10. through the possession, use, or threatened use of a deadly weapon,
11. without the other person's consent, and
12. without proper legal authority.
- [13. and that the defendant's conduct was not legally authorized by

the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; deadly weapon).

#### COMMENT

1. See § 18-9-119(5), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:172 (defining “hold hostage”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:281 (defining “possession”); Instruction F:308 (defining “recklessly”).
3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. See generally *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) (“In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.”).

**9-1:63 FAILURE OR REFUSAL TO LEAVE PREMISES OR  
PROPERTY UPON REQUEST OF A PEACE OFFICER  
(ANOTHER PERSON; BELIEF AS TO DEADLY WEAPON)**

The elements of the crime of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. barricaded or refused police entry to any premises or property through use, or threatened use, of force, and
5. refused or failed to leave any premises or property upon being requested to do so by a peace officer,
6. who had probable cause to believe a crime was occurring and that defendant constituted a danger to himself [herself] or others, and
7. in the same criminal episode,
8. knowingly,
9. held another person hostage or confined or detained another person,
10. by knowingly causing the other person to reasonably believe that he [she] possessed a deadly weapon.
- [11. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find

the defendant guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure or refusal to leave premises or property upon request of a peace officer (another person; belief as to deadly weapon).

#### COMMENT

1. See § 18-9-119(7), C.R.S. 2020.
2. See Instruction F:88 (defining “deadly weapon”); Instruction F:172 (defining “hold hostage”); Instruction F:195 (defining “knowingly”); Instruction F:263 (defining “peace officer”); Instruction F:281 (defining “possession”); Instruction F:308 (defining “recklessly”).
3. Because the statute requires a two-part determination of probable cause, in most cases it will be necessary to draft a supplemental instruction explaining that the prosecution must prove that the facts known to the officer were sufficient to induce a person of ordinary prudence and caution reasonably to believe that: (1) a crime was occurring; and (2) defendant constituted a danger to himself [herself] or others. See generally *Wigger v. McKee*, 809 P.2d 999, 1005 (Colo. App. 1990) (“In a § 1983 damage suit, the existence of probable cause, when dependent on the resolution of factual questions, is for the determination of the jury. However, if no genuine issue as to any material fact exists and if credibility conflicts are absent, the determination may be made on summary judgment as a matter of law.”).

## 9-1:64 TERRORIST TRAINING ACTIVITIES

The elements of the crime of terrorist training activities are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. taught or demonstrated to any person the use, application, or making of any firearm, explosive, or incendiary device, or technique capable of causing injury or death to any person, knowing that it would be unlawfully used in furtherance of a civil disorder; or assembled with one or more other persons for the purpose of training or practicing with, or being instructed in the use of, any firearm, explosive or incendiary device, or technique capable of causing injury or death to any person, with the intent to unlawfully use the same in furtherance of a civil disorder.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of terrorist training activities.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of terrorist training activities.

### COMMENT

1. See § 18-9-120(2), C.R.S. 2020.
2. See Instruction F:54 (defining “civil disorder”); Instruction F:133 (defining “explosive or incendiary device”); Instruction F:155 (defining “firearm”).

3. Section 18-9-120(3), C.R.S. 2020, establishes exemptions from criminal liability for a variety of legitimate weapons training activities, and also for acts that law enforcement officers commit as part of their duties. However, the Committee has not drafted model affirmative defense instructions.

## 9-1:65 BIAS-MOTIVATED CRIMES (BODILY INJURY)

The elements of bias-motivated crime (bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,
5. knowingly,
6. caused bodily injury to another person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (bodily injury).

### COMMENT

1. *See* § 18-9-121(2)(a), C.R.S. 2020.
2. *See* Instruction F:36 (defining "bodily injury"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:273 (defining "person with a disability"); Instruction F:342 (defining "sexual orientation"); *see also* § 18-9-121(5)(a), C.R.S. 2020

("Physical or mental disability" refers to a disability as used in the definition of the term 'person with a disability' in section 18-6.5-102(11).").

## **9-1:66.INT BIAS-MOTIVATED CRIMES – INTERROGATORY (BODILY INJURY; AIDED OR ABETTED BY ANOTHER)**

If you find the defendant not guilty of bias-motivated crime (bodily injury), you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of bias-motivated crime (bodily injury), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant aided or abetted? (Answer “Yes” or “No”)

The defendant was aided or abetted only if:

1. he [she] was physically aided or abetted by one or more other persons,
2. during the commission of the bias-motivated crime.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-9-121(2)(a), (3), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## 9-1:67 BIAS-MOTIVATED CRIMES (FEAR)

The elements of bias-motivated crime (fear) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,
5. knowingly,
6. by words or conduct,
7. placed another person in fear of imminent lawless action directed at that person, or that person's property,
8. and such words or conduct were likely to produce bodily injury to that person or damage to that person's property.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (fear).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (fear).

### COMMENT

1. See § 18-9-121(2)(b), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:273 (defining “person with a disability”); Instruction F:342 (defining “sexual orientation”); *see also* § 18-9-121(5)(a), C.R.S. 2020 (“‘Physical or mental disability’ refers to a disability as used in the definition of the term ‘person with a disability’ in section 18-6.5-102(11).”).

## 9-1:68 BIAS-MOTIVATED CRIMES (PROPERTY)

The elements of bias-motivated crime (property) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, national origin, physical or mental disability, or sexual orientation,
5. knowingly,
6. caused damage to or destruction of the property of another person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bias-motivated crime (property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bias-motivated crime (property).

### COMMENT

1. See § 18-9-121(2)(c), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:273 (defining "person with a disability"); Instruction F:342 (defining "sexual orientation"); see also § 18-9-

121(5)(a), C.R.S. 2020 (“‘Physical or mental disability’ refers to a disability as used in the definition of the term ‘person with a disability’ in section 18-6.5-102(11).”).

## 9-1:69 PREVENTING PASSAGE TO OR FROM A HEALTH CARE FACILITY

The elements of the crime of preventing passage [to] [from] a health care facility are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. obstructed, detained, hindered, impeded, or blocked another person's entry to, or exit from, a health care facility.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of preventing passage [to] [from] a health care facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of preventing passage [to] [from] a health care facility.

### COMMENT

1. See § 18-9-122(2), C.R.S. 2020.
2. See Instruction F:169 (defining "health care facility"); Instruction F:195 (defining "knowingly").

## 9-1:70 ENGAGING IN PROHIBITED ACTIVITIES NEAR A HEALTH CARE FACILITY

The elements of the crime of prohibited activities near a health care facility are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. approached to within eight feet of another person,
5. without that person's consent,
6. for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with that person,
7. in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited activities near a health care facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited activities near a health care facility.

### COMMENT

1. See § 18-9-122(3), C.R.S. 2020.

2. See Instruction F:169 (defining “health care facility”); Instruction F:195 (defining “knowingly”).

## 9-1:71 BRINGING AN ALCOHOL BEVERAGE, BOTTLE, OR CAN INTO THE MAJOR LEAGUE BASEBALL STADIUM

The elements of the crime of bringing an alcohol beverage, bottle, or can into the major league baseball stadium are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. carried or brought,
4. into the Denver metropolitan major league baseball stadium district stadium,
5. any alcohol beverage, bottle, or can.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of bringing a[n] [alcohol beverage] [bottle] [can] into the major league baseball stadium.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of bringing a[n] [alcohol beverage] [bottle] [can] into the major league baseball stadium.

### COMMENT

1. See § 18-9-123(1), C.R.S. 2020.
2. See Instruction F:15 (defining "alcohol beverage"); Instruction F:39 (defining "bottle"); Instruction F:43 (defining "can"); Instruction F:195 (defining "knowingly"); Instruction F:351 (defining "stadium"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly

designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes exemptions from criminal liability. *See* § 18-9-123(2), C.R.S. 2020 (“Nothing in this section shall be construed to prohibit a person from bringing or carrying into the stadium a beverage, bottle, or can required in connection with the person’s practice of religion, the person’s medical or physical condition, or food or formula for the person’s infant.”). However, the Committee has not drafted a model affirmative defense instruction.

## 9-1:72 HAZING

The elements of the crime of hazing are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in hazing.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hazing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hazing.

### COMMENT

1. *See* § 18-9-124(2)(a), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); Instruction F:168 (defining “hazing”); Instruction F:308 (defining “recklessly”).

## 9-1:73 INTERFERENCE WITH A FUNERAL (PRIVATE PROPERTY)

The elements of the crime of interference with a funeral (private property) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing a funeral was being conducted,
4. refused to leave any private property within one hundred feet of the funeral site,
5. upon the request of the owner of the private property, or the owner's agent.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with a funeral (private property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with a funeral (private property).

### COMMENT

1. See § 18-9-125(1)(a), C.R.S. 2020.
2. See Instruction F:159 (defining "funeral"); Instruction F:195 (defining "knowingly").

## 9-1:74 INTERFERENCE WITH A FUNERAL (PUBLIC PROPERTY)

The elements of the crime of interference with a funeral (public property) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowing a funeral was being conducted,
  4. refused to leave any public property within one hundred feet of the funeral site upon the request of a public official with authority over the property or upon the request of a peace officer, and
  5. the public official or peace officer making the request had reasonable grounds to believe that defendant had violated a rule or regulation applicable to that property, or a statute or local ordinance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with a funeral (public property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with a funeral (public property).

### COMMENT

1. See § 18-9-125(1)(b), C.R.S. 2020.

2. See Instruction F:159 (defining “funeral”); Instruction F:195 (defining “knowingly”).



## CHAPTER 9-2

### CRUELTY TO ANIMALS

<a href="#"><u>9-2:01</u></a>	CRUELTY TO ANIMALS (PROHIBITED ACTS)
<a href="#"><u>9-2:02</u></a>	CRUELTY TO ANIMALS (INTENTIONAL ABANDONMENT OF A DOG OR CAT)
<a href="#"><u>9-2:03</u></a>	CRUELTY TO ANIMALS (RECKLESSLY OR NEGLIGENTLY TORTURING, NEEDLESSLY MUTILATING, OR NEEDLESSLY KILLING)
<a href="#"><u>9-2:04</u></a>	AGGRAVATED CRUELTY TO ANIMALS
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<a href="#"><u>9-2:18</u></a>	FALSE REPORTING OF ANIMAL CRUELTY

## CHAPTER COMMENTS

1. Section 18-9-201.5, C.R.S. 2020, states that the offenses within Article 9, Part 2, do not apply to a variety of circumstances (e.g., accepted animal husbandry practices, conduct permitted by wildlife statutes, legally authorized animal care, and facilities licensed under the federal Animal Welfare Act). However, the Committee has not drafted model affirmative defense instructions.

## **9-2:01 CRUELTY TO ANIMALS (PROHIBITED ACTS)**

The elements of the crime of cruelty to animals (prohibited acts) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, recklessly, or with criminal negligence,
4. overdrove, overloaded, overworked, tormented, deprived of necessary sustenance, unnecessarily or cruelly beat, allowed to be housed in a manner that resulted in chronic or repeated serious physical harm, carried or confined in or upon any vehicles in a cruel or reckless manner, engaged in a sexual act with an animal, or otherwise mistreated or neglected any animal, or caused or procured it to be done, or, having the charge or custody of any animal, failed to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandoned an animal.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (prohibited acts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (prohibited acts).

### COMMENT

1. See § 18-9-202(1)(a), C.R.S. 2020.

2. See Instruction F:03 (defining “abandon”); Instruction F:17 (defining “animal”); Instruction F:79 (defining “criminal negligence”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:231 (defining “mistreatment”); Instruction F:240 (defining “neglect”); Instruction F:308 (defining “recklessly”); Instruction F:333 (defining “serious physical harm”); Instruction F:336 (defining “sexual act with an animal”).

3. See Instruction H:57 (affirmative defense of “dog found running, worrying, or injuring sheep, cattle, or other livestock”).

4. It appears that knowing or reckless abandonment, as defined by the final clause of section 18-9-202(1)(a), is applicable only to persons who have “charge or custody” of an animal. This is the interpretation that was embodied in COLJI-Crim. 35:12 (1983), and it is maintained in the above model instruction.

## 9-2:02 CRUELTY TO ANIMALS (INTENTIONAL ABANDONMENT OF A DOG OR CAT)

The elements of the crime of cruelty to animals (intentional abandonment of a dog or cat) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. abandoned a dog or cat.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (intentional abandonment of a dog or cat).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (intentional abandonment of a dog or cat).

### COMMENT

1. *See* § 18-9-202(1)(b), C.R.S. 2020.
2. *See* Instruction F:03 (defining “abandon”); Instruction F:185 (defining “intentionally”).
3. *See* Instruction H:57 (affirmative defense of “dog found running, worrying, or injuring sheep, cattle, or other livestock”).

**9-2:03 CRUELTY TO ANIMALS (RECKLESSLY OR  
NEGLIGENTLY TORTURING, NEEDLESSLY MUTILATING,  
OR NEEDLESSLY KILLING)**

The elements of the crime of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly, or with criminal negligence,
4. tortured, needlessly mutilated, or needlessly killed an animal.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to animals (recklessly or negligently torturing, needlessly mutilating, or needlessly killing).

**COMMENT**

1. See § 18-9-202(1.5)(a), C.R.S. 2020.
2. See Instruction F:17 (defining "animal"); Instruction F:79 (defining "criminal negligence"); Instruction F:308 (defining "recklessly").
3. See Instruction H:57 (affirmative defense of "dog found running, worrying, or injuring sheep, cattle, or other livestock").

## 9-2:04 AGGRAVATED CRUELTY TO ANIMALS

The elements of the crime of aggravated cruelty to animals are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. tortured, needlessly mutilated, or needlessly killed an animal.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of aggravated cruelty to animals.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of aggravated cruelty to animals.

### COMMENT

1. *See* § 18-9-202(1.5)(b), C.R.S. 2020.
2. *See* Instruction F:17 (defining “animal”); Instruction F:195 (defining “knowingly”).
3. *See* Instruction H:57 (affirmative defense of “dog found running, worrying, or injuring sheep, cattle, or other livestock”).

## **9-2:05 CRUELTY TO A SERVICE ANIMAL OR A CERTIFIED POLICE WORKING DOG OR POLICE WORKING HORSE**

The elements of the crime of cruelty to a service animal or a certified police working dog or police working horse are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. knowingly, recklessly, or with criminal negligence,
4. overdrove, overloaded, overworked, tormented, deprived of necessary sustenance, unnecessarily or cruelly beat, allowed to be housed in a manner that resulted in chronic or repeated serious physical harm, carried or confined in or upon any vehicles in a cruel or reckless manner, engaged in a sexual act with an animal, or otherwise mistreated or neglected any animal, or caused or procured it to be done, or, having the charge or custody of any animal, failed to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved, or abandoned an animal,]
- [3. intentionally,
4. abandoned a dog or cat,]
5. and the animal was a service animal, certified police working dog, or police working horse, whether or not the service animal, certified police working dog, or police working horse was on duty.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find

the defendant guilty of cruelty to a service animal or a certified police working dog or police working horse.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cruelty to a service animal or a certified police working dog or police working horse.

#### COMMENT

1. *See* § 18-9-202(1.5)(c), C.R.S. 2020.
2. *See* Instruction F:03 (defining “abandon”); Instruction F:48.2 (defining “certified police working dog”); Instruction F:48.25 (defining “police working horse”); Instruction F:79 (defining “criminal negligence”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:231 (defining “mistreatment”); Instruction F:240 (defining “neglect”); Instruction F:308 (defining “recklessly”); Instruction F:333 (defining “serious physical harm”); Instruction F:334 (defining “service animal”); Instruction F:336 (defining “sexual act with an animal”).
3. Although it seems highly improbable that a cat would ever qualify as a “service animal” for purposes of section 18-9-201(2.3), C.R.S. 2020, the model instruction nevertheless includes language contemplating that possibility because section 18-9-202(1.5)(c) explicitly incorporates all of section 18-9-202(1), and section 18-9-202(1)(b) specifically includes cats.
4. *See* Instruction 9-2:01, Comment 4 (discussing knowing or reckless abandonment, as defined by the final clause of section 18-9-202(1)(a)).
5. *See* Instruction H:57 (affirmative defense of “dog found running, worrying, or injuring sheep, cattle, or other livestock”).
6. In 2016, the Committee modified this instruction pursuant to a legislative amendment. *See* Ch. 236, sec. 2, § 18-9-202(1.5)(c), 2016 Colo. Sess. Laws 952, 953.

7. In 2018, pursuant to a legislative amendment, the Committee added “certified police working horse” to the instruction’s title, modified the fifth element, and added the cross-reference to Instruction F:48.25 in Comment 2. *See* Ch. 19, sec. 2, § 18-9-202(1.5)(c), 2018 Colo. Sess. Laws 266, 267.

8. In 2019, the Committee changed the phrase “certified police working horse” to “police working horse” throughout this instruction pursuant to a legislative amendment. *See* Ch. 75, sec. 2, § 18-9-202(1.5)(c), 2019 Colo. Sess. Laws 276, 277.

## 9-2:06 ANIMAL FIGHTING

The elements of the crime of animal fighting are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. caused, sponsored, arranged, held, or encouraged a fight between animals,
4. for the purpose of monetary gain or entertainment.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of animal fighting.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of animal fighting.

### COMMENT

1. See § 18-9-204(1)(a), C.R.S. 2020.
2. See Instruction F:17 (defining "animal").
3. The statute includes exemptions from criminal liability for normal hunting practices and animal training. See § 18-9-204(3), (4), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 9-2:07.SP ANIMAL FIGHTING – SPECIAL INSTRUCTION

A person encourages a fight between animals for the purpose of monetary gain or entertainment if he [she]: is knowingly present at or wagers on such a fight; or owns, trains, transports, possesses, breeds, sells, transfers, or equips an animal with the intent that such animal will be engaged in such a fight; or knowingly allows any such fight to occur on any property owned or controlled by him [her]; or knowingly allows any animal used for such a fight to be kept, boarded, housed, or trained on, or transported in, any property owned or controlled by him [her]; or knowingly uses any means of communication for the purpose of promoting such a fight; or knowingly possesses any animal used for such a fight or any device intended to enhance the animal's fighting ability.

### COMMENT

1. *See* § 18-9-204(1)(b)(I)-(VI), C.R.S. 2020.
2. *See* Instruction F:17 (defining “animal”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).

## 9-2:08 UNLAWFUL OWNERSHIP OF A DANGEROUS DOG

The elements of the crime of unlawful ownership of a dangerous dog are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. owned, possessed, harbored, kept, had a financial or property interest in, or had custody or control over,
4. a dangerous dog.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful ownership of a dangerous dog.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful ownership of a dangerous dog.

### COMMENT

1. *See* § 18-9-204.5(3)(a), C.R.S. 2020.
2. *See* Instruction F:84 (defining “dangerous dog”); Instruction F:256 (defining “owner” or “owns”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The above instruction reflects an understanding of the offense as being fully defined by section 18-9-204.5(3)(a), with sentence enhancement provisions defined by section 18-9-204.5(3)(b), (c), (d), (e)(I), (e)(III)(B.5), C.R.S. 2020. Under this construction, if the dangerous dog does not cause any injury and does not damage any property, the base level offense is unclassified, and the only penalties are those that are set forth in section 18-9-204.5(e.5)(I)-(VI), C.R.S. 2020. *See* § 18-1.3-504(1), C.R.S. 2020 (“Any . . . petty offense defined by state statute without specification of its class shall be punishable as provided in the statute defining it”). *See also* § 18-9-204.5(e)(III)(B.5), C.R.S. 2020 (establishing the least severe sentence enhancement provision, which makes the offense a class one petty offense if the dog has damaged or destroyed the property of another).

4. *See* Instruction H:58 (affirmative defense of “conduct of the person or animal attacked”).

## 9-2:09.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – INTERROGATORY (BODILY INJURY)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant's dog injure a person? (Answer "Yes" or "No")

The defendant's dog injured a person only if:

1. defendant owned the dog, and
2. the dangerous dog inflicted bodily injury upon any person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-9-204.5(3)(b), C.R.S. 2020.
2. *See* Instruction F:37 (defining "bodily injury"); Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); *see, e.g.*, Instruction E:28 (special verdict form).

## **9-2:10.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – INTERROGATORY (SERIOUS BODILY INJURY)**

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog seriously injure a person? (Answer "Yes" or "No")

The defendant's dog seriously injured a person only if:

1. defendant owned the dog, and
2. the dog inflicted serious bodily injury upon any person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### **COMMENT**

1. *See* § 18-9-204.5(3)(c), C.R.S. 2020.
2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); Instruction F:332 (defining "serious bodily injury"); *see, e.g.*, Instruction E:28 (special verdict form).

## 9-2:11.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – INTERROGATORY (DEATH OF A PERSON)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog kill a person? (Answer "Yes" or "No")

The defendant's dog killed a person only if:

1. defendant owned the dog, and
2. the dog caused the death of a person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-204.5(3)(d), C.R.S. 2020.
2. See Instruction F:84 (defining "dangerous dog"); Instruction F:256 (defining "owner" or "owns"); see, e.g., Instruction E:28 (special verdict form).

## 9-2:12.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – INTERROGATORY (DOMESTIC ANIMAL)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog harm a domestic animal? (Answer "Yes" or "No")

The defendant's dog harmed a domestic animal only if:

1. defendant owned the dog, and
2. the dog injured or caused the death of any domestic animal.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-204.5(3)(e)(I), C.R.S. 2020.
2. See Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner" or "owns"); see, e.g., Instruction E:28 (special verdict form).

## 9-2:13.INT UNLAWFUL OWNERSHIP OF A DANGEROUS DOG – INTERROGATORY (PROPERTY)

If you find the defendant not guilty of unlawful ownership of a dangerous dog, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful ownership of a dangerous dog, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did defendant's dog harm property? (Answer "Yes" or "No")

The defendant's dog harmed property only if:

1. defendant owned the dog, and
2. the dog damaged or destroyed the property of another person.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark "Yes" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark "No" in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-9-204.5(3)(e)(III)(B.5), C.R.S. 2020.
2. *See* Instruction F:84 (defining "dangerous dog"); Instruction F:107 (defining "domestic animal"); Instruction F:256 (defining "owner" or "owns"); *see, e.g.*, Instruction E:28 (special verdict form).

## 9-2:14 UNAUTHORIZED RELEASE OF AN ANIMAL

The elements of the crime of unauthorized release of an animal are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally,
  4. released any animal which was lawfully confined for scientific, research, commercial, legal sporting, or educational purposes or for public safety purposes because the animal had been determined to be dangerous to people, had an infectious disease, or was quarantined to determine whether or not it had an infectious disease,
  5. without the consent of the owner or custodian of the animal.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of an animal.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of an animal.

### COMMENT

1. See § 18-9-206(1), C.R.S. 2020.
2. See Instruction F:17 (defining "animal"); Instruction F:185 (defining "intentionally").

3. In 2016, pursuant to a legislative amendment, the Committee added the cross-reference to Instruction F:17 in Comment 2, and it deleted the prior Comment 3. *See* Ch. 236, sec. 1, § 18-9-201, 2016 Colo. Sess. Laws 952, 952 (providing that these definitions apply to “this part 2”).

## 9-2:15 TAMPERING WITH LIVESTOCK (TAMPER OR SABOTAGE)

The elements of the crime of tampering with livestock (tamper or sabotage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. tampered with or sabotaged any livestock that had been registered, entered, or exhibited in any exhibition in Colorado.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (tamper or sabotage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock (tamper or sabotage).

### COMMENT

1. See § 18-9-207(2)(a), C.R.S. 2020.
2. See Instruction F:131 (defining "exhibition"); Instruction F:198 (defining "livestock"); Instruction F:325 (defining "sabotage"); Instruction F:361 (defining "tamper"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

## 9-2:16 TAMPERING WITH LIVESTOCK (UNAPPROVED DRUG OR USAGE)

The elements of the crime of tampering with livestock (unapproved drug or usage) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. administered, dispensed, distributed, manufactured, possessed, sold, or used,
4. any drug to or for livestock,
- [5. that was not approved in accordance with the “Federal Food, Drug, and Cosmetic Act” by the United States Food and Drug Administration or the United States Department of Agriculture.]
- [5. that had been approved only for investigational use in accordance with the “Federal Food, Drug, and Cosmetic Act” by the United States Food and Drug Administration or the United States Department of Agriculture, and
6. the defendant used the drug for a purpose other than the approved investigational use.]
- [\_. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (unapproved drug or usage).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock

(unapproved drug or usage).

#### COMMENT

1. *See* § 18-9-207(2)(b), C.R.S. 2020.
2. *See* Instruction F:198 (defining “livestock”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. In cases brought under section 18-9-207(2)(b), the court should determine the legal question of whether, at the time of the alleged offense, the United States Food and Drug Administration or the United States Department of Agriculture had approved (or had approved for investigational use) the drug(s) at issue. The court should use the bracketed language that reflects its determination and explain its legal ruling in a separate special instruction.

## 9-2:17 TAMPERING WITH LIVESTOCK (DANGEROUS DRUG)

The elements of the crime of tampering with livestock (dangerous drug) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. administered, distributed, possessed, sold, or used,
4. any dangerous drug to or for livestock,
5. without a prescription for the drug that had been issued by a licensed veterinarian entitled to practice in Colorado.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with livestock (dangerous drug).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with livestock (dangerous drug).

### COMMENT

1. *See* § 18-9-207(2)(c), C.R.S. 2020.
2. *See* Instruction F:198 (defining "livestock"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material

elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 9-2:18 FALSE REPORTING OF ANIMAL CRUELTY

The elements of the crime of false reporting of animal cruelty are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made a false report of animal cruelty,
5. to a local law enforcement agency or to the state bureau of animal protection.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false reporting of animal cruelty.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false reporting of animal cruelty.

### COMMENT

1. *See* § 18-9-209(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).
3. If the defendant is not separately charged with the offense of cruelty to animals (which, presumably, will usually be the case), provide the jury with the elemental instruction for the offense of cruelty to animals, but omit the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for cruelty to animals immediately after the

above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability. *See* Instructions 9-2:01 to 9-2:05.

## CHAPTER 9-3

### OFFENSES INVOLVING COMMUNICATIONS

- 9-3:01 MISUSING A WIRETAPPING OR EAVESDROPPING DEVICE
- 9-3:02 WIRETAPPING (KNOWINGLY OVERHEARING, READING, TAKING, COPYING, OR RECORDING AN ELECTRONIC COMMUNICATION)
- 9-3:03 WIRETAPPING (INTENTIONALLY, FOR THE PURPOSE OF COMMITTING, AIDING, OR ABETTING AN UNLAWFUL ACT)
- 9-3:04 WIRETAPPING (KNOWINGLY USING OR DISCLOSING)
- 9-3:05 WIRETAPPING (TAPPING OR INTERCEPTING DEVICE)
- 9-3:06 WIRETAPPING (APPARATUS)
- 9-3:07.INT WIRETAPPING – INTERROGATORY
- 9-3:08 EAVESDROPPING (KNOWINGLY OVERHEARING OR RECORDING)
- 9-3:09 EAVESDROPPING (INTENTIONALLY OVERHEARING OR RECORDING)
- 9-3:10 EAVESDROPPING (KNOWING USE OR DISCLOSURE)
- 9-3:11 EAVESDROPPING (CONSPIRACY)
- 9-3:12 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (DIVULGING MESSAGE)
- 9-3:13 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (FALSE MESSAGE)
- 9-3:14 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (OPENING A SEALED ENVELOPE)
- 9-3:15 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (IMPERSONATING ANOTHER)
- 9-3:16 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (READING A MESSAGE)
- 9-3:17 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (BRIBERY)

<a href="#"><u>9-3:18</u></a>	OBSTRUCTION OF TELEPHONE OR TELEGRAPH SERVICE
<a href="#"><u>9-3:19</u></a>	REFUSAL TO YIELD A PARTY LINE
<a href="#"><u>9-3:20</u></a>	PRETEXTUAL REQUEST FOR A PARTY LINE
<a href="#"><u>9-3:21</u></a>	PUBLISHING TELEPHONE DIRECTORY WITHOUT NOTICE
<a href="#"><u>9-3:22</u></a>	TELECOMMUNICATIONS CRIME (DEVICE)
<a href="#"><u>9-3:23</u></a>	TELECOMMUNICATIONS CRIME (ILLEGAL EQUIPMENT)
<a href="#"><u>9-3:24</u></a>	TELECOMMUNICATIONS CRIME (ILLEGAL EQUIPMENT TO ANOTHER)
<a href="#"><u>9-3:25</u></a>	TELECOMMUNICATIONS CRIME (PLANS OR INSTRUCTIONS)
<a href="#"><u>9-3:26</u></a>	TELECOMMUNICATIONS CRIME (NUMBER OR CODE)
<a href="#"><u>9-3:27</u></a>	TELECOMMUNICATIONS CRIME (THEFT OF SERVICE BY FRAUDULENT MEANS)
<a href="#"><u>9-3:28</u></a>	TELECOMMUNICATIONS CRIME (THEFT OF SERVICE WITH FRAUDULENT INTENT)
<a href="#"><u>9-3:29.INT</u></a>	TELECOMMUNICATIONS CRIME (THEFT OF SERVICE) – INTERROGATORY (VALUE)
<a href="#"><u>9-3:30</u></a>	TELECOMMUNICATIONS CRIME (CLONING EQUIPMENT)
<a href="#"><u>9-3:31</u></a>	TELECOMMUNICATIONS CRIME (CLONING EQUIPMENT; AIDING OR ABETTING)
<a href="#"><u>9-3:32</u></a>	UNLAWFUL USE OF INFORMATION
<a href="#"><u>9-3:33</u></a>	MISUSE OF AN AUTOMATED DIALING SYSTEM
<a href="#"><u>9-3:34</u></a>	UNLAWFULLY MAKING AVAILABLE ON THE INTERNET PERSONAL INFORMATION ABOUT A LAW ENFORCEMENT OFFICIAL
<a href="#"><u>9-3:34.5</u></a>	UNLAWFULLY MAKING AVAILABLE ON THE INTERNET PERSONAL INFORMATION ABOUT A + HUMAN SERVICES WORKER
<a href="#"><u>9-3:35</u></a>	INTERFERENCE WITH LAWFUL DISTRIBUTION OF NEWSPAPERS
<a href="#"><u>9-3:36.INT</u></a>	INTERFERENCE WITH LAWFUL DISTRIBUTION OF NEWSPAPERS – INTERROGATORY (NUMBER OF NEWSPAPERS)

## CHAPTER COMMENTS

1. Section 18-9-305, C.R.S. 2020, lists several “exceptions” to the prohibitions of sections 18-9-302 to 18-9-304 which, pursuant to section 18-9-305(5), “shall be affirmative defenses.” The Committee, however, has not drafted model affirmative defense instructions. *See* § 18-9-305(1) (specified conduct by a “news agency” or conduct on one’s “own premises for security or business purposes”); § 18-9-305(2) (listed acts by a “provider of wire or electronic communication service”); § 18-9-305(3) (providing information to an investigative or law enforcement officer who is authorized to intercept communications); § 18-9-305(4) (stating that a “good faith reliance” on a court order or a specified statutory provision “shall constitute a complete defense to any criminal action” involving communications); § 18-9-305(4.3) (excepting the interception of communications that are “readily accessible to the general public,” certain “radio” communications, and various other types of communications); § 18-9-305(4.5) (exempting pen registers, trap and trace devices, and certain acts conducted for the purpose of preventing “fraudulent, unlawful, or abusive use” of an electronic communication service); § 18-9-305(4.7) (allowing electronic communication service providers to divulge the contents of a communication pursuant to statutory authority; or with the lawful consent of a party to the communication; or to a forwarding entity; or, if inadvertently obtained and pertinent to the commission of a crime, to a law enforcement agency); § 18-9-305(4.9) (allowing a district attorney or law enforcement officer to listen to recordings or read transcriptions of communications involving a cordless telephone that were provided by a third party); *see also* § 18-9-312, C.R.S. 2020 (hostage, endangered person, or armed person in geographical area – telephone, electronic, cellular, or digital communications).

2. The Committee added this chapter in 2016.

## 9-3:01 MISUSING A WIRETAPPING OR EAVESDROPPING DEVICE

The elements of the crime of misusing a wiretapping or eavesdropping device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. manufactured, bought, sold, or knowingly had in his [her] possession an instrument, device, contrivance, machine, or apparatus designed or commonly used for the crime of wiretapping or eavesdropping,
4. with the intent,
5. to unlawfully use or employ or allow the same to be so used or employed.]
- [3. knowingly,
4. aided, authorized, agreed with, employed, permitted, or conspired with any person to unlawfully manufacture, buy, sell, or have in his [her] possession,
5. an instrument, device, contrivance, machine, or apparatus designed or commonly used for wiretapping or eavesdropping.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misusing a wiretapping or eavesdropping device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of misusing a wiretapping or eavesdropping device.

#### COMMENT

1. *See* § 18-9-302, C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”).
3. Because this instruction refers to “the crime of wiretapping or eavesdropping,” the court should also give a modified instruction for the appropriate wiretapping or eavesdropping crime. *See* Instructions 9-3:02 to 9-3:11. The court should change the first element to read “That the defendant or another person,” and it should omit the two concluding paragraphs that explain the burden of proof.

**9-3:02 WIRETAPPING (KNOWINGLY OVERHEARING, READING, TAKING, COPYING, OR RECORDING AN ELECTRONIC COMMUNICATION)**

The elements of the crime of wiretapping by knowingly overhearing, reading, taking, copying, or recording are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. overheard, read, took, copied, or recorded a telephone, telegraph, or electronic communication, or attempted to do so,
5. without the consent of either a sender or a receiver thereof.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wiretapping by knowingly overhearing, reading, taking, copying, or recording.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wiretapping by knowingly overhearing, reading, taking, copying, or recording.

**COMMENT**

1. *See* § 18-9-303(1)(a), C.R.S. 2020.
2. *See* Instruction F:115.2 (defining “electronic communication”); Instruction F:195 (defining “knowingly”).

3. The introductory portion of the wiretapping statute indicates that it applies to a person who was “not a sender or intended receiver of a telephone or telegraph communication.” § 18-9-303(1). Subsection (1)(a), however, applies to telephone, telegraph, or *electronic* communications. Presumably, this disconnect arises from a 1988 amendment in which the General Assembly added the phrase “or electronic” to subsection (1)(a) but did not modify the introductory portion of subsection (1). *See* Ch. 118, sec. 6, § 18-9-303(1), 1988 Colo. Sess. Laws 684, 693. Thus, the statute is arguably overbroad in the context of electronic communications, as it is not limited to persons who were not senders or intended recipients of such communications. For the purposes of this particular crime, however, this appears to be irrelevant, as the crime also requires that the defendant acted “without the consent of either a sender or a receiver thereof.” Because this phrase is logically synonymous with the phrase “was not a sender or intended recipient” – that is, any person who *is* a sender or intended recipient necessarily operates with consent – the “without consent” language of the fifth element serves to limit the breadth of this crime, regardless of the type of communication at issue. For this reason, the Committee has omitted the statute’s “not a sender or intended receiver” language from this instruction.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

### **9-3:03 WIRETAPPING (INTENTIONALLY, FOR THE PURPOSE OF COMMITTING, AIDING, OR ABETTING AN UNLAWFUL ACT)**

The elements of the crime of wiretapping (intentionally, for the purpose of committing, aiding, or abetting an unlawful act) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a sender or intended receiver of a telephone or telegraph communication, and
4. intentionally,
5. overheard, read, took, copied, or recorded a telephone, telegraph, or electronic communication for the purpose of committing or aiding or abetting the commission of the unlawful act of [insert language identifying the “unlawful act[s]”].
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wiretapping, (intentionally, for the purpose of committing, aiding, or abetting an unlawful act).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wiretapping (intentionally, for the purpose of intentionally committing, aiding, or abetting an unlawful act).

## COMMENT

1. See § 18-9-303(1)(b), C.R.S. 2020.
2. See Instruction F:115.2 (defining “electronic communication”); Instruction F:185 (defining “intentionally”); Instruction G2:05 (conspiracy).
3. The introductory portion of the wiretapping statute indicates that it applies to a person who was “not a sender or intended receiver of a telephone or telegraph communication.” § 18-9-303(1). Subsection (1)(b), however, applies to telephone, telegraph, or *electronic* communications. Presumably, this disconnect arises from a 1988 amendment in which the General Assembly added the phrase “or electronic” to subsection (1)(b) but did not modify the introduction portion of subsection (1). See Ch. 118, sec. 6, § 18-9-303(1), 1988 Colo. Sess. Laws 684, 693. Thus, the statute is arguably overbroad in the context of electronic communications, as it is not limited to persons who were not senders or intended recipients of such communications. Therefore, if it is undisputed that only electronic communications are at issue, the court should omit the third element. Conversely, if only telephonic or telegraphic communications are at issue, the court should replace “a telephone, telegraph, or electronic communication” with “such communication” in the fifth element.
4. For the fifth element, if the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

### **9-3:04 WIRETAPPING (KNOWINGLY USING OR DISCLOSING)**

The elements of the crime of wiretapping (knowingly using or disclosing) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a sender or intended receiver of a telephone or telegraph communication, and
4. knowingly,
5. used for any purpose or disclosed to any person the contents of any such communication, or attempted to do so,
6. while knowing or having reason to know that such information was obtained in violation of [insert the relevant wiretapping crime].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wiretapping (knowingly using or disclosing).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wiretapping (knowingly using or disclosing).

#### COMMENT

1. See § 18-9-303(1)(c), C.R.S. 2020.

2. See Instruction F:68.5 (defining “contents”); Instruction F:195 (defining “knowingly”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
4. This crime requires that either the defendant or another person committed a separate wiretapping crime. See § 18-9-303(1)(c) (discussing information obtained “in violation of this section”); Instructions 9-3:02 to 9-3:06. Therefore, if the defendant is not separately charged with the pertinent wiretapping crime, the court should provide the jury with the elemental instruction for that offense, replacing the phrase “That the defendant” with “That the defendant or another person,” and omitting the two concluding paragraphs that explain the burden of proof. The court should place the elemental instruction for that wiretapping crime immediately after the above instruction (or as close to it as practicable), and it should provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 9-3:05 WIRETAPPING (TAPPING OR INTERCEPTING DEVICE)

The elements of the crime of wiretapping (tapping or intercepting device) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a sender or intended receiver of a telephone or telegraph communication, and
4. knowingly,
5. tapped or made a connection with any telephone or telegraph line, wire, cable, or instrument belonging to another or with any electronic, mechanical, or other device belonging to another or installed any device whether connected or not which permits the interception of messages.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wiretapping (tapping or intercepting device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wiretapping (tapping or intercepting device).

### COMMENT

1. See § 18-9-303(1)(d), C.R.S. 2020.

2. See Instruction F:116.5 (defining “electronic, mechanical, or other device”); Instruction F:185.3 (defining “intercept”); Instruction F:195 (defining “knowingly”).

3. The Committee has included the third element because its language appears in the statute. See § 18-9-303(1). However, the Committee questions whether this exempting language regarding a sender or intended receiver of a particular communication should apply to this offense. This particular wiretapping crime prohibits tapping phone lines generally – it does not apply to specific communications. Thus, it is difficult to see how someone who lawfully sends or receives specific messages would be exempt.

## 9-3:06 WIRETAPPING (APPARATUS)

The elements of the crime of wiretapping (apparatus) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a sender or intended receiver of a telephone or telegraph communication, and
4. knowingly,
- [5. used any apparatus to unlawfully do, or cause to be done, [insert the relevant wiretapping crime].]
- [5. aided, authorized, agreed with, employed, permitted, or intentionally conspired with any person to commit [insert the relevant wiretapping crime].]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of wiretapping (apparatus).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of wiretapping (apparatus).

### COMMENT

1. See § 18-9-303(1)(f), C.R.S. 2020.
2. See Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction G2:05 (conspiracy).

3. This crime requires that either the defendant or another person committed a separate wiretapping crime. *See* § 18-9-303(1)(f); Instructions 9-3:02 to 9-3:06. Therefore, if the defendant is not separately charged with the pertinent wiretapping crime, the court should provide the jury with the elemental instruction for that offense, replacing the phrase “That the defendant” with “That the defendant or another person,” and omitting the two concluding paragraphs that explain the burden of proof. The court should place the elemental instruction for that wiretapping crime immediately after the above instruction (or as close to it as practicable), and it should provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 9-3:07.INT WIRETAPPING – INTERROGATORY

If you find the defendant not guilty of wiretapping, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of wiretapping, you should sign the verdict form to indicate your finding of guilt and answer the following verdict question:

Did the wiretapping involve a cordless telephone?  
(Answer “Yes” or “No”)

The wiretapping involved a cordless telephone only if:

1. the [communication] [line, wire, cable, instrument, or device] [apparatus] at issue in the wiretapping offense that the defendant committed involved a cordless telephone.

The prosecution has the burden to prove, beyond a reasonable doubt, that the wiretapping did not involve a cordless telephone. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, the above numbered condition.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should find that the wiretapping solely involved a cordless telephone, mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has met this burden, you should find that the wiretapping did not solely involve a cordless telephone, mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-9-303(2), C.R.S. 2020.

2. This interrogatory is drafted in the same format used for other sentence mitigating factors. *See, e.g.*, Instruction 3-2:07.INT (First Degree Assault – Interrogatory (Provoked And Sudden Heat Of Passion)).
3. The term “cordless telephone” is not defined by statute.
4. *See People v. Richardson*, 983 P.2d 5, 8 (Colo. 1999) (“Because the plain language of [the wiretapping statute] demonstrates a general purpose of protecting the privacy of telephone or telegraph communications, we hold that the statutory classification distinguishing between corded and cordless phones is based on differences that are real in fact and that are reasonably related to the relative ease of intercepting cordless telephone calls.” (citation omitted)).

## 9-3:08 EAVESDROPPING (KNOWINGLY OVERHEARING OR RECORDING)

The elements of the crime of eavesdropping (knowingly overhearing or recording) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not visibly present during a conversation or discussion, and
4. knowingly,
5. overheard or recorded such conversation or discussion without the consent of at least one of the principal parties thereto, or attempted to do so.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eavesdropping (knowingly overhearing or recording).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of eavesdropping (knowingly overhearing or recording).

### COMMENT

1. See § 18-9-304(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:254.7 (defining “oral communication,” which, as explained in the next comment,

has been held to be synonymous with the terms “conversation or discussion”).

3. Although the terms “conversation or discussion” are not defined by statute, in *People v. Blehm*, 623 P.2d 411, 417 (Colo. App. 1980), a division of the court of appeals held that “the terms ‘conversation or discussion’ in § 18-9-304 . . . are synonymous with the term ‘oral communication’ as defined in § 18-9-301(8)” ; *see also People v. Lesslie*, 939 P.2d 443, 449 (Colo. App. 1996) (holding that in a criminal eavesdropping prosecution, the defendant’s proposed instructions concerning the definition of “oral communication” were properly rejected as misleading to extent that they would have enabled the jury to reconsider the trial court’s legal determination that occupants of a restroom had an objectively reasonable expectation of privacy).

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 9-3:09 EAVESDROPPING (INTENTIONALLY OVERHEARING OR RECORDING)

The elements of the crime of eavesdropping (intentionally overhearing or recording) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not visibly present during a conversation or discussion, and
4. intentionally,
5. overheard or recorded such conversation or discussion for the purpose of committing, aiding, or abetting the commission of [insert description of the unlawful act(s)].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eavesdropping (intentionally overhearing or recording).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of eavesdropping (intentionally overhearing or recording).

### COMMENT

1. See § 18-9-304(1)(b), C.R.S. 2020.
2. See Instruction F:185 (defining "intentionally"); Instruction F:254.7 (defining "oral communication," which, as explained in Comment 3 to

Instruction 9-3:08, has been held to be synonymous with the terms “conversation or discussion”).

3. If the defendant is not separately charged with a referenced offense for the purpose of element 5, the court should give a modified version of the elemental instruction for the offense. The court should replace the phrase “That the defendant” with “That the defendant or another person” in the first element, it should remove the phrase “at or about the date and place charged” from the second element, and it should omit the two concluding paragraphs that explain the burden of proof. Place this modified instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 9-3:10 EAVESDROPPING (KNOWING USE OR DISCLOSURE)

The elements of the crime of eavesdropping (use or disclosure) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged.
3. was not visibly present during a conversation or discussion,  
and
4. knowingly,
5. used for any purpose, disclosed, or attempted to use or disclose to any other person the contents of such conversation or discussion,
6. while knowing or having reason to know the information was obtained by eavesdropping.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eavesdropping (use or disclosure).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of eavesdropping (use or disclosure).

### COMMENT

1. See § 18-9-304(1)(c), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:254.7 (defining “oral communication,” which, as explained in Comment 3 to Instruction 9-3:08, has been held to be synonymous with the terms “conversation or discussion”).

3. This crime requires that either the defendant or another person committed a separate eavesdropping crime. See § 18-9-304(1)(c) (discussing information obtained “in violation of this section”); Instructions 9-3:08 to 9-3:11. Therefore, if the defendant is not separately charged with the pertinent eavesdropping crime, the court should provide the jury with the elemental instruction for that offense, replacing the phrase “That the defendant” with “That the defendant or another person,” and omitting the two concluding paragraphs that explain the burden of proof. The court should place the elemental instruction for that wiretapping crime immediately after the above instruction (or as close to it as practicable), and it should provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 9-3:11 EAVESDROPPING (CONSPIRACY)

The elements of the crime of eavesdropping (conspiracy) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not visibly present during a conversation or discussion,  
and
4. knowingly,
5. aided, authorized, agreed with, employed, permitted, or  
intentionally conspired with any person to commit  
eavesdropping.
- [6. and that the defendant's conduct was not legally authorized by  
the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eavesdropping (with any person).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of eavesdropping (with any person).

### COMMENT

1. *See* § 18-9-304(1)(d), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:254.7 (defining “oral communication,” which, as explained in Comment 3 to Instruction 9-3:08, has been held to be synonymous with the terms “conversation or discussion”); Instruction G2:05 (conspiracy).

3. This crime requires that either the defendant or another person committed a separate eavesdropping crime. *See* § 18-9-304(1)(d); Instructions 9-3:08 to 9-3:10. Therefore, if the defendant is not separately charged with the pertinent eavesdropping crime, the court should provide the jury with the elemental instruction for that offense, replacing the phrase “That the defendant” with “That the defendant or another person,” and omitting the two concluding paragraphs that explain the burden of proof. The court should place the elemental instruction for that wiretapping crime immediately after the above instruction (or as close to it as practicable), and it should provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

### **9-3:12 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (DIVULGING MESSAGE)**

The elements of the crime of abuse of telephone and telegraph service (divulging message) are:

1. That the defendant
  2. in the State of Colorado, at or about the date and place charged,
  3. was an employee of a telegraph or telephone company, and
  4. knowingly,
  5. divulged the contents or the purport of any message or part thereof sent or intended to be sent to any person other than one to whom said message was sent or person authorized to receive the same.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (divulging message).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (divulging message).

#### COMMENT

1. See § 18-9-306(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

3. Because jurors may not be aware that “purport” can be used as a noun, it may be appropriate to define the term. *See, e.g., Webster's Third New International Dictionary 1847* (2002) (defining “purport” as the “meaning conveyed, professed, or implied”).

### **9-3:13 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (FALSE MESSAGE)**

The elements of the crime of abuse of telephone and telegraph service (false message) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sent or delivered a false message or furnished or conspired to furnish such message to an operator to be sent or delivered,
5. with intent,
6. to injure, deceive, or defraud any person, corporation, or the public.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (false message).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (false message).

#### COMMENT

1. See § 18-9-306(1)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction G2:05 (conspiracy).

3. It may be appropriate to modify the fourth element by adding either “telephone or “telegraph” as an adjective to modify the word “operator,” or by adding either “telephonic” or “telegraphic” as an adjective to modify the word “message.”

### **9-3:14 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (OPENING A SEALED ENVELOPE)**

The elements of the crime of abuse of telephone and telegraph service (opening a sealed envelope) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. without authorization,
5. opened a sealed envelope enclosing a message with the purpose of learning its contents.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (opening a sealed envelope).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (opening a sealed envelope).

#### COMMENT

1. *See* § 18-9-306(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

3. It may be appropriate to modify the fifth element by adding either “telephonic” or “telegraphic” as an adjective to modify the word “message.”

### **9-3:15 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (IMPERSONATING ANOTHER)**

The elements of the crime of abuse of telephone and telegraph service (impersonating another) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to use, destroy, or detain a message directed to another person,
5. impersonated such person, and thereby procured the delivery to himself [herself] of the message directed to such person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (impersonating another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (impersonating another).

#### COMMENT

1. See § 18-9-306(1)(d), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").

3. It may be appropriate to modify the fourth and fifth elements by adding either “telephonic” or “telegraphic” as an adjective to modify the word “message.”

## 9-3:16 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (READING A MESSAGE)

The elements of the crime of abuse of telephone and telegraph service (reading a message) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. without authorization,
5. read or learned the contents or meaning of a message on its transit and used or communicated to another any information so obtained.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (reading a message).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (reading a message).

### COMMENT

1. See § 18-9-306(1)(e), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

3. In some cases, it may be appropriate to modify the fifth element by adding either “telephonic” or “telegraphic” as an adjective to modify the word “message.”

## 9-3:17 ABUSE OF TELEPHONE AND TELEGRAPH SERVICE (BRIBERY)

The elements of the crime of abuse of telephone and telegraph service (bribery) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. bribed a telegraph or telephone operator or employee of a telegraph or telephone company to disclose any private message or the purport of the same received by him [her] by reason of his [her] trust as agent of the company or used such information when thus obtained.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of telephone and telegraph service (bribery).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of telephone and telegraph service (bribery).

### COMMENT

1. See § 18-9-306(1)(f), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. The term “bribe” is not defined in this chapter, but the meaning should be evident from the context. Do not define the term based on

section 18-8-302, C.R.S. 2020, as the bribery offense defined in that section relates only to the bribery of a “public servant.”

4. Because jurors may not be aware that “purport” can be used as a noun, it may be appropriate to define the term. *See, e.g., Webster's Third New International Dictionary 1847 (2002) (defining “purport” as the “meaning conveyed, professed, or implied”).*

## 9-3:18 OBSTRUCTION OF TELEPHONE OR TELEGRAPH SERVICE

The elements of the crime of obstruction of telephone or telegraph service are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. prevented, obstructed, or delayed, by any means whatsoever, the sending, transmission, conveyance, or delivery in Colorado of any message, communication, or report by or through any telegraph or telephone line, wire, cable, or other facility or any cordless, wireless, electronic, mechanical, or other device.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obstruction of telephone or telegraph service.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obstruction of telephone or telegraph service.

### COMMENT

1. See § 18-9-306.5, C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); see also Instruction F:116.5 (defining "electronic, mechanical, or other device" pursuant to

section 18-9-301(4), C.R.S. 2020, which applies to terms “used in sections 18-9-301 to 18-9-305”).

## 9-3:19 REFUSAL TO YIELD A PARTY LINE

The elements of the crime of refusal to yield a party line are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. willfully,
  4. refused to immediately yield or surrender the use of a party line when informed that the line was needed for an emergency call to a fire department, or police department, or sheriff's office or for medical aid or ambulance service.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to yield a party line.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to yield a party line.

### COMMENT

1. *See* § 18-9-307(2), C.R.S. 2020.
2. *See* Instruction F:116.8 (defining "emergency" (party line)); Instruction F:195 (defining "willfully"); Instruction F:258.3 (defining "party line").
3. Section 18-9-307(2) states that it "shall not apply to persons using a party line for such an emergency call." However, the Committee has not drafted a model affirmative defense instruction.

## 9-3:20 PRETEXTUAL REQUEST FOR A PARTY LINE

The elements of the crime of pretextual request for a party line are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing,
4. that no emergency in fact existed,
5. requested the use of a party line on the pretext that an emergency existed.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of pretextual request for a party line.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of pretextual request for a party line.

### COMMENT

1. See § 18-9-307(3), C.R.S. 2020.
2. See Instruction F:116.8 (defining “emergency” (party line)); Instruction F:195 (defining “knowingly”); Instruction F:258.3 (defining “party line”).

## 9-3:21 PUBLISHING TELEPHONE DIRECTORY WITHOUT NOTICE

The elements of the crime of publishing a telephone directory without notice are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person, firm, or corporation providing telephone service, and
4. distributed or caused to be distributed in this state a telephone directory published for distribution to the members of the general public, and
5. the directory was not a directory distributed solely for business advertising purposes (commonly known as a “classified directory”), and
6. the directory did not contain a notice, printed in no smaller than ten-point type and preceded by the word “WARNING,” explaining the crime[s] of [refusal to yield a party line] [pretextual request for a party line].
- [7. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of publishing a telephone directory without notice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of publishing a telephone directory without notice.

## COMMENT

1. *See* § 18-9-308, C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the qualifying felony offense(s). *See* Instruction 9-3:19 (refusal to yield a party line); 9-3:20 (pretextual request for a party line).

## 9-3:22 TELECOMMUNICATIONS CRIME (DEVICE)

The elements of telecommunications crime (device) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. accessed, used, manipulated, or damaged any telecommunications device without the authority of the owner or person who had the lawful possession or use thereof.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (device).

### COMMENT

1. *See* § 18-9-309(2)(a), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:363 (defining “telecommunications device”).
3. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020.

However, the Committee has not drafted model affirmative defense instructions.

## 9-3:23 TELECOMMUNICATIONS CRIME (ILLEGAL EQUIPMENT)

The elements of telecommunications crime (illegal equipment) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made, possessed, or used illegal telecommunications equipment, and
  5. did not use cloning equipment to create a cloned cellular phone.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (illegal equipment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (illegal equipment).

### COMMENT

1. See § 18-9-309(2)(b), C.R.S. 2020.
2. See Instruction F:55 (defining "cloned cellular phone"); Instruction F:55.5 (defining "cloning equipment"); Instruction F:175.7 (defining "illegal telecommunications equipment"); Instruction F:195 (defining "knowingly").

3. Regarding the fifth element, the statute provides that a person commits a class 3 misdemeanor if he “[m]akes, possesses, or uses illegal telecommunications equipment; *except that a person who knowingly uses cloning equipment to create a cloned cellular phone commits a class 4 felony as provided in subsection (4) of this section*” (emphasis added). § 18-9-309(2)(b), C.R.S. 2020. Because subsection (2)(b) uses the word “except” in the same sentence as the conduct defining the misdemeanor, the Committee has concluded that this language constitutes a negative element of the misdemeanor that the prosecution must disprove. *See People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply.”).

The Committee notes that the misdemeanor under subsection (2)(b) makes reference to the separate felony of improper use of cloning equipment, as criminalized in subsection (4). *See* Instruction 9-3:30. However, the misdemeanor is not a lesser included offense of the felony; rather, the “except” clause demonstrates that the two offenses are mutually exclusive. *Cf. People v. Shields*, 822 P.2d 15, 19 (Colo. 1991) (“[S]econd-degree sexual assault *is not a lesser included offense* of first-degree sexual assault. . . . Second-degree sexual assault requires some means of causing, or contributing to causing, the victim’s submission that is different in kind from the means specified in the first-degree sexual assault statute but essential to causing the submission of the victim. Establishment of the elements of first-degree sexual assault, therefore, can never establish all of the elements required to prove second-degree sexual assault. We therefore hold that under this statutory scheme the offenses of first- and second-degree sexual assault *are mutually exclusive.*” (emphasis added)).

4. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 9-3:24 TELECOMMUNICATIONS CRIME (ILLEGAL EQUIPMENT TO ANOTHER)

The elements of telecommunications crime (illegal equipment to another) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, gave, or furnished to another or advertised or offered for sale illegal telecommunications equipment.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (illegal equipment to another).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (illegal equipment to another).

### COMMENT

1. See § 18-9-309(2)(c), C.R.S. 2020.
2. See Instruction F:175.7 (defining “illegal telecommunications equipment”); Instruction F:195 (defining “knowingly”).
3. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or

interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 9-3:25 TELECOMMUNICATIONS CRIME (PLANS OR INSTRUCTIONS)

The elements of telecommunications crime (plans or instructions) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, gave, or furnished to another or advertised or offered for sale any plans or instructions for making, assembling, or using illegal telecommunications equipment.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (plans or instructions).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (plans or instructions).

### COMMENT

1. See § 18-9-309(2)(d), C.R.S. 2020.
2. See Instruction F:175.7 (defining “illegal telecommunications equipment”); Instruction F:195 (defining “knowingly”).
3. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. See § 18-9-309(5), C.R.S. 2020.

However, the Committee has not drafted model affirmative defense instructions.

## 9-3:26 TELECOMMUNICATIONS CRIME (NUMBER OR CODE)

The elements of telecommunications crime (number or code) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold, rented, lent, gave, published, or otherwise transferred or disclosed to another or offered or advertised for sale or rental the number or code of a counterfeited, cancelled, expired, revoked, or nonexistent telephone number or credit card number or method of numbering or coding which is employed in the issuance of telephone numbers access devices or credit card numbers or an existing number or code or method of numbering or coding,
5. without the authority of the owner or person who had the lawful possession or use thereof.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (number or code).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (number or code).

## COMMENT

1. *See* § 18-9-309(2)(e), C.R.S. 2020.
2. *See* Instruction F:04.5 (defining “access device”); Instruction F:78.2 (defining “credit card number”); Instruction F:195 (defining “knowingly”); Instruction F:363 (defining “telecommunications device”).
3. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## **9-3:27 TELECOMMUNICATIONS CRIME (THEFT OF SERVICE BY FRAUDULENT MEANS)**

The elements of the crime of telecommunications crime (theft of service by fraudulent means) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. obtained any telecommunications service,
5. by charging such service to or causing such service to be charged to an existing telephone number, access device, or credit card number without the authority of the person to whom issued or of the subscriber thereto or of the lawful holder thereof or to a nonexistent, counterfeit, expired, revoked, or cancelled credit card number, or by any method of code calling, or by installing, rearranging, or tampering with any equipment, physically or electronically, or by the use of any other fraudulent means, method, trick, or device or scheme.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (theft of service by fraudulent means).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (theft of service by fraudulent means).

## COMMENT

1. *See* § 18-9-309(3)(a), C.R.S. 2020.
2. *See* Instruction F:04.5 (defining “access device”); Instruction F:78.2 (defining “credit card number”); Instruction F:195 (defining “knowingly”); Instruction F:364 (defining “telecommunications service”).
3. The term “code calling” is not defined by statute.
4. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## **9-3:28 TELECOMMUNICATIONS CRIME (THEFT OF SERVICE WITH FRAUDULENT INTENT)**

The elements of the crime of telecommunications crime (theft of service with fraudulent intent) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, and
4. with fraudulent intent,
5. obtained telecommunications service through the use of a false or fictitious name, telephone number, address, or credit information or through the unauthorized use of the name, telephone number, address, or credit information of another.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (theft of service with fraudulent intent).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (theft of service with fraudulent intent).

### COMMENT

1. See § 18-9-309(3)(b), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:364 (defining “telecommunications service”).

3. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. See § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## **9-3:29.INT TELECOMMUNICATIONS CRIME (THEFT OF SERVICE) – INTERROGATORY (VALUE)**

If you find the defendant not guilty of telecommunications crime (theft of service), you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of telecommunications crime (theft of service), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question[s] on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

1. Was the value of the thing involved in the telecommunications crime (theft of service) [insert a description of the amount(s) from section 18-4-401(2) or section 18-6.5-103(5), (5.5) (at-risk persons)]? (Answer “Yes” or “No”)
2. Was the value of the thing involved in the telecommunications crime (theft of service) [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]
3. Was the value of the thing involved in the telecommunications crime (theft of service) [insert a description of the amount(s) from section 18-4-401(2)]? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-9-309(3), C.R.S. 2020 (incorporating section 18-4-401).
2. *See, e.g.*, E:28 (special verdict form); Instruction 4-4:06.INT, Comments 3-4 (directions for multiple valuation questions).
3. It is unclear whether section 18-9-309(3) incorporates the provisions of section 18-4-401(4)(a), (b), C.R.S. 2020 (multiple thefts aggregated and charged in the same count; thefts from the same person pursuant to one scheme or course of conduct aggregated and charged in the same count), which are embodied in Instruction 4-4:16.INT.

## 9-3:30 TELECOMMUNICATIONS CRIME (CLONING EQUIPMENT)

The elements of the crime of unlawful use of telecommunications crime (cloning equipment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. used cloning equipment to intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or used cloning equipment to create a cloned cellular phone.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (cloning equipment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (cloning equipment).

### COMMENT

1. See § 18-9-309(4)(a), C.R.S. 2020.
2. See Instruction F:48 (defining "cellular phone"); Instruction F:55 (defining "cloned cellular phone"); Instruction F:55.5 (defining "cloning

equipment"); Instruction F:195 (defining "knowingly"); Instruction F:363.3 (defining "telecommunications provider" (telecommunications crime)); Instruction F:364 (defining "telecommunications service").

3. *See* § 18-9-309(4)(c), C.R.S. 2020 ("Each violation of this subsection (4), including each instance of intercepting signals or of creating a cloned cellular phone, shall be a separate offense.").

4. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

### **9-3:31 TELECOMMUNICATIONS CRIME (CLONING EQUIPMENT; AIDING OR ABETTING)**

The elements of the crime of unlawful use of telecommunications crime (cloning equipment; aiding or abetting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. aided, abetted, advised, or encouraged one or more persons who,
4. knowingly,
5. used cloning equipment to intercept signals, including signals transmitted to or from cellular phones, between a telecommunications provider and persons using telecommunications services or between persons using telecommunications services; or used cloning equipment to create a cloned cellular phone.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of telecommunications crime (cloning equipment; aiding or abetting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of telecommunications crime (cloning equipment; aiding or abetting).

## COMMENT

1. *See* § 18-9-309(4)(b), C.R.S. 2020.
2. *See* Instruction F:48 (defining “cellular phone”); Instruction F:55 (defining “cloned cellular phone”); Instruction F:55.5 (defining “cloning equipment”); Instruction F:195 (defining “knowingly”); Instruction F:363.3 (defining “telecommunications provider” (telecommunications crime)); Instruction F:364 (defining “telecommunications service”); Instruction G2:05 (conspiracy); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. *See* § 18-9-309(4)(c), C.R.S. 2020 (“Each violation of this subsection (4), including each instance of intercepting signals or of creating a cloned cellular phone, shall be a separate offense.”).
4. The statute includes exemptions from criminal liability for authorized work by telecommunications providers, law enforcement activities in penal and correctional facilities, and authorized governmental monitoring or interception of cellular telephone service. *See* § 18-9-309(5), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 9-3:32 UNLAWFUL USE OF INFORMATION

The elements of the crime of unlawful use of information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. obtained information pursuant to a court order for wiretapping or eavesdropping, and
4. knowingly,
5. used, published, or divulged the information to any person or in any manner, and
6. was not authorized to do so as a(n) [insert a description of the relevant provision granting authority from section 16-15-102(12)–(14), C.R.S. 2020, which is incorporated by section 18-9-305(4.7)(a), C.R.S. 2020].
- [7. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully use of information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of information.

### COMMENT

1. See § 18-9-310, C.R.S. 2020.
2. Section 18-9-310 states that it prohibits disclosure “not authorized by this part 3.” This appears to be a reference to the permissible disclosure

provisions of the wiretapping statute, *see* § 16-15-102(12)-(14), C.R.S. 2020 (investigative and grand jury disclosures), which are incorporated by the permissible disclosure provisions of section 18-9-305(4.7)(a), C.R.S. 2020 (disclosures by electronic communication service providers). Accordingly, it may be necessary to draft an instruction that discusses in greater detail the statutory authority to use such information.

### 9-3:33 MISUSE OF AN AUTOMATED DIALING SYSTEM

The elements of the crime of misuse of an automated dialing system are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. utilized an automated dialing system with a prerecorded message,
  4. for the purpose of soliciting another person to purchase goods or services, whether such solicitation occurred or was intended to occur during the prerecorded message or during some further communication initiated by or resulting from the prerecorded message, and
  5. there was no existing business relationship between such persons, or, if there was an existing business relationship, the person being called did not then consent to hear the prerecorded message.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misuse of an automated dialing system.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of misuse of an automated dialing system.

#### COMMENT

1. See § 18-9-311(1), C.R.S. 2020.

2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The term “automated dialing system” is not defined by statute.

### **9-3:34 UNLAWFULLY MAKING AVAILABLE ON THE INTERNET PERSONAL INFORMATION ABOUT A LAW ENFORCEMENT OFFICIAL**

The elements of unlawfully making available, on the internet, personal information about a law enforcement official are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. made available on the internet personal information about a law enforcement official or the official's immediate family member, and
  5. the dissemination of the personal information posed an imminent and serious threat to the law enforcement official's safety or the safety of the law enforcement official's immediate family, and
  6. the defendant knew or reasonably should have known of the imminent and serious threat.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully making available on the internet personal information about a law enforcement official.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully making available on the internet personal information about a law enforcement official.

## COMMENT

1. *See* § 18-9-313(2), C.R.S. 2020.
2. *See* Instruction F:177.3 (defining “immediate family” (law enforcement official)); Instruction F:195 (defining “knowingly”); Instruction F:196.3 (defining “law enforcement official”); Instruction F:272.5 (defining “personal information”).

### **9-3:34.5 UNLAWFULLY MAKING AVAILABLE ON THE INTERNET PERSONAL INFORMATION ABOUT A + HUMAN SERVICES WORKER**

The elements of unlawfully making available, on the internet, personal information about a caseworker are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. made available on the internet personal information about a + human services worker or the human services worker's immediate family, and
5. the dissemination of personal information posed an imminent and serious threat to the + human services worker's safety or the safety of the human services worker's immediate family, and
6. the defendant knew or reasonably should have known of the imminent and serious threat.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully making available on the internet personal information about a caseworker.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully making available on the internet personal information about a caseworker.

## COMMENT

1. *See* § 18-9-313(2.7), C.R.S. 2020.
2. *See* Instruction F:45.5 (defining “human services worker”); Instruction F:177.3 (defining “immediate family” (law enforcement official)); Instruction F:195 (defining “knowingly”); Instruction F:272.5 (defining “personal information”).
3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 95, sec. 1, § 18-9-313(2.7), 2019 Colo. Sess. Laws 349, 349.
4. + In 2020, pursuant to a legislative amendment, the Committee changed the term “caseworker” to “human services worker” throughout this instruction. *See* Ch. 77, sec. 1, § 18-9-313(2.7), 2020 Colo. Sess. Laws 315, 316.

## 9-3:35 INTERFERENCE WITH LAWFUL DISTRIBUTION OF NEWSPAPERS

The elements of the crime of interference with lawful distribution of newspapers are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. obtained or exerted control over more than five copies of an edition of a newspaper from a newspaper distribution container owned or leased by the newspaper publisher,
  4. with the intent,
  5. to prevent other individuals from reading that edition of the newspaper, and
  6. there was a notice on the newspaper or on the newspaper distribution container that possession of more than five copies with intent to prevent other individuals from reading that edition of the newspaper was illegal.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with lawful distribution of newspapers.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with lawful distribution of newspapers.

## COMMENT

1. *See* § 18-9-314(1), C.R.S. 2020.
2. *See* Instruction F:114.5 (defining “edition of a newspaper”); Instruction F:241.8 (defining “newspaper”); Instruction F:266.8 (defining “periodical”).
3. The third element of the model instruction does not include the word “unauthorized” as an adjective modifying “control” because the definition of “unauthorized control,” from section 18-9-314(1), is set forth in the sixth element.
4. The statute includes an exemption from criminal liability. *See* § 18-9-314(5), C.R.S. 2020 (“This section shall not apply to a person who, with the authority or permission of the person who possesses real or personal property, removes or disposes of newspapers that have been deposited in or left on that property without the authority or permission of the person who possesses the real or personal property.”). However, the Committee has not drafted a model affirmative defense instruction.

**9-3:36.INT INTERFERENCE WITH LAWFUL DISTRIBUTION OF NEWSPAPERS – INTERROGATORY (NUMBER OF NEWSPAPERS)**

If you find the defendant not guilty of interference with lawful distribution of newspapers, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of interference with lawful distribution of newspapers, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

[. Did the interference with lawful distribution of newspapers involve five hundred or more newspapers?]

[. Did the interference with lawful distribution of newspapers involve more than one hundred and fewer than five hundred newspapers?]

The prosecution has the burden to prove the number of newspapers beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 18-9-314(2), C.R.S. 2020.

2. *See, e.g.,* E:28 (special verdict form).
3. *See, e.g.,* 18:22.INT (cultivating or growing marijuana – interrogatory (number of plants)), Comments 3–4 (dispute as to the number of items; submission of multiple questions concerning the number of items).



## CHAPTER 10

### GAMBLING OFFENSES

<a href="#">10:01</a>	GAMBLING
<a href="#">10:02</a>	PROFESSIONAL GAMBLING
<a href="#">10:03</a>	POSSESSION OF A GAMBLING DEVICE OR RECORD
<a href="#">10:04</a>	GAMBLING DEVICE (PROHIBITED ACTS)
<a href="#">10:05</a>	TRANSMITTING OR RECEIVING GAMBLING INFORMATION
<a href="#">10:06</a>	MAINTAINING GAMBLING PREMISES

### CHAPTER COMMENTS

1. Section 18-10-108, C.R.S. 2020, which is titled “Exceptions,” provides as follows: “Nothing contained in this article 10 shall be construed to modify, amend, or otherwise affect the validity of any provisions contained in part 6 of article 21 of title 24 [(Bingo and Raffles Law)] and articles 30 [(Colorado Limited Gaming Act)] and 32 [(Racing)] of title 44.” *See also* § 18-10-102(2)(c), C.R.S. 2020 (providing that “gambling” does not include “[o]ther acts or transactions now or hereafter expressly authorized by law”). However, the Committee has not drafted model affirmative defense instructions.

2. The court should not ask the jury to make a finding regarding whether a defendant is a “repeating gambling offender” as defined in section 18-10-102(9), C.R.S. 2020. Although COLJI-Crim. 27:13, 27:14, and 27:15 (1983) defined three separate offenses of “repeating gambling offender” based on section 18-10-102(9), the Committee is now of the view that the trial court should make this determination at sentencing. *See People v. Nunn*, 148 P.3d 222, 228 (Colo. App. 2006) (holding that, under the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the defendant in

habitual criminal proceedings “had no right to have a jury determine whether he was the person convicted in the prior cases”).

3. The Committee added this chapter in 2016.

4. In 2018, the Committee modified the quotation in Comment 1 pursuant to legislative amendments. *See* Ch. 26, sec. 13, § 18-10-108, 2018 Colo. Sess. Laws 285, 322; Ch. 274, sec. 94, § 18-10-108, 2018 Colo. Sess. Laws 1694, 1726.

## 10:01 GAMBLING

The elements of the crime of gambling are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in gambling.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gambling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gambling.

### COMMENT

1. *See* § 18-10-103(1), C.R.S. 2020.
2. *See* Instruction F:160.2 (defining “gambling”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 10:02 PROFESSIONAL GAMBLING

The elements of the crime of professional gambling are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in professional gambling.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of professional gambling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of professional gambling.

### COMMENT

1. *See* § 18-10-103(2), C.R.S. 2020.
2. *See* Instruction F:287.2 (defining “professional gambling”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 10:03 POSSESSION OF A GAMBLING DEVICE OR RECORD

The elements of the crime of possession of a gambling device or record are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowing,
4. that a gambling device or gambling record was to be used in professional gambling,
5. owned, manufactured, sold, transported, possessed, or engaged in any transaction designed to affect the ownership, custody, or use of such device or record.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a gambling device or record.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a gambling device or record.

### COMMENT

1. See § 18-10-105(1), C.R.S. 2020.
2. See Instruction F:160.3 (defining "gambling device"); Instruction F:160.7 (defining "gambling record"); Instruction F:195 (defining "knowingly"); Instruction F:287.2 (defining "professional gambling").

3. Section 18-10-105(1), C.R.S. 2020, incorporates exceptions for conduct authorized by section 18-10-105(1.5), which provides as follows:

The sale, transportation, manufacture, and remanufacture of gambling devices, including the acquisition of essential parts therefor and the assembly of such parts, is permitted if such devices are sold, transported, manufactured, and remanufactured only for transportation in interstate or foreign commerce when such transportation is not prohibited by any applicable foreign, state, or federal law. Storage of gambling devices is also permitted but only for purposes of manufacturing, remanufacturing, and transporting such devices in interstate or foreign commerce when their transportation is not prohibited. Such activities may be conducted only by persons who have registered with the United States government pursuant to the provisions of chapter 24 of Title XV of the United States Code, as amended.

However, the Committee has not drafted model affirmative defense instructions.

## 10:04 GAMBLING DEVICE (PROHIBITED ACTS)

The elements of the crime of gambling device (prohibited acts) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. openly displayed a gambling device,
4. to someone other than a legal buyer.]
- [3. sold a gambling device for use in Colorado regardless of where it was purchased.]
- [3. manufactured, remanufactured, or stored for purposes of manufacture, remanufacture, and transportation,
4. a gambling device,
5. in violation of [insert a description of the “applicable state or federal law”].]
- [\_. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gambling device (prohibited acts).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gambling device (prohibited acts).

### COMMENT

1. See § 18-10-105(1.5), C.R.S. 2020.

2. See Instruction F:160.3 (defining “gambling device”); Instruction F:196.55 (defining “legal buyer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 10:05 TRANSMITTING OR RECEIVING GAMBLING INFORMATION

The elements of the crime of transmitting or receiving gambling information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. transmitted or received gambling information by telephone, telegraph, radio, semaphore, or other means.]
- [4. installed or maintained equipment for the transmission or receipt of gambling information.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transmitting or receiving gambling information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transmitting or receiving gambling information.

### COMMENT

1. See § 18-10-106(1), C.R.S. 2020.
2. See Instruction F:160.4 (defining "gambling information"); Instruction F:195 (defining "knowingly").

3. The term “semaphore” is not defined by statute. *See Webster's Third New International Dictionary* 2062 (2002) (defining “semaphore” as “an apparatus for visual signaling”).

## 10:06 MAINTAINING GAMBLING PREMISES

The elements of the crime of maintaining gambling premises are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. as an owner, lessee, agent, employee, operator, or occupant,
5. maintained, aided, or permitted the maintaining of gambling premises.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of maintaining gambling premises.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of maintaining gambling premises.

### COMMENT

1. *See* § 18-10-107(1), C.R.S. 2020.
2. *See* Instruction F:160.5 (defining “gambling premises”); Instruction F:195 (defining “knowingly”).



**CHAPTER 10.5**  
**SIMULATED GAMBLING DEVICES**

**10.5:01**

**UNLAWFUL OFFERING OF A SIMULATED  
GAMBLING DEVICE**

**CHAPTER COMMENTS**

1. The Committee added this chapter in 2016.

## 10.5:01 UNLAWFUL OFFERING OF A SIMULATED GAMBLING DEVICE

The elements of the crime of unlawful offering of a simulated gambling device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. offered, facilitated, contracted for, or otherwise made available to or for members of the public or members of an organization or club,
4. any simulated gambling device, where
5. the defendant received, directly or indirectly,
6. a payment or transfer of consideration in connection with an entrant's use of the simulated gambling device, admission to premises on which the simulated gambling device was located, or the purchase of any product or service associated with access to or use of the simulated gambling device,
7. regardless of whether consideration in connection with such use, admission, or purchase was monetary or nonmonetary and regardless of whether it was paid or transferred before the simulated gambling device was used by an entrant, and
8. as a consequence of, in connection with, or after the play of the simulated gambling device, an award of a prize was expressly or implicitly made to a person using the device.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful offering of a simulated gambling device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful offering of a simulated gambling device.

#### COMMENT

1. See § 18-10.5-103(1), C.R.S. 2020.
2. See Instruction F:126.5 (defining “entrant”); Instruction F:285.7 (defining “prize”); Instruction F:345.3 (defining “simulated gambling device”); see also *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as “[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee”); § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Section 18-10.5-103(8), C.R.S. 2020, provides as follows: “Conducting or assisting in the conduct of gaming wagering activities and live or simulcast racing and parimutuel wagering activities otherwise authorized by Colorado law is not a violation of this section.” Additionally, section 18-10.5-103(9) provides that the statute does not limit activities related to the stock market or lawfully established sweepstakes. Moreover, section 18-10.5-103(10) provides that telecommunications providers are not liable if customers use their services to conduct prohibited games. Finally, section 18-10.5-103(11) provides that the crime does not apply to persons who ceased participating in simulated gambling activity on or before July, 1, 2018, and who provide corroborating documentation to the district attorney. However, the Committee has not drafted model affirmative defense instructions.
4. The Committee has included the seventh element because its language appears in the statute. The Committee notes, however, that this “monetary or nonmonetary” language – as well as the language stating

that it is irrelevant whether consideration was paid before an entrant used the device – is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that receiving nonmonetary consideration does not constitute a defense, nor does the timing of receipt of the consideration.

5. In 2018, pursuant to a legislative amendment, the Committee modified this instruction, added the cross-reference to Instruction F:126.5 in Comment 2, added the fourth sentence to Comment 3, and added Comment 4. *See* Ch. 381, sec. 4, § 18-10.5-103(1)(a), 2018 Colo. Sess. Laws 2297, 2300-01.

## CHAPTER 11

### OFFENSES INVOLVING DISLOYALTY

<a href="#"><u>11:01</u></a>	TREASON
<a href="#"><u>11:02.SP</u></a>	TREASON – SPECIAL INSTRUCTION
<a href="#"><u>11:03</u></a>	INSURRECTION
<a href="#"><u>11:04</u></a>	ADVOCATING OVERTHROW OF GOVERNMENT (SEDITION)
<a href="#"><u>11:05</u></a>	INCITING DESTRUCTION OF LIFE OR PROPERTY
<a href="#"><u>11:06</u></a>	MEMBERSHIP IN AN ANARCHISTIC AND SEDITIONOUS ASSOCIATION
<a href="#"><u>11:07</u></a>	MUTILATION OR CONTEMPT OF FLAG
<a href="#"><u>11:08</u></a>	UNLAWFUL FLAG DISPLAY

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 11:01 TREASON

The elements of the crime of treason are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. levied war against the state of Colorado or adhered to its enemies, giving them aid and comfort.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of treason.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of treason.

### COMMENT

1. *See* § 18-11-101(1), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 11:02.SP TREASON – SPECIAL INSTRUCTION

No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

### COMMENT

1. *See* § 18-11-101(1), C.R.S. 2020.
2. In most cases, this legal principle will be a matter for the court's determination about which the jury need not be advised. However, the Committee has drafted a special instruction because there may be instances where it is necessary to advise the jurors that this rule governs their determination of whether the evidence is sufficient (e.g., to inform a jury that it cannot convict based entirely on circumstantial evidence if it rejects the testimony of all, or all but one, of the witnesses).
3. *See* Instruction G2:05 (conspiracy), Comment 7 (explaining the non-statutory origins of the definition of an "overt act" for purposes of conspiracy).

## 11:03 INSURRECTION

The elements of the crime of insurrection are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. by force of arms to obstruct, retard, or resist the execution of any law of this state,
5. engaged, cooperated, or participated with any armed force; or with an armed force invaded any portion of this state.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of insurrection.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of insurrection.

### COMMENT

1. See § 18-11-102, C.R.S. 2020.
2. See Instruction F:185 (defining "with intent").
3. The statute does not define the term "armed force."

## 11:04 ADVOCATING OVERTHROW OF GOVERNMENT (SEDITION)

The elements of the crime of sedition are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, or otherwise,
4. advocated, taught, incited, proposed, aided, abetted, encouraged, or advised resistance by physical force to, or the destruction or overthrow by physical force of, constituted government in general, or of the government or laws of the United States, or of this state,
5. under circumstances constituting a clear and present danger that violent action would result therefrom.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sedition.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sedition.

### COMMENT

1. See § 18-11-201(1), C.R.S. 2020.
2. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental

state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The term “clear and present danger” is not defined by statute. The Committee notes that, in other contexts, the requirement of a “clear and present danger” implicates constitutional considerations. *See In re Jameson*, 340 P.2d 423, 428 (Colo. 1959) (noting, in the context of a newspaper’s First Amendment challenge to a contempt citation, that “[w]hat finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished as a constructive contempt”).

## 11:05 INCITING DESTRUCTION OF LIFE OR PROPERTY

The elements of the crime of inciting destruction of life or property are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures,
  4. advocated, taught, incited, proposed, aided, abetted, encouraged, or advised the unlawful injury or destruction of private or public property by the use of physical force, violence, or bodily injury, or the unlawful injury by the use of physical force or violence of any person, or the unlawful taking of human life, as a policy or course of conduct,
  5. under circumstances constituting a clear and present danger that violent action would result therefrom.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inciting destruction of life or property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inciting destruction of life or property.

### COMMENT

1. See § 18-11-202, C.R.S. 2020.

2. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The term “clear and present danger” is not defined by statute. The Committee notes that, in other contexts, the requirement of a “clear and present danger” implicates constitutional considerations. See *In re Jameson*, 340 P.2d 423, 428 (Colo. 1959) (noting, in the context of a newspaper’s First Amendment challenge to a contempt citation, that “[w]hat finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished as a constructive contempt”).

## 11:06 MEMBERSHIP IN AN ANARCHISTIC AND SEDITIOUS ASSOCIATION

The elements of the crime of membership in an anarchistic and seditious association are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. acted or professed to act as an officer of any anarchistic and seditious association, or spoke, wrote, or published as a representative or professed representative of any such association, or, knowing the purpose, teachings, and doctrine of such association, became or continued to be a member thereof or contributed dues, money, or other things of value to it or to anyone for it.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of membership in an anarchistic and seditious association.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of membership in an anarchistic and seditious association.

### COMMENT

1. See § 18-11-203(2), C.R.S. 2020.
2. See Instruction F:16.5 (defining “anarchistic and seditious association”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable

mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 11:07 MUTILATION OR CONTEMPT OF FLAG

The elements of the crime of mutilation or contempt of flag are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. with intent to outrage the sensibilities of persons liable to observe or discover the action or its results,]
- [3. with intent to cause a breach of the peace or incitement to riot,]
- [3. under such circumstances that it might cause a breach of the peace or incitement to riot,]
4. mutilated, defaced, defiled, trampled upon, burned, cut, or tore any flag in public.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of mutilation or contempt of flag.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of mutilation or contempt of flag.

### COMMENT

1. *See* § 18-11-204(1)(b)–(d), C.R.S. 2020.
2. *See* Instruction F:157.3 (defining “flag” (mutilation or contempt)); Instruction F:185 (defining “with intent”).

3. The Committee has not included model language for section 18-11-204(1)(a), C.R.S. 2020, because that provision was declared unconstitutional in *People v. Vaughan*, 514 P.2d 1318, 1323 (Colo. 1973). Although the Committee has included model language for the remaining provisions of the statute, there are indications that these provisions may be unconstitutional. See *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (striking down, as unconstitutional, the Flag Protection Act of 1989); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the defendant’s act of burning the American flag during a protest rally was expressive conduct within the protection of the First Amendment, and that the state could not justify prosecution of the defendant based on an interest in preventing breaches of peace or to preserve the flag as a symbol of nationhood and national unity); see also *Vaughan*, 514 P.2d at 1322–23 (“It is well settled that the state has an overriding interest in prohibiting conduct or speech which incites others to unlawful conduct or provokes retaliatory actions amounting to a breach of the peace. Thus, a statute narrowly drawn to implement such compelling state interests would withstand constitutional scrutiny even though it has the effect of proscribing some limited forms of expression.” (citation omitted)); *id.* at 1323 (“Not only must a statute infringing upon expression be justified by an overriding state interest, but such a statute may be applied only where there is a clear and present danger to such interest.”).

## 11:08 UNLAWFUL FLAG DISPLAY

The elements of the crime of unlawful flag display are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. displayed any flag other than the flag of the United States of America or the state of Colorado or any of its subdivisions, agencies, or institutions,
4. on a permanent flagstaff located on a state, county, municipal, or other public building or on its grounds within this state.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful flag display.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful flag display.

### COMMENT

1. *See* § 18-11-205(1), C.R.S. 2020.
2. *See* Instruction F:157.7 (defining “flag” (unlawful display)).
3. Section 18-11-205(4)(a), C.R.S. 2020, establishes a variety of exceptions for the display of flags that are ceremonial, educational, commemorative, etc. Section 18-11-205(4)(b) states that such exceptions shall qualify as affirmative defenses; however, the Committee has not drafted model affirmative defense instructions.



## CHAPTER 12-1

### OFFENSES RELATING TO FIREARMS AND WEAPONS

<a href="#"><u>12-1:01</u></a>	POSSESSION OF A DANGEROUS WEAPON
<a href="#"><u>12-1:02</u></a>	POSSESSION OF AN ILLEGAL WEAPON
<a href="#"><u>12-1:03</u></a>	POSSESSION OF A DEFACED FIREARM
<a href="#"><u>12-1:04</u></a>	DEFACING A FIREARM
<a href="#"><u>12-1:05</u></a>	UNLAWFULLY CARRYING A CONCEALED WEAPON (KNIFE)
<a href="#"><u>12-1:05.5</u></a>	UNLAWFULLY CARRYING A CONCEALED WEAPON (FIREARM)
<a href="#"><u>12-1:06</u></a>	UNLAWFUL POSSESSION OF A WEAPON (GENERAL ASSEMBLY)
<a href="#"><u>12-1:07</u></a>	UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS
<a href="#"><u>12-1:08</u></a>	PROHIBITED USE OF A WEAPON (AIMING)
<a href="#"><u>12-1:09</u></a>	PROHIBITED USE OF A WEAPON (DISCHARGING OR SHOOTING)
<a href="#"><u>12-1:10</u></a>	PROHIBITED USE OF A WEAPON (UNATTENDED)
<a href="#"><u>12-1:11</u></a>	PROHIBITED USE OF A WEAPON (UNDER THE INFLUENCE)
<a href="#"><u>12-1:12</u></a>	PROHIBITED USE OF A WEAPON (THROWING STAR OR NUNCHAKU)
<a href="#"><u>12-1:13.SP</u></a>	PROHIBITED USE OF WEAPONS – SPECIAL INSTRUCTION (POSSESSION OF A PERMIT IS NOT A DEFENSE)
<a href="#"><u>12-1:14</u></a>	PROHIBITED USE OF A STUN GUN
<a href="#"><u>12-1:15</u></a>	ILLEGAL DISCHARGE OF A FIREARM
<a href="#"><u>12-1:16</u></a>	POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER
<a href="#"><u>12-1:17.INT</u></a>	POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (DANGEROUS WEAPON)
<a href="#"><u>12-1:18.INT</u></a>	POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (PREVIOUS CONVICTION FOR BURGLARY, ARSON, OR ANY

- FELONY INVOLVING THE USE OF FORCE OR A DEADLY WEAPON)
- [12-1:19](#) POSSESSION OF A HANDGUN BY A JUVENILE
- [12-1:20](#) UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE (PROHIBITED POSSESSION)
- [12-1:21](#) UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A HANDGUN (PROHIBITED POSSESSION)
- [12-1:22](#) UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE OR PERMITTING A JUVENILE TO POSSESS A HANDGUN (SUBSTANTIAL RISK)
- [12-1:23](#) UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A HANDGUN (FAILURE TO ACT BASED ON A SUBSTANTIAL RISK)
- [12-1:24](#) UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A FIREARM OTHER THAN A HANDGUN
- [12-1:25](#) POSSESSION OR CONTROL OF AN EXPLOSIVE OR INCENDIARY DEVICE
- [12-1:26](#) POSSESSION OR CONTROL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON
- [12-1:27](#) USE OF AN EXPLOSIVE OR INCENDIARY DEVICE OR A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON IN THE COMMISSION, OR ATTEMPTED COMMISSION, OF A FELONY
- [12-1:28](#) REMOVAL OF AN EXPLOSIVE OR INCENDIARY DEVICE
- [12-1:29](#) REMOVAL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON
- [12-1:30](#) POSSESSION OF EXPLOSIVE OR INCENDIARY PARTS
- [12-1:31](#) POSSESSION OF CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON PARTS
- [12-1:32](#) FALSE, FACSIMILE, OR HOAX DEVICE OR WEAPON
- [12-1:33](#) UNLAWFULLY DISPENSING, DISTRIBUTING, OR SELLING AN EXPLOSIVE OR INCENDIARY DEVICES
- [12-1:34](#) PURCHASING OR OBTAINING A FIREARM FOR A PERSON WHO IS INELIGIBLE

<a href="#"><u>12-1:35</u></a>	FAILURE TO DISPLAY SIGNAGE EXPLAINING THAT IT IS UNLAWFUL TO PURCHASE OR OBTAIN A FIREARM FOR A PERSON WHO IS INELIGIBLE
<a href="#"><u>12-1:36</u></a>	TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK
<a href="#"><u>12-1:37</u></a>	NONCOMPLIANCE BY A LICENSED GUN DEALER PERFORMING A BACKGROUND CHECK FOR A PROSPECTIVE FIREARM TRANSFEROR WHO IS NOT A LICENSED GUN DEALER
<a href="#"><u>12-1:38</u></a>	FAILURE TO PROVIDE RESULTS OF BACKGROUND CHECK
<a href="#"><u>12-1:39</u></a>	OVERCHARGING FOR A BACKGROUND CHECK
<a href="#"><u>12-1:40</u></a>	ACCEPTING POSSESSION OF A FIREARM WITHOUT APPROVAL
<a href="#"><u>12-1:41</u></a>	PROVIDING FALSE INFORMATION FOR THE PURPOSE OF ACQUIRING A FIREARM
<a href="#"><u>12-1:42</u></a>	TRANSFER AFTER EXPIRATION OF APPROVAL

## CHAPTER COMMENTS

1. Section 18-12-101(2), C.R.S. 2020, states: “It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties.” *See* Instruction H:60 (affirmative defense of “peace officer”).
2. *See* Instruction H:59 (affirmative defense of “knife – hunting or fishing”).

## **12-1:01 POSSESSION OF A DANGEROUS WEAPON**

The elements of the crime of possession of a dangerous weapon are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed a dangerous weapon.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a dangerous weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a dangerous weapon.

### COMMENT

1. *See* § 18-12-102(3), C.R.S. 2020.
2. *See* Instruction F:86 (defining “dangerous weapon”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. *See* Instruction H:61 (affirmative defense based on exceptions for peace officers, members of the armed services, and licensed possession).

## 12-1:02 POSSESSION OF AN ILLEGAL WEAPON

The elements of the crime of possession of an illegal weapon are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed an illegal weapon.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of an illegal weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of an illegal weapon.

### COMMENT

1. *See* § 18-12-102(4), C.R.S. 2020.
2. *See* Instruction F:176 (defining “illegal weapon”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. *See* Instruction H:61 (affirmative defense based on exceptions for peace officers, members of the armed services, and licensed possession).

## 12-1:03 POSSESSION OF A DEFACED FIREARM

The elements of the crime of possession of a defaced firearm are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. possessed a firearm,
5. the manufacturer's serial number of which, or other distinguishing number or identification mark, had been removed, defaced, altered, or destroyed, except by normal wear and tear.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a defaced firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a defaced firearm.

### COMMENT

1. See § 18-12-103, C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

## 12-1:04 DEFACING A FIREARM

The elements of the crime of defacing a firearm are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. removed, defaced, covered, altered, or destroyed,
  5. the manufacturer's serial number or any other distinguishing number or identification mark of a firearm.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of defacing a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of defacing a firearm.

### COMMENT

1. *See* § 18-12-104, C.R.S. 2020.
2. *See* Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

## 12-1:05 UNLAWFULLY CARRYING A CONCEALED WEAPON (KNIFE)

The elements of the crime of unlawfully carrying a concealed weapon (knife) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. carried a knife concealed on or about his [her] person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully carrying a concealed weapon (knife).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully carrying a concealed weapon (knife).

### COMMENT

1. See § 18-12-105(1)(a), C.R.S. 2020.
2. See Instruction F:194 (defining “knife”); Instruction F:195 (defining “knowingly”); see also *People in the Interest of R.J.A.*, 556 P.2d 491 (Colo. App. 1976) (holding, in the context of a probation revocation proceeding not subject to standard of proof beyond a reasonable doubt, that a pistol tucked under the edge of the seat on which the juvenile was sitting, within his easy reach, was “concealed on or about his person” because it was sufficiently close to be readily accessible for immediate use).

3. See Instruction H:62 (affirmative defenses based on exceptions for permissible locations or possession of a valid permit).
4. See *People in Interest of L.C.*, 2017 COA 82, ¶¶ 13, 26, \_\_ P.3d \_\_ (recognizing that the defendant’s act of carrying a concealed knife in his backpack was unlawful because “he was doing so in violation of a court order”; noting that, “by its plain meaning, ‘about’ necessarily enlarges the area in which a weapon may be concealed, encompassing a space close to, even if not directly on, the person”).
5. In 2016, the Committee split this instruction into two separate instructions: one for carrying a concealed knife, the other for carrying a concealed firearm. See Instruction 12-1:05.5, Comment 4.
6. In 2019, the Committee added Comment 4.

## 12-1:05.5 UNLAWFULLY CARRYING A CONCEALED WEAPON (FIREARM)

The elements of the crime of unlawfully carrying a concealed weapon (firearm) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. carried a firearm concealed on or about his [her] person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully carrying a concealed weapon (firearm).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully carrying a concealed weapon (firearm).

### COMMENT

1. See § 18-12-105(1)(b), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); see also *People in the Interest of O.R.*, 220 P.3d 949, 952 (Colo. App. 2008) ("concealed' for purposes of section 18-12-105(1)(b) means placed out of sight so as not to be discernible or apparent by ordinary observation"); *People in the Interest of R.J.A.*, 556 P.2d 491 (Colo. App. 1976) (holding, in the context of a probation revocation proceeding not subject to standard of proof beyond a reasonable doubt, that a pistol tucked under

the edge of the seat on which the juvenile was sitting, within his easy reach, was “concealed on or about his person” because it was sufficiently close to be readily accessible for immediate use).

3. *See* Instruction H:62 (affirmative defenses based on exceptions for permissible locations or possession of a valid permit).

4. The Committee added this instruction in 2016. *See* Instruction 12-1:05, Comment 4.

## **12-1:06 UNLAWFUL POSSESSION OF A WEAPON (GENERAL ASSEMBLY)**

The elements of the crime of unlawful possession of a weapon (general assembly) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. without legal authority,
  4. carried, brought, or had in his [her] possession,
  5. a firearm, or any explosive, incendiary, or other dangerous device,
  6. on the property of or within any building in which the chambers, galleries, or offices of the general assembly, or either house thereof, were located, or in which a legislative hearing or meeting was being or was to be conducted, or in which the official office of any member, officer, or employee of the general assembly was located.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a weapon (general assembly).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a weapon (general assembly).

## COMMENT

1. *See* § 18-12-105(1)(c), C.R.S. 2020.
2. *See* Instruction F:154 (defining “firearm”); Instruction F:281 (defining “possession”).
3. *See* Instruction H :62 (affirmative defenses based on exceptions for permissible locations or possession of a valid permit).

## **12-1:07 UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS**

The elements of the crime of unlawful possession of a weapon on school, college, or university grounds are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. and without legal authority,
5. carried, brought, or had in his [her] possession,
6. a deadly weapon,
7. in or on the real estate and all improvements erected thereon of any public or private elementary, middle, junior high, high, or vocational school or any public or private college, university, or seminary,
8. other than for the purpose of presenting an authorized public demonstration or exhibition pursuant to instruction in conjunction with an organized school or class, or for the purpose of carrying out the necessary duties and functions of an employee of an educational institution that required the use of a deadly weapon, or for the purpose of participation in an authorized extracurricular activity or on an athletic team.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a weapon on school, college, or university grounds.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a weapon on school, college, or university grounds.

#### COMMENT

1. *See* § 18-12-105.5(1), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. *See* Instruction H:63 (affirmative defenses based on exceptions for permissible locations and purposes, or possession of a valid permit).
4. + *See People v. Procasky*, 2019 COA 181, ¶ 31, 467 P.3d 1252, 1260 (holding that, where the defendant pulled into a school parking lot in response to police activating their sirens, he was not acting unlawfully, meaning he could not be found guilty of unlawfully knowingly and unlawfully possessing a weapon on school grounds).
5. + In 2020, the Committee added Comment 4.

## **12-1:08 PROHIBITED USE OF A WEAPON (AIMING)**

The elements of the crime of prohibited use of a weapon (aiming) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. aimed a firearm at another person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (aiming).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (aiming).

### COMMENT

1. See § 18-12-106(1)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

## 12-1:09 PROHIBITED USE OF A WEAPON (DISCHARGING OR SHOOTING)

The elements of the crime of prohibited use of a weapon (discharging or shooting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. recklessly or with criminal negligence,
4. discharged a firearm or shot a bow and arrow.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (discharging or shooting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (discharging or shooting).

### COMMENT

1. See § 18-12-106(1)(b), C.R.S. 2020.
2. See Instruction F:79 (defining "criminal negligence"); Instruction F:154 (defining "firearm"); Instruction F:308 (defining "recklessly").

## 12-1:10 PROHIBITED USE OF A WEAPON (UNATTENDED)

The elements of the crime of prohibited use of a weapon (unattended) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. set a loaded gun, trap, or device designed to cause an explosion upon being tripped or approached, and
  5. left it unattended by a competent person immediately present.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (unattended).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (unattended)

### COMMENT

1. *See* § 18-12-106(1)(c), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

## 12-1:11 PROHIBITED USE OF A WEAPON (UNDER THE INFLUENCE)

The elements of the crime of prohibited use of a weapon (under the influence) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. had a firearm in his [her] possession,
4. while he [she] was under the influence of intoxicating liquor or of a controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (under the influence).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (under the influence).

### COMMENT

1. See § 18-12-106(1)(d), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:154 (defining “firearm”); Instruction F:281 (defining “possession”).
3. See *People v. Beckett*, 782 P.2d 812, 813 (Colo. App. 1989) (holding that “the failure to define ‘under the influence,’ if error, was harmless”).

4. *See People v. Koper*, 2018 COA 137, ¶¶ 54, \_\_ P.3d \_\_ (holding that, where the defendant was charged with possessing a firearm while under the influence and requested an instruction tracking the statutory presumptions and inferences regarding driving under the influence, the trial court properly rejected the instruction because the presumptions and inferences are not incorporated into the possession statute).
5. In 2015, the Committee added Comment 3.
6. In 2019, the Committee added Comment 4.

## **12-1:12 PROHIBITED USE OF A WEAPON (THROWING STAR OR NUNCHAKU)**

The elements of the crime of prohibited use of a weapon (throwing star or nunchaku) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. aimed, swung, or threw,
5. a throwing star or nunchaku,
6. at another person.]
- [4. possessed a throwing star or nunchaku,
5. in a public place,
6. other than for the purpose of presenting an authorized public demonstration or exhibition or pursuant to instruction in conjunction with an organized school or class.]
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a weapon (throwing star or nunchaku).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a weapon (throwing star or nunchaku).

## COMMENT

1. See § 18-12-106(1)(e), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:244 (defining “nunchaku”); Instruction F:281 (defining “possession”); Instruction F:372 (defining “throwing star”).
3. In a case involving transportation of throwing stars or nunchaku, draft a special instruction explaining the following limitation: “When transporting throwing stars or nunchaku for a public demonstration or exhibition or for a school or class, they shall be transported in a closed, nonaccessible container.” § 18-12-106(1)(e), C.R.S. 2020.

**12-1:13.SP PROHIBITED USE OF WEAPONS – SPECIAL INSTRUCTION (POSSESSION OF A PERMIT IS NOT A DEFENSE)**

Possession of a concealed weapon permit, handgun permit, or temporary emergency concealed handgun permit is no defense to a charge of prohibited use of a weapon.

COMMENT

1. *See* § 18-12-106(1)(d), C.R.S. 2020.
2. Although this limitation is set forth as part of the subsection criminalizing possession of a firearm while under the influence of an intoxicating liquor or a controlled substance, *see* § 18-12-106(1)(d), it is, by its terms, applicable to any “violation of this subsection (1).” Accordingly, the Committee has placed this special instruction after the last instruction that defines an offense in violation of section 18-12-106(1).

## 12-1:14 PROHIBITED USE OF A STUN GUN

The elements of the crime of prohibited use of a stun gun are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly and unlawfully,
4. used a stun gun in the commission of the crime of [insert name(s) of offense(s)].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited use of a stun gun.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited use of a stun gun.

### COMMENT

1. See § 18-12-106.5, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:354 (defining “stun gun”).
3. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.

## 12-1:15 ILLEGAL DISCHARGE OF A FIREARM

The elements of the crime of illegal discharge of a firearm are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or recklessly,
4. discharged a firearm into any dwelling or any other building or occupied structure, or into any motor vehicle occupied by any person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of illegal discharge of a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of illegal discharge of a firearm.

### COMMENT

1. See § 18-12-107.5, C.R.S. 2020.
2. See Instruction F:114 (defining "dwelling"); Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:236 (defining "motor vehicle"); Instruction F:308 (defining "recklessly"); see also Instruction F:40 (defining "building" for purposes of Article 4 offenses); Instruction F:248 (defining "occupied structure" for purposes of Article 4 offenses).
3. Section 18-12-107.5(2) provides "[i]t shall not be an offense under this section if the person who discharges a firearm in violation of subsection (1)

of this section is a peace officer . . . acting within the scope of such officer's authority and in the performance of such officer's duties." This language is slightly different from the language in section 18-12-101(2), C.R.S. 2020 ("It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful discharge of his duties."). Accordingly, it may be appropriate to modify Instruction H:60 (affirmative defense of "peace officer"), which, as noted in an introductory comment to this chapter, is based on section 18-12-101(2).

## 12-1:16 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER

The elements of the crime of possession of a weapon by a previous offender are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. subsequent to being convicted of [insert the name(s) of the qualifying felony offense(s)],]
- [3. subsequent to being convicted of attempt or conspiracy to commit [insert the name(s) of the qualifying felony offense(s)],]
- [3. subsequent to being adjudicated for [insert the name(s) of the qualifying act(s)],]
- [3. subsequent to being adjudicated for attempt or conspiracy to commit [insert the name(s) of the qualifying felony offense(s)],]
4. knowingly,
5. possessed, used, or carried upon his [her] person a [firearm] [insert name(s) of “any other weapon that is subject to the provisions of this article”].
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a weapon by a previous offender.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a weapon by a previous offender.

## COMMENT

1. See § 18-12-108(1), (3), C.R.S. 2020.
2. See Instruction F:154 (defining “firearm”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. See *People v. DeWitt*, 275 P.3d 728, 735 (Colo. App. 2011) (“We conclude that the plain language of the amended POWPO statute evinces the General Assembly’s clear intent for the ‘knowingly’ mental state to apply only to the possession element of the offense, and not to the prior felony conviction element.”).
4. See Instruction H:64 (affirmative defense of “possession of a weapon by a previous offender – choice of evils”).

## **12-1:17.INT POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (DANGEROUS WEAPON)**

If you find the defendant not guilty of possession of a weapon by a previous offender, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of possession of a weapon by a previous offender, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant possess a dangerous weapon? (Answer “Yes” or “No”)

The defendant possessed a dangerous weapon only if:

1. he [she] possessed a firearm silencer, machine gun, short shotgun, short rifle, or ballistic knife.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See §18-12-108(2)(b), (4)(b), C.R.S. 2020.
2. See Instruction F:29 (defining “ballistic knife”); Instruction F:86 (defining “dangerous weapon”); Instruction F:154 (defining “firearm”);

Instruction F:156 (defining “firearm silencer”); Instruction F:203 (defining “machine gun”); Instruction F:345 (defining “short shotgun”); Instruction F:344 (defining “short rifle”); *see, e.g.*, Instruction E:28 (special verdict form).

**12-1:18.INT POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – INTERROGATORY (PREVIOUS CONVICTION FOR BURGLARY, ARSON, OR ANY FELONY INVOLVING THE USE OF FORCE OR A DEADLY WEAPON)**

If you find the defendant not guilty of possession of a weapon by a previous offender, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of possession of a weapon by a previous offender, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant previously convicted of [burglary] [arson] [an offense involving the use of [force] [a deadly weapon]]? (Answer “Yes” or “No”)

The defendant was previously convicted of [burglary] [arson] [an offense involving the use of [force] [a deadly weapon]] only if:

1. the defendant’s previous [conviction] [adjudication] was for [burglary] [arson] [[insert name of other felony offense(s) for which the defendant was convicted or adjudicated delinquent] involving the use of force or a deadly weapon], and
2. the date on which the defendant committed the possession of a weapon by a previous offender occurred within ten years after the date of conviction, if the defendant was not incarcerated; or within ten years after the date the defendant was released from confinement, if the defendant was incarcerated; or, within ten years after the date of release from supervision, if the defendant was subject to supervision imposed as a result of conviction.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has

met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-12-108(2)(c), (4)(c), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).
3. See *People v. Blue*, 544 P.2d 385, 387 (Colo. 1975) (the words “involving” and “use of force or violence” are comprehensible and readily understood).
4. Sections 18-12-108(2)(c) and 18-12-108(4)(c) apply to prior convictions for burglary or arson (or acts committed by a juvenile which would, if committed by an adult, constitute either such offense) without requiring proof that the prior conviction was one “involving the use of force or the use of a deadly weapon.” Accordingly, while it is the jury’s role to determine whether the defendant was previously convicted as alleged, it appears that, for prior convictions based on offenses other than burglary or arson, it is the trial court’s function to determine whether the prior conviction was for a felony. Further, in some cases it may not be necessary to ask the jury whether a prior conviction was one “involving the use of force or the use of a deadly weapon” because the court will be able to answer that question, as a matter of law, by examining the statutory elements of the prior offense for which the defendant was convicted. See, e.g., *People v. Allaire*, 843 P.2d 38, 40 (Colo. App. 1992) (it was not error for the trial court to instruct the jury that second degree assault involves force or violence as a matter of law; all of the relevant means by which second degree assault, as a class four felony, can be committed involve the use of force); see also *People v. Gallegos*, 563 P.2d 937, 938 (Colo. 1977) (holding, under the previous version of the POWPO statute, that attempted robbery by threat is a felony involving the use of force).

5. It may be necessary to draft supplemental instructions to help guide the jury's determination of the date that the defendant was "convicted" or "released." See generally *People v. Larson*, 782 P.2d 840, 843 (Colo. App. 1989) (trial court erred by failing to instruct the jury that, in order for defendant to be found guilty of possession of a weapon by a previous offender, he must have possessed a firearm within ten years after his discharge from incarceration; however, no plain error because the issue was not contested at trial).

## 12-1:19 POSSESSION OF A HANDGUN BY A JUVENILE

The elements of the [crime] [offense] of possession of a handgun by a juvenile are:

1. That the [defendant] [juvenile],
2. in the State of Colorado, at or about the date and place charged,
3. had not attained the age of eighteen years, and
4. knowingly,
5. possessed a handgun.
- [6. and that the [defendant's] [juvenile's] conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find [the defendant guilty] [that the juvenile committed the offense] of possession of a handgun by a juvenile.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find [the defendant not guilty] [that the juvenile did not commit the offense] of possession of a handgun by a juvenile.

### COMMENT

1. See § 18-12-108.5(1)(a), C.R.S. 2020.
2. See Instruction F:167 (defining “handgun”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. See Instruction H:65 (affirmative defense of “permissible purpose”).

4. The Committee recognizes that juveniles are not entitled to a trial by jury for misdemeanors or petty offenses. *See* § 19-2-107(2), C.R.S. 2020. Nevertheless, the Committee has created this instruction in the event that a juvenile would ever face a jury trial, either in criminal court or in juvenile court. Furthermore, the Committee has provided bracketed language throughout the instruction to match the appropriate venue. If the proceeding takes place in criminal court, the court should use the first set of brackets. If the proceeding takes place in juvenile court, the court should use the second set of brackets, which replaces several terms (i.e., “crime,” “defendant,” “guilty”) with their appropriate counterpart (i.e., “offense,” “juvenile,” “committed the offense”).

5. In 2017, the Committee added the bracketed alternatives to this instruction, for the reasons described in Comment 4.

## **12-1:20 UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE (PROHIBITED POSSESSION)**

The elements of the crime of providing a handgun to a juvenile (prohibited possession) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. provided a handgun,
5. with or without remuneration,
6. to any person under the age of eighteen years,
7. in violation of the statute that prohibits possession of a handgun by a juvenile.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing a handgun to a juvenile (prohibited possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing a handgun to a juvenile (prohibited possession).

### COMMENT

1. See § 18-12-108.7(1)(a), C.R.S. 2020.

2. See Instruction F:167 (defining “handgun”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:308 (defining “recklessly”); Instruction F:310 (defining “remuneration”).
3. Because section 18-12-108.7(1)(a) requires proof that the juvenile’s possession violated section 18-12-108.5, an adult charged with violating section 18-12-108.7(1)(a) may be entitled to an instruction explaining the affirmative defense that applies to section 18-12-108.5. See Instruction H:65 (affirmative defense of “permissible purpose”).
4. See Instruction H:66 (affirmative defense of “physical harm from attempt to disarm”).
5. If the defendant is not charged with possession of a handgun by a juvenile, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. See Instruction 12-1:19 (possession of a handgun by a juvenile). Place the elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for possession of a handgun by a juvenile.

## **12-1:21 UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A HANDGUN (PROHIBITED POSSESSION)**

The elements of the crime of permitting a juvenile to possess a handgun (prohibited possession) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knew of a juvenile's conduct which violated the statute that prohibits possession of a handgun by a juvenile, and
  4. failed to make reasonable efforts to prevent such violation.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of permitting a juvenile to possess a handgun (prohibited possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of permitting a juvenile to possess a handgun (prohibited possession).

### COMMENT

1. See § 18-12-108.7(1)(a), C.R.S. 2020.
2. See Instruction F:167 (defining "handgun"); Instruction F:193 (defining "juvenile").
3. Because section 18-12-108.7(1)(a) requires proof that the juvenile's possession violated section 18-12-108.5, an adult charged with violating section 18-12-108.7(1)(a) may be entitled to an instruction explaining the

affirmative defense that applies to section 18-12-108.5. *See* Instruction H:65 (affirmative defense of “permissible purpose”).

4. *See* Instruction H:66 (affirmative defense of “physical harm from attempt to disarm”).

5. If the defendant is not charged with possession of a handgun by a juvenile, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 12-1:19 (possession of a handgun by a juvenile). Place the elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for possession of a handgun by a juvenile.

## **12-1:22 UNLAWFULLY PROVIDING A HANDGUN TO A JUVENILE OR PERMITTING A JUVENILE TO POSSESS A HANDGUN (SUBSTANTIAL RISK)**

The elements of the crime of unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun (substantial risk) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally, knowingly, or recklessly,
4. provided a handgun to a juvenile or permitted a juvenile to possess a handgun,
5. even though the defendant was aware of a substantial risk that the juvenile would use a handgun to commit [insert name(s) of felony offense(s)].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun (substantial risk).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun (substantial risk).

## COMMENT

1. *See* § 18-12-108.7(2)(a), C.R.S. 2020.
2. *See* Instruction F:167 (defining “handgun”); Instruction F:185 (defining “intentionally”); Instruction F:193 (defining “juvenile”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:308 (defining “recklessly”).
3. *See* Instruction H:66 (affirmative defense of “physical harm from attempt to disarm”).
4. In 2016, the Committee eliminated the bracketing from the instruction’s opening paragraph.

**12-1:23 UNLAWFULLY PERMITTING A JUVENILE TO  
POSSESS A HANDGUN (FAILURE TO ACT BASED ON A  
SUBSTANTIAL RISK)**

The elements of the crime of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was aware of a substantial risk that a juvenile would use a handgun to commit [insert name(s) of felony offense(s)], and
  4. failed to make reasonable efforts to prevent the commission of the offense.
- [5. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully permitting a juvenile to possess a handgun (failure to act based on a substantial risk).

COMMENT

1. See § 18-12-108.7(2)(a), C.R.S. 2020.
2. See Instruction F:167 (defining “handgun”); Instruction F:193 (defining “juvenile”).
3. Section 18-12-108.7(2)(a) provides as follows:

A person shall be deemed to have violated this paragraph (a) if such person provides a handgun to or permits the possession of a handgun by any juvenile who has been convicted of a crime of violence, as defined in section 18-1.3-406, or any juvenile who has been adjudicated a juvenile delinquent for an offense which would constitute a crime of violence, as defined in section 18-1.3-406, if such juvenile were an adult.

This provision could be interpreted as establishing either: (1) a permissible inference that should be explained to the jury by means of a special instruction, *see generally Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process); or (2) a substantive offense with an imputed mens rea of “knowingly.” *See* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”). The Committee takes no position concerning which interpretation is correct.

4. *See* Instruction H:66 (affirmative defense of “physical harm from attempt to disarm”).

## **12-1:24 UNLAWFULLY PERMITTING A JUVENILE TO POSSESS A FIREARM OTHER THAN A HANDGUN**

The elements of the crime of unlawfully permitting a juvenile to possess a firearm other than a handgun are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. sold, rented, transferred ownership of, or allowed unsupervised possession of,
4. a firearm other than a handgun,
5. with or without remuneration,
6. to any juvenile,
7. without the consent of the juvenile's parent or legal guardian.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully permitting a juvenile to possess a firearm other than a handgun.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully permitting a juvenile to possess a firearm other than a handgun.

### COMMENT

1. See § 18-12-108.7(3), C.R.S. 2020.

2. See Instruction F:154 (defining “firearm”); Instruction F:167 (defining “handgun”); Instruction F:193 (defining “juvenile”); Instruction F:281 (defining “possession”); Instruction F:310 (defining “remuneration”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. See Instruction H:66 (affirmative defense of “physical harm from attempt to disarm”).

## 12-1:25 POSSESSION OR CONTROL OF AN EXPLOSIVE OR INCENDIARY DEVICE

The elements of the crime of possession or control of an explosive or incendiary device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed, controlled, manufactured, gave, mailed, sent, or caused to be sent,
5. an explosive or incendiary device.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession or control of an explosive or incendiary device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession or control of an explosive or incendiary device.

### COMMENT

1. See § 18-12-109(2), C.R.S. 2020.
2. See Instruction F:134 (defining "explosive or incendiary device"); Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. Section 18-12-109(3), C.R.S. 2020, enumerates several exemptions from criminal liability (e.g., peace officers, National Guard servicepersons, etc.). However, the Committee has not drafted model affirmative defense instructions.

## **12-1:26 POSSESSION OR CONTROL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON**

The elements of the crime of possession or control of a chemical, biological, or radiological weapon are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed, controlled, manufactured, gave, mailed, sent, or caused to be sent,
5. a chemical, biological, or radiological weapon.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of a chemical, biological, or radiological weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of a chemical, biological, or radiological weapon.

### COMMENT

1. See § 18-12-109(2.5), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:281 (defining "possession").

3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

**12-1:27 USE OF AN EXPLOSIVE OR INCENDIARY DEVICE  
OR A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL  
WEAPON IN THE COMMISSION, OR ATTEMPTED  
COMMISSION, OF A FELONY**

The elements of the crime of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. used, caused to be used, or gave, mailed, sent, or caused to be sent,
5. a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials],
6. in [the commission of, or in an attempt to commit, [insert name of felony offense(s)].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of a[n] [explosive or incendiary device] [chemical, biological, or radiological weapon or materials] in the [attempted] commission of a felony.

## COMMENT

1. *See* § 18-12-109(4), C.R.S. 2020.
2. *See* Instruction F:134 (defining “explosive or incendiary device”); Instruction F:195 (defining “knowingly”); Instruction G2:01 (criminal attempt).
3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

## 12-1:28 REMOVAL OF AN EXPLOSIVE OR INCENDIARY DEVICE

The elements of the crime of removal of an explosive or incendiary device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. removed or caused to be removed, or carried away,
4. any explosive or incendiary device,
5. from the premises where the explosive or incendiary device was kept by the lawful user, vendor, transporter, or manufacturer thereof,
6. without the consent or direction of the lawful possessor.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removal of an explosive or incendiary device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removal of an explosive or incendiary device.

### COMMENT

1. *See* § 18-12-109(5), C.R.S. 2020.
2. *See* Instruction F:134 (defining “explosive or incendiary device”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is

expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 12-1:29 REMOVAL OF A CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON

The elements of the crime of removal of a chemical, biological, or radiological weapon are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. removed or caused to be removed, or carried away,
4. a chemical, biological, or radiological weapon,
5. from the premises where the chemical, biological, or radiological weapon was kept by the lawful user, vendor, transporter, or manufacturers thereof,
6. without the consent or direction of the lawful possessor.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removal of a chemical, biological, or radiological weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removal of a chemical, biological, or radiological weapon.

### COMMENT

1. See § 18-12-109(5.5), C.R.S. 2020.

2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

## 12-1:30 POSSESSION OF EXPLOSIVE OR INCENDIARY PARTS

The elements of the crime of possession of explosive or incendiary parts are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed any explosive or incendiary parts.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of explosive or incendiary parts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of explosive or incendiary parts.

### COMMENT

1. *See* § 18-12-109(6), C.R.S. 2020.
2. *See* Instruction F:135 (defining “explosive or incendiary parts”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 12-1:31 POSSESSION OF CHEMICAL, BIOLOGICAL, OR RADIOLOGICAL WEAPON PARTS

The elements of the crime of possession of chemical, biological, or radiological weapon parts are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed any chemical, biological, or radiological weapon parts.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of chemical, biological, or radiological weapon parts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of chemical, biological, or radiological weapon parts.

### COMMENT

1. See § 18-12-109(7), C.R.S. 2020.
2. See Instruction F:281 (defining "possession"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

## 12-1:32 FALSE, FACSIMILE, OR HOAX DEVICE OR WEAPON

The elements of the crime of false, facsimile, or hoax device or weapon are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. manufactured, possessed, gave, mailed, sent, or caused to be sent,
4. any false, facsimile or hoax [explosive or incendiary device] [chemical, biological, or radiological weapon],
5. to another person.]
- [3. placed any false, facsimile or hoax [explosive or incendiary device] [chemical, biological, or radiological weapon],
4. in or upon any real or personal property.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false, facsimile, or hoax device or weapon.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false, facsimile, or hoax device or weapon.

### COMMENT

1. See § 18-12-109(7), C.R.S. 2020.

2. See Instruction F:134 (defining “explosive or incendiary device”); Instruction F:281 (defining “possession”).
3. The terms “chemical, biological, or radiological weapon” are not defined by statute.

## **12-1:33 UNLAWFULLY DISPENSING, DISTRIBUTING, OR SELLING AN EXPLOSIVE OR INCENDIARY DEVICES**

The elements of the crime unlawfully dispensing, distributing, or selling explosive or incendiary devices are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. [possessed a valid [insert description of permit issued under the provisions of article 7 of title 9, C.R.S.] [was an employee of a person who possessed a valid [insert description of permit issued under the provisions of article 7 of title 9, C.R.S.], and was acting within the scope of his [her] employment], and
5. dispensed, distributed, or sold,
6. explosive or incendiary devices,
7. to a person who was not authorized to possess or control such an explosive or incendiary device.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully dispensing, distributing, or selling explosive or incendiary devices.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully dispensing, distributing, or selling explosive or incendiary devices.

## COMMENT

1. *See* § 18-12-109(8), C.R.S. 2020.
2. *See* Instruction F:134 (defining “explosive or incendiary device”); Instruction F:281 (defining “possession”).

## **12-1:34 PURCHASING OR OBTAINING A FIREARM FOR A PERSON WHO IS INELIGIBLE**

The elements of the crime of purchasing or obtaining a firearm for a person who is ineligible are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. purchased or otherwise obtained a firearm,
5. on behalf of, or for transfer to, a person whom the transferor knew, or reasonably should have known, was ineligible to possess a firearm pursuant to federal or state law.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of purchasing or obtaining a firearm for a person who is ineligible.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of purchasing or obtaining a firearm for a person who is ineligible.

### COMMENT

1. See § 18-12-111(1), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly").

3. It may be necessary to draft a special instruction to guide the jury's determination of whether the recipient was ineligible to possess a firearm.

## **12-1:35 FAILURE TO DISPLAY SIGNAGE EXPLAINING THAT IT IS UNLAWFUL TO PURCHASE OR OBTAIN A FIREARM FOR A PERSON WHO IS INELIGIBLE**

The elements of the crime of failure to display signage explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a licensed dealer, pursuant to [insert a description of the relevant license issued pursuant to Chapter 44 of 18 U.S.C.; *see* 18 U.S.C. § 921(a)(11)], and,
4. failed to post a sign displaying that a person commits a felony if he [she] knowingly purchases or otherwise obtains a firearm on behalf of, or for transfer to, a person who the transferor knows or reasonably should know is ineligible to possess a firearm pursuant to federal or state law,
5. in a manner that was easily readable, and
6. in an area that was visible to the public at each location from which the defendant sold firearms to the general public.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to display signage explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to display signage

explaining that it is unlawful to purchase or obtain a firearm for a person who is ineligible.

#### COMMENT

1. *See* § 18-12-111(2), C.R.S. 2020.
2. *See* Instruction F:154 (defining “firearm”); Instruction F:195 (defining “knowingly”).

## 12-1:36 TRANSFER OF A FIREARM WITHOUT A BACKGROUND CHECK

The elements of the crime of transfer of a firearm without a background check are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a licensed gun dealer, and
4. before transferring or attempting to transfer possession of a firearm to a transferee,
5. failed to [require that a background check be conducted of the prospective transferee] [obtain approval of the transfer from the federal bureau of alcohol, tobacco, and firearms after a background check had been requested by a licensed gun dealer in accordance with [insert a description of the procedure, from section 24-33.5-424]].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transfer of a firearm without a background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transfer of a firearm without a background check.

### COMMENT

1. See § 18-12-112(1)(a), (9)(a), C.R.S. 2020.

2. See Instruction F:154 (defining “firearm”); Instruction F:196.65 (defining “licensed gun dealer”); Instruction F:375 (defining “transferee”).
3. See Instruction H:67 (affirmative defense of “permissible transfer”).
4. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
5. In 2015, the Committee added Comment 4.
6. In 2018, the Committee added the cross-reference to Instruction F:196.65 in Comment 2 pursuant to a legislative amendment. See Ch. 8, sec. 6, § 18-12-112(1)(a), 2018 Colo. Sess. Laws 145, 153.

**12-1:37 NONCOMPLIANCE BY A LICENSED GUN DEALER  
PERFORMING A BACKGROUND CHECK FOR A  
PROSPECTIVE FIREARM TRANSFEROR WHO IS NOT A  
LICENSED GUN DEALER**

The elements of the crime of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a licensed gun dealer, and
4. obtained a background check on a prospective transferee, for a prospective firearm transferor who was not a licensed gun dealer, and
5. failed to [record the transfer [insert a description of the recording requirement from section 18-12-402] and retain the records [insert a description of the retention requirement from section 18-12-403] in the same manner as when conducting a sale, rental, or exchange at retail] [comply with [insert a description of the relevant state or federal laws, including 18 U.S.C. § 922] as if he [she] were transferring the firearm from his [her] inventory to the prospective transferee].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer.

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of noncompliance by a licensed gun dealer performing a background check for a prospective firearm transferor who is not a licensed gun dealer.

#### COMMENT

1. *See* § 18-12-112(2)(b), (9)(a), C.R.S. 2020.
2. *See* Instruction F:154 (defining “firearm”); Instruction F:196.65 (defining “licensed gun dealer”); Instruction F:375 (defining “transferee”).
3. *See* Instruction H:67 (affirmative defense of “permissible transfer”).
4. For further details on the recording and retention requirements, *see* Instruction 12-4:01 (improper firearms record (failure to keep record)).
5. In 2018, pursuant to a legislative amendment, the Committee modified the statutory citations in the fifth element, added the cross-reference to Instruction F:196.65 in Comment 2, and added Comment 4. *See* Ch. 8, sec. 6, § 18-12-112(2)(b), 2018 Colo. Sess. Laws 145, 153.

## 12-1:38 FAILURE TO PROVIDE RESULTS OF BACKGROUND CHECK

The elements of the crime of failure to provide results of background check are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a licensed gun dealer, and
  4. obtained a background check for a prospective firearm transferor, and
  5. failed to provide the firearm transferor and transferee with a copy of the results of the background check, including the federal bureau of alcohol, tobacco, and firearms' approval or disapproval of the transfer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to provide results of background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to provide results of background check.

### COMMENT

1. See § 18-12-112(2)(c), (9)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of “permissible transfer”).

## 12-1:39 OVERCHARGING FOR A BACKGROUND CHECK

The elements of the crime of overcharging for a background check are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a licensed gun dealer, and
  4. obtained a background check for a prospective firearm transferor, and
  5. charged a fee of more than ten dollars for his [her] services.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of overcharging for a background check.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of overcharging for a background check.

### COMMENT

1. See § 18-12-112(2)(d), (9)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm").
3. The Committee has drafted a model instruction for a violation of section 18-12-112(2)(d) because section 18-12-112(9) states, without limitation, that "[a] person who violates a provision of this section commits a class 1 misdemeanor." However, the Committee acknowledges that

section 18-12-112(4) could be construed as setting the maximum fee without also establishing a substantive offense as an enforcement mechanism.

4. *See* Instruction H:67 (affirmative defense of “permissible transfer”).
5. Section 18-12-112 does not define the term “transferor.”

## **12-1:40 ACCEPTING POSSESSION OF A FIREARM WITHOUT APPROVAL**

The elements of the crime of accepting possession of a firearm without approval are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a prospective firearm transferee, and
4. accepted possession of a firearm, and
5. the prospective firearm transferor had not obtained approval of the transfer from the federal bureau of alcohol, tobacco, and firearms' after a background check had been requested by a licensed gun dealer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of accepting possession of a firearm without approval.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of accepting possession of a firearm without approval.

### **COMMENT**

1. See § 18-12-112(3)(a), (9)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee"); Instruction F:281 (defining "possession").

3. *See* Instruction H:67 (affirmative defense of “permissible transfer”).
4. Section 18-12-112 does not define the term “transferor.”

## 12-1:41 PROVIDING FALSE INFORMATION FOR THE PURPOSE OF ACQUIRING A FIREARM

The elements of the crime of providing false information for the purpose of acquiring a firearm are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a prospective firearm transferee, and
  5. provided false information to a prospective firearm transferor or to a licensed gun dealer,
  6. for the purpose of acquiring a firearm.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing false information for the purpose of acquiring a firearm.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing false information for the purpose of acquiring a firearm.

### COMMENT

1. See § 18-12-112(3)(b), (9)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:195 (defining "knowingly"); Instruction F:375 (defining "transferee").

3. *See* Instruction H:67 (affirmative defense of “permissible transfer”).
4. Section 18-12-112 does not define the term “transferor.”

## 12-1:42 TRANSFER AFTER EXPIRATION OF APPROVAL

The elements of the crime of transfer after expiration of approval are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a prospective firearm transferee or transferor, and
4. completed a transfer of a firearm,
5. more than thirty calendar days after the federal bureau of alcohol, tobacco, and firearms had approved the transfer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transfer after expiration of approval.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transfer after expiration of approval.

### COMMENT

1. See § 18-12-112(4), (9)(a), C.R.S. 2020.
2. See Instruction F:154 (defining "firearm"); Instruction F:375 (defining "transferee").
3. The Committee has drafted a model instruction for a violation of section 18-12-112(4) because section 18-12-112(9) states, without limitation, that "[a] person who violates a provision of this section commits a class 1 misdemeanor." Moreover, it does not appear that a transfer of a firearm

after an approval has expired can be prosecuted under any other provision of section 18-12-112. However, the Committee acknowledges that section 18-12-112(4) could be construed as setting an expiration period without also establishing a substantive offense as an enforcement mechanism.

4. *See* Instruction H:67 (affirmative defense of “permissible transfer”).
5. Section 18-12-112 does not define the term “transferor.”

## CHAPTER 12-3

### OFFENSES RELATING TO LARGE-CAPACITY AMMUNITION MAGAZINES

- [12-3:01](#) UNLAWFUL SALE, TRANSFER, OR POSSESSION OF  
A LARGE-CAPACITY MAGAZINE
- [12-3:02.INT](#) UNLAWFUL SALE, TRANSFER, OR POSSESSION OF  
A LARGE-CAPACITY MAGAZINE –  
INTERROGATORY (POSSESSION DURING  
COMMISSION OF A FELONY OR A CRIME OF  
VIOLENCE)
- [12-3:03](#) MANUFACTURE OF A LARGE-CAPACITY  
MAGAZINE WITHOUT A DATE STAMP OR  
MARKING

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 12-3:01 UNLAWFUL SALE, TRANSFER, OR POSSESSION OF A LARGE-CAPACITY MAGAZINE

The elements of the crime of unlawful sale, transfer, or possession of a large-capacity magazine are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. sold, transferred, or possessed a large-capacity magazine.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale, transfer, or possession of a large-capacity magazine.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale, transfer, or possession of a large-capacity magazine.

### COMMENT

1. *See* § 18-12-302(1)(a), C.R.S. 2020.
2. *See* Instruction F:196.2 (defining “large-capacity magazine”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:67.2 (affirmative defense of “lawful ownership”).
4. Section 18-12-302(3), C.R.S. 2020, presents a variety of exceptions to prosecution (e.g., licensed gun dealers). The Committee, however, has not drafted model affirmative defense instructions.

**12-3:02.INT UNLAWFUL SALE, TRANSFER, OR POSSESSION OF A LARGE-CAPACITY MAGAZINE – INTERROGATORY (POSSESSION DURING COMMISSION OF A FELONY OR A CRIME OF VIOLENCE)**

If you find the defendant not guilty of unlawful sale, transfer, or possession of a large-capacity magazine, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful sale, transfer, or possession of a large-capacity magazine, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the defendant possess the large-capacity magazine during commission of a specified crime? (Answer “Yes” or “No”)

The defendant possessed the large-capacity magazine during the commission of a specified crime only if:

1. the defendant possessed a large-capacity magazine during the commission of [insert name(s) of felony offense(s) or crime(s) of violence], as defined in your instructions.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-12-302(1)(c), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It is not necessary to submit an interrogatory asking the jury to make a finding with regard to the sentence enhancement factor in section 18-12-302(1)(b), C.R.S. 2020 (repeat offender). This is a matter of law for the court to determine.

## 12-3:03 MANUFACTURE OF A LARGE-CAPACITY MAGAZINE WITHOUT A DATE STAMP OR MARKING

The elements of the crime of manufacture of a large-capacity magazine without a date stamp or marking are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. manufactured a large-capacity magazine in Colorado on or after July 1, 2013,
4. without including a permanent stamp or marking, legibly and conspicuously engraved or cast upon the outer surface of the large-capacity magazine, indicating that it was manufactured or assembled after July 1, 2013.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacture of a large-capacity magazine without a date stamp or marking.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacture of a large-capacity magazine without a date stamp or marking.

### COMMENT

1. See § 18-12-303(1), (3), C.R.S. 2020.
2. See Instruction F:196.2 (defining “large-capacity magazine”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly

designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## CHAPTER 12-4

### FIREARMS – DEALERS

- [12-4:01](#) IMPROPER FIREARMS RECORD (FAILURE TO KEEP RECORD)
- [12-4:02](#) IMPROPER FIREARMS RECORD (POLICE OFFICER)
- [12-4:03](#) IMPROPER FIREARMS RECORD (FALSE INFORMATION)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 4, §§ 18-12-401 to -404, 2018 Colo. Sess. Laws 145, 150-51.

## **12-4:01 IMPROPER FIREARMS RECORD (FAILURE TO KEEP RECORD)**

The elements of the crime of improper firearms record (failure to keep record) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in the retail sale, rental, or exchange of firearms, pistols, or revolvers, and
- [4. failed to keep a record of each pistol or revolver sold, rented, or exchanged at retail.]
- [4. at the time of the transaction, failed to make a record of the sale, rental, or exchange in a book kept for that purpose.]
- [4. the defendant's record of the sale, rental, or exchange failed to include one or more of the following pieces of information: the name of the person to whom the pistol or revolver was sold or rented or with whom exchanged; his or her age, occupation, residence, and, if residing in a city, the street and number therein where he or she resided; the make, caliber, and finish of said pistol or revolver, together with its number and serial letter, if any; the date of the sale, rental, or exchange of said pistol or revolver; and the name of the employee or other person making such sale, rental, or exchange.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper firearms record (failure to keep record).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper firearms record (failure to keep record).

#### COMMENT

1. *See* §§ 18-12-402, 18-12-403, C.R.S. 2020.
2. *See* Instruction F:156.5 (defining “firearms” (dealers)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 12-4:02 IMPROPER FIREARMS RECORD (POLICE OFFICER)

The elements of the crime of improper firearms record (police officer) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. engaged in the retail sale, rental, or exchange of firearms, pistols, or revolvers, and
4. refused to exhibit his [her] record book detailing all such sales, rentals, or exchanges to a police officer when requested.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper firearms record (police officer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper firearms record (police officer).

### COMMENT

1. See §§ 18-12-402, 18-12-403, C.R.S. 2020.
2. See Instruction F:156.5 (defining "firearms" (dealers)); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

## 12-4:03 IMPROPER FIREARMS RECORD (FALSE INFORMATION)

The elements of the crime of improper firearms record (false information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a purchaser, lessee, or exchanger of a pistol or revolver, and
4. gave false information,
5. in connection with the making of a record kept by an individual, firm, or corporation engaged, within Colorado, in the retail sale, rental, or exchange of firearms, pistols, or revolvers.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper firearms record (false information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper firearms record (false information).

### COMMENT

1. See §§ 18-12-402, 18-12-403, C.R.S. 2020.
2. See Instruction F:156.5 (defining "firearms" (dealers)); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly

designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. If necessary, draft a supplemental instruction detailing the information that retail firearms dealers must keep in records. *See* Instruction 12-4:01 (improper firearms record (failure to keep record)).

## CHAPTER 12-5

### BACKGROUND CHECKS – GUN SHOWS

<a href="#"><u>12-5:01</u></a>	IMPROPER BACKGROUND CHECK (FAILURE TO CONDUCT)
<a href="#"><u>12-5:02</u></a>	IMPROPER BACKGROUND CHECK (FAILURE TO OBTAIN APPROVAL)
<a href="#"><u>12-5:03</u></a>	IMPROPER BACKGROUND CHECK (PROMOTER'S FAILURE TO ARRANGE)
<a href="#"><u>12-5:04</u></a>	IMPROPER BACKGROUND CHECK (TRANSFER WITHOUT CHECK)
<a href="#"><u>12-5:05</u></a>	FALSE INFORMATION REGARDING GUN RECORD
<a href="#"><u>12-5:06</u></a>	FAILURE TO POST BACKGROUND CHECK NOTICE

### CHAPTER COMMENTS

1. Section 18-12-505, C.R.S. 2020, provides that these offenses do not apply to transfers of antique firearms, *see* Instruction F:19, or transfers of curios or relics, *see* Instruction F:82. However, the Committee has not drafted model affirmative defense instructions.
2. The Committee added this chapter in 2018 pursuant to a legislative reorganization. *See* Ch. 8, sec. 5, §§ 18-12-501 to -508, 2018 Colo. Sess. Laws 145, 151-53.

## 12-5:01 IMPROPER BACKGROUND CHECK (FAILURE TO CONDUCT)

The elements of the crime of improper background check (failure to conduct) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a gun show vendor, and
4. transferred or attempted to transfer a firearm at a gun show, and
5. before such transfer or attempted transfer occurred, he [she] failed to require that a background check, in accordance with the national instant criminal background check system, was conducted of the prospective transferee.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper background check (failure to conduct).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper background check (failure to conduct).

### COMMENT

1. See § 18-12-501(1)(a), (4), C.R.S. 2020.
2. See Instruction F:154.5 (defining "firearm" (background checks – gun shows)); Instruction F:166.2 (defining "gun show"); Instruction F:166.8

(defining “gun show vendor”); Instruction F:375 (defining “transferee”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. If necessary, draft a supplemental instruction detailing the relevant provisions of the national instant criminal background check system. *See* § 24-33.5-424, C.R.S. 2020.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 12-5:02 IMPROPER BACKGROUND CHECK (FAILURE TO OBTAIN APPROVAL)

The elements of the crime of improper background check (failure to obtain approval) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a gun show vendor, and
4. transferred or attempted to transfer a firearm at a gun show, and
5. before such transfer or attempted transfer occurred, he [she] failed to obtain approval of the transfer from the Colorado bureau of investigation after a background check had been requested by a licensed gun dealer, in accordance with the national instant criminal background check system.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper background check (failure to obtain approval).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper background check (failure to obtain approval).

### COMMENT

1. See § 18-12-501(1)(b), (4), C.R.S. 2020.

2. See Instruction F:154.5 (defining “firearm” (background checks – gun shows)); Instruction F:166.2 (defining “gun show”); Instruction F:166.8 (defining “gun show vendor”); Instruction F:196.65 (defining “licensed gun dealer”); Instruction F:375 (defining “transferee”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. If necessary, draft a supplemental instruction detailing the relevant provisions of the national instant criminal background check system. *See* § 24-33.5-424, C.R.S. 2020.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 12-5:03 IMPROPER BACKGROUND CHECK (PROMOTER'S FAILURE TO ARRANGE)

The elements of the crime of improper background check (promoter's failure to arrange) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a gun show promoter, and
  4. failed to arrange for the services of a licensed gun dealer on the premises of the gun show to obtain a background check as required by law.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper background check (promoter's failure to arrange).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper background check (promoter's failure to arrange).

### COMMENT

1. See § 18-12-501(2), (4), C.R.S. 2020.
2. See Instruction F:166.2 (defining "gun show"); Instruction F:166.5 (defining "gun show promoter"); Instruction F:196.65 (defining "licensed gun dealer"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a

culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. If necessary, draft a supplemental instruction detailing the relevant background check requirements. *See* § 24-33.5-424, C.R.S. 2020.

## 12-5:04 IMPROPER BACKGROUND CHECK (TRANSFER WITHOUT CHECK)

The elements of the crime of improper background check (transfer without check) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was any part of a firearm transaction that took place at a gun show,
  4. a firearm was transferred, and
  5. no background check relating to that transfer had been obtained by a licensed gun dealer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper background check (transfer without check).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper background check (transfer without check).

### COMMENT

1. See § 18-12-501(3), (4), C.R.S. 2020.
2. See Instruction F:154.5 (defining "firearm" (background checks – gun shows)); Instruction F:166.2 (defining "gun show"); Instruction F:196.65 (defining "licensed gun dealer"); see also § 18-1-503(2), C.R.S. 2020

(“ Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Unlike subsections (1) and (2) – which apply to gun show vendors and gun show promoters, respectively – subsection (3) of section 18-12-501 does not specify a class of individuals. Instead, it simply provides that “[i]f any part of a firearm transaction takes place at a gun show, no firearm shall be transferred unless a background check has been obtained by a licensed gun dealer.” The Committee takes no position on whether the General Assembly intended for subsection (3) to apply to anyone or only to gun show vendors, dealers, or promoters.

4. If necessary, draft a supplemental instruction detailing the relevant background check requirements. *See* § 24-33.5-424, C.R.S. 2020.

## 12-5:05 FALSE INFORMATION REGARDING GUN RECORD

The elements of the crime of false information regarding gun record are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. gave false information,
4. in connection with the making of a record kept by a licensed gun dealer who obtained a background check on a prospective transferee and recorded the transfer as required by law.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false information regarding gun record.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false information regarding gun record.

### COMMENT

1. See § 18-12-502(1), (2), C.R.S. 2020.
2. See Instruction F:196.65 (defining "licensed gun dealer"); Instruction F:375 (defining "transferee"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. If necessary, draft a supplemental instruction detailing the information that must be kept in records. *See* § 18-12-402, C.R.S. 2020; Instruction 12-4:01 (improper firearms record (failure to keep record)).

## 12-5:06 FAILURE TO POST BACKGROUND CHECK NOTICE

The elements of the crime of failure to post background check notice are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a gun show promoter, and
4. failed to post prominently a notice, in a form prescribed by the executive director of the department of public safety or his or her designee,
5. setting forth the requirement for a background check as provided by law.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to post background check notice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to post background check notice.

### COMMENT

1. *See* § 18-12-504(1), (2), C.R.S. 2020.
2. *See* Instruction F:166.5 (defining “gun show promoter”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## CHAPTER 13

### MISCELLANEOUS OFFENSES

<a href="#"><u>13:01</u></a>	ABUSE OF A CORPSE (REMOVAL)
<a href="#"><u>13:02</u></a>	ABUSE OF A CORPSE (TREATMENT)
<a href="#"><u>13:03</u></a>	FIGHTING BY AGREEMENT
<a href="#"><u>13:04</u></a>	DUELING
<a href="#"><u>13:05</u></a>	DISCARDING OR ABANDONING AN ARTICLE WITH A COMPARTMENT
<a href="#"><u>13:06</u></a>	INTERFERENCE WITH PERSONS WITH DISABILITIES (FALSE IMPERSONATION)
<a href="#"><u>13:07</u></a>	INTERFERENCE WITH PERSONS WITH DISABILITIES (DENIAL OF RIGHT OR PRIVILEGE)
<a href="#"><u>13:07.3</u></a>	INTENTIONAL MISREPRESENTATION OF ENTITLEMENT TO AN ASSISTANCE ANIMAL
<a href="#"><u>13:07.7</u></a>	INTENTIONAL MISREPRESENTATION OF A SERVICE ANIMAL
<a href="#"><u>13:08</u></a>	REMOVAL OF TIMBER FROM STATE LANDS
<a href="#"><u>13:09</u></a>	FIRING WOODS OR PRAIRIE
<a href="#"><u>13:10</u></a>	FIRING WOODS OR PRAIRIE (KNOWING VIOLATION)
<a href="#"><u>13:11</u></a>	INTENTIONALLY SETTING WILDFIRE
<a href="#"><u>13:12</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (BOOK OR REGISTER)
<a href="#"><u>13:13</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (PEACE OFFICER)
<a href="#"><u>13:14</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (FALSE INFORMATION)
<a href="#"><u>13:15</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (SCRAP THEFT ALERT SYSTEM)
<a href="#"><u>13:16</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (METHOD OF PAYMENT)
<a href="#"><u>13:17</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (RECORD RETENTION)

<a href="#"><u>13:18.SP</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS – SPECIAL INSTRUCTION
<a href="#"><u>13:19.INT</u></a>	UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS – INTERROGATORY (VALUE)
<a href="#"><u>13:20</u></a>	HAZARDOUS WASTE VIOLATIONS (ABANDONING A VEHICLE)
<a href="#"><u>13:21.SP</u></a>	HAZARDOUS WASTE VIOLATIONS – SPECIAL INSTRUCTION (INDICIA OF INTENT TO ABANDON A VEHICLE)
<a href="#"><u>13:22</u></a>	HAZARDOUS WASTE VIOLATIONS (INTENTIONALLY SPILLING)
<a href="#"><u>13:23</u></a>	UNLAWFUL SALE OF METAL BEVERAGE CONTAINER WITH DETACHABLE OPENING DEVICE
<a href="#"><u>13:24</u></a>	UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (RECORDS)
<a href="#"><u>13:25</u></a>	UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (FALSE INFORMATION)
<a href="#"><u>13:26</u></a>	UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (FLEA MARKETS AND SIMILAR FACILITIES)
<a href="#"><u>13:27</u></a>	SALE WITHOUT PROOF OF OWNERSHIP
<a href="#"><u>13:28</u></a>	FAILURE TO MAKE PROOF OF OWNERSHIP AVAILABLE
<a href="#"><u>13:29</u></a>	FAILURE TO POST NOTICE
<a href="#"><u>13:30</u></a>	FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (UNLICENSED)
<a href="#"><u>13:31</u></a>	FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (FAILURE TO COLLECT AND REMIT)
<a href="#"><u>13:32</u></a>	FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (OPERATOR OF A FLEA MARKET OR SIMILAR FACILITY)
<a href="#"><u>13:33</u></a>	FAILURE TO COMPLY WITH SALES RECORD REQUIREMENTS
<a href="#"><u>13:33.4</u></a>	FAILURE TO RECORD CREDIT PURCHASE

- [13:33.5.SP](#) FAILURE TO RECORD CREDIT PURCHASE – SPECIAL INSTRUCTION (REGISTER REQUIREMENTS)
- [13:33.6.INT](#) FAILURE TO RECORD CREDIT PURCHASE – INTERROGATORY (VALUE)
- [13:34](#) ABUSE OF HEALTH INSURANCE (FULL PAYMENT BY THIRD-PARTY PAYOR)
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- [13:45](#) ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL BY AN UNDERAGE PERSON
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- [13:48.SP](#) ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL OR MARIJUANA, OR ILLEGAL POSSESSION OF MARIJUANA PARAPHERNALIA,

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<a href="#"><u>13:49</u></a>	UNLAWFUL ADMINISTRATION OF GAMMA HYDROXYBUTYRATE (GHB) OR KETAMINE
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<a href="#"><u>13:56</u></a>	SMUGGLING OF HUMANS
<a href="#"><u>13:57</u></a>	PROHIBITED BAIL BOND ACTIVITIES (SELECTION OF AN ATTORNEY)
<a href="#"><u>13:58</u></a>	PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO A PROHIBITED PERSON)
<a href="#"><u>13:59</u></a>	PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO AN ATTORNEY)
<a href="#"><u>13:60</u></a>	PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO PERSON ON BOND)
<a href="#"><u>13:61</u></a>	PROHIBITED BAIL BOND ACTIVITIES (ACCEPTING ANYTHING OF VALUE)
<a href="#"><u>13:62</u></a>	PROHIBITED BAIL BOND ACTIVITIES (INDUCE TO COMMIT CRIME)
<a href="#"><u>13:63</u></a>	PROHIBITED BAIL BOND ACTIVITIES (POSTING BOND WHILE RESTRICTED)
<a href="#"><u>13:64</u></a>	PROHIBITED BAIL BOND ACTIVITIES (FAILURE TO RETURN)
<a href="#"><u>13:65</u></a>	PROHIBITED BAIL BOND ACTIVITIES (ACCEPTING ANYTHING OF VALUE AS INDEMNITOR)
<a href="#"><u>13:66</u></a>	PROHIBITED BAIL BOND ACTIVITIES (BLANK BAIL BONDS)

[13:67](#)

**PROHIBITED BAIL BOND ACTIVITIES (MULTIPLE BONDS)**

[13:68](#)

**PROHIBITED BAIL BOND ACTIVITIES (NO RECEIPT)**

[13:69+](#)

**MISUSE OF GAMETES**

## **CHAPTER COMMENTS**

1. The Committee added this chapter in 2016.

### **13:01 ABUSE OF A CORPSE (REMOVAL)**

The elements of the crime of abuse of a corpse (removal) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without statutory or court-ordered authority,
4. removed the body or remains of any person from a grave or other place of sepulcher,
5. without the consent of the person who had the right to dispose of the remains.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of a corpse (removal).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of a corpse (removal).

#### COMMENT

1. *See* § 18-13-101(1)(a), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The term “sepulcher” is not defined by statute. *See, e.g., Webster's Third New International Dictionary* 2071 (2002) (defining “sepulcher” as “a place for the interment of a dead body”).

4. If necessary, draft a supplemental instruction(s) to guide the jury's determination of: (1) whether the defendant had “statutory or court-ordered authority”; and/or (2) the identity of the person(s) who had authority to dispose of the remains pursuant to section 15-19-106, C.R.S. 2020.

5. + Section 18-13-101(3)(a) provides that a defendant may not be convicted of both this crime and tampering with a deceased human body, *see* Instruction 8-6:11.5, “if the act arises out of a single incident.” Subsection (3)(b) provides that, if a defendant is charged with both crimes, the court should proceed pursuant to section 18-1-408, C.R.S. (prosecution of multiple counts for same act).

6. + In 2020, the Committee added Comment 5 pursuant to new legislation. *See* Ch. 100, sec. 2, § 18-13-101(3), 2020 Colo. Sess. Laws 387, 388.

## 13:02 ABUSE OF A CORPSE (TREATMENT)

The elements of the crime of abuse of a corpse (treatment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without statutory or court-ordered authority,
4. treated the body or remains of any person in a way that would outrage normal family sensibilities.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of a corpse (treatment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of a corpse (treatment).

### COMMENT

1. *See* § 18-13-101(1)(b), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, draft a supplemental instruction to guide the jury's determination of whether the defendant had “statutory or court-ordered authority.”

4. + Section 18-13-101(3)(a) provides that a defendant may not be convicted of both this crime and tampering with a deceased human body, *see* Instruction 8-6:11.5, “if the act arises out of a single incident.” Subsection (3)(b) provides that, if a defendant is charged with both crimes, the court should proceed pursuant to section 18-1-408, C.R.S. (prosecution of multiple counts for same act).

5. + In 2020, the Committee added Comment 4 pursuant to new legislation. *See* Ch. 100, sec. 2, § 18-13-101(3), 2020 Colo. Sess. Laws 387, 388.

## 13:03 FIGHTING BY AGREEMENT

The elements of the crime of fighting by agreement are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. fought one or more persons by agreement in a public place,
4. and the fight did not take place in a sporting event authorized by law.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fighting by agreement.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fighting by agreement.

### COMMENT

1. *See* § 18-13-104(1), C.R.S. 2020.
2. *See* Instruction F:303 (defining “public place”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, draft a supplemental instruction to guide the jury's determination of whether there was a “sporting event authorized by law” (e.g., a sanctioned boxing match).

## 13:04 DUELING

The elements of the crime of dueling are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. by agreement with another person,
  4. engaged in a fight with deadly weapons,
  5. whether in a public or private place.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dueling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dueling.

### COMMENT

1. *See* § 18-13-104(2), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:303 (defining “public place”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-13-104(2). The Committee notes, however, that this “public or private place” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that – unlike with the crime of fighting by agreement, *see* Instruction 13:03 – the act of fighting by agreement with deadly weapons *in private* is not a defense to dueling.

## 13:05 DISCARDING OR ABANDONING AN ARTICLE WITH A COMPARTMENT

The elements of the crime of discarding or abandoning an article with a compartment are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. abandoned or discarded, in any public or private place accessible to children,
4. a chest, closet, piece of furniture, refrigerator, icebox, motor vehicle, or other article, having a compartment of a capacity of one and one-half cubic feet or more and having a door or lid which when closed cannot be opened easily from the inside.]
- [3. was an owner, lessee, or manager of any public or private place accessible to children, and
4. knowingly,
5. permitted an abandoned or discarded chest, closet, piece of furniture, refrigerator, icebox, motor vehicle, or other article, having a compartment of a capacity of one and one-half cubic feet or more and having a door or lid which when closed cannot be opened easily from the inside, to remain in such condition.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of discarding or abandoning an article with a compartment.

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of discarding or abandoning an article with a compartment.

#### COMMENT

1. *See* § 18-13-106, C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:303 (defining “public place”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:06 INTERFERENCE WITH PERSONS WITH DISABILITIES (FALSE IMPERSONATION)

The elements of the crime of interference with persons with disabilities (false impersonation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. falsely impersonated an individual who [insert a description of the relevant disability, as defined in section 24-34-301(5.6), which incorporates the definition from “the federal ‘Americans with Disabilities Act of 1990,’ 42 U.S.C. sec. 12131, and its related amendments and implementing regulations”].
- [4. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with persons with disabilities (false impersonation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with persons with disabilities (false impersonation).

### COMMENT

1. *See* § 18-13-107(1), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or

with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **13:07 INTERFERENCE WITH PERSONS WITH DISABILITIES (DENIAL OF RIGHT OR PRIVILEGE)**

The elements of the crime of interference with persons with disabilities (denial of right or privilege) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. denied an individual who [insert a description of the relevant disability, as defined in section 24-34-301(5.6), which incorporates the definition from “the federal ‘Americans with Disabilities Act of 1990,’ 42 U.S.C. sec. 12131, and its related amendments and implementing regulations”],
5. the right or privilege to [insert right or privilege protected in section 24-34-502, 24-34-502.2, 24-34-601, 24-34-802(1), or 24-34-803].
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of interference with persons with disabilities (denial of right or privilege).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of interference with persons with disabilities (denial of right or privilege).

## COMMENT

1. *See* § 18-13-107(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).

### 13:07.3 INTENTIONAL MISREPRESENTATION OF ENTITLEMENT TO AN ASSISTANCE ANIMAL

The elements of the crime of intentional misrepresentation of entitlement to an assistance animal are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. misrepresented entitlement to an animal in his [her] possession as an assistance animal,
5. for the purpose of obtaining any of the rights or privileges set forth in state or federal law for an individual with a disability as a reasonable accommodation in housing, and
6. he [she] was previously given a written or verbal warning regarding the fact that it is illegal to intentionally misrepresent entitlement to an assistance animal, and
- [7. he [she] knew that the animal was not an assistance animal with regard to him [her].]
- [7. he [she] knew that he [she] did not have a disability.]
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intentional misrepresentation of entitlement to an assistance animal.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intentional misrepresentation

of entitlement to an assistance animal.

## COMMENT

1. *See* § 18-13-107.3(1), C.R.S. 2020.
2. *See* Instruction F:23.5 (defining “assistance animal”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).
3. Section 18-13-107.3(5)(b) defines “disability” as follows: “‘Disability’ has the same meaning as set forth in the federal ‘Americans with Disabilities Act of 1990’, 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations and includes a handicap as that term is defined in the federal ‘Fair Housing Act’, 42 U.S.C. sec. 3601 et seq., as amended, and 24 CFR 100.201.” Because other statutory definitions of “disability” explicitly decline to incorporate the federal definition, *see* Instruction F:184, the Committee has not defined this term. The court should craft an appropriate definitional instruction that incorporates the relevant language from the federal statutes and regulations.
4. Regarding the fifth element, the court should provide a supplemental instruction defining the relevant privileges set forth in state or federal law. *See* § 18-13-107.3(5)(d) (“‘State and federal law’ includes section 24-34-803, C.R.S., the federal laws specified in [section 18-13-107.3(5)(a)], and rules and regulations implementing those laws.”).
5. The statute provides for an affirmative defense when certain written findings have been made by licensees. *See* § 18-13-107.3(4) (incorporating by reference sections 12-240-144(1)(a), 12-245-229(1)(a), and 12-255-133(1)(a), C.R.S. 2020). However, the Committee has not drafted model affirmative defense instructions.
6. In 2019, the Committee updated the statutory cross-references in Comment 5 to reflect a legislative amendment. *See* Ch. 136, sec. 99, § 18-13-107.3(4), 2019 Colo. Sess. Laws 613, 1677.

## 13:07.7 INTENTIONAL MISREPRESENTATION OF A SERVICE ANIMAL

The elements of the crime of intentional misrepresentation of a service animal are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. intentionally,
  4. misrepresented an animal in his [her] possession as his [her] service animal or service-animal-in-training,
  5. for the purpose of obtaining [list the relevant right(s) or privilege(s) set forth in section 24-34-803, C.R.S., 2016], and
  6. he [she] was previously given a written or verbal warning regarding the fact that it is illegal to intentionally misrepresent a service animal, and
  7. he [she] knew that the animal in question was not a service animal or service-animal-in-training.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intentional misrepresentation of a service animal.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intentional misrepresentation of a service animal.

## COMMENT

1. *See* § 18-13-107.7(1), C.R.S. 2020.
2. *See* Instruction F:23.5 (defining “assistance animal”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:334.5 (defining “service-animal-in-training”).
3. Section 18-13-107.7(4)(c) defines “service animal” as follows: “‘Service animal’ has the same meaning as set forth in the implementing regulations of Title II and Title III of the federal ‘Americans with Disabilities Act of 1990’, 42 U.S.C. sec. 12101 et seq.” This definition differs from that found in Instruction F:334 (cruelty to a service animal). Therefore, rather than providing Instruction F:334, the court should draft a separate definitional instruction that derives from the federal regulations.

## 13:08 REMOVAL OF TIMBER FROM STATE LANDS

The elements of the crime of removal of timber from state lands are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. cut or removed any timber from any state land,
4. without lawful authority.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of removal of timber from state lands.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of removal of timber from state lands.

### COMMENT

1. *See* § 18-13-108, C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, draft a supplemental instruction to guide the jury's determination of whether the defendant had “lawful authority.”

## 13:09 FIRING WOODS OR PRAIRIE

The elements of the crime of firing woods or prairie are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly, recklessly, or with criminal negligence,
- [4. without lawful authority,
5. set on fire, or caused to be set on fire, any woods, prairie, or grounds of any description,
6. other than his [her] own.]
- [4. permitted a fire,
5. set or caused to be set by the defendant,
6. to pass from the defendant's own grounds to the injury of any other person.]
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of firing woods or prairie.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of firing woods or prairie.

### COMMENT

1. See § 18-13-109(1)(a), C.R.S. 2020.

2. See Instruction F:79 (defining “criminal negligence”); Instruction F:195 (defining “knowingly”); Instruction F:308 (defining “recklessly”).
3. It is unclear whether the phrase “to the injury of any other person” encompasses property damage.

### 13:10 FIRING WOODS OR PRAIRIE (KNOWING VIOLATION)

The elements of the crime of firing woods or prairie (knowing violation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. without lawful authority,
5. set on fire, or caused to be set on fire, any woods, prairie, or grounds of any description,
6. any woods, prairie, or grounds of any description,
7. other than his [her] own, and]
- [4. permitted a fire,
5. set or caused to be set by a person without lawful authority,
6. to pass from the defendant's own grounds to the injury of any other person, and]
- \_. knew or reasonably should have known that he [she] was violating [insert description of the applicable order, rule, or regulation lawfully issued by a governmental authority that prohibits, bans, restricts, or otherwise regulates fires during periods of extreme fire hazard and that is designed to promote the safety of persons and property].
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of firing woods or prairie (knowing violation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of firing woods or prairie (knowing violation).

#### COMMENT

1. *See* § 18-13-109(2)(a), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).
3. It is unclear whether the phrase “to the injury of any other person” encompasses property damage.
4. The statute includes four exemptions from criminal liability for lawful burning activities. *See* § 18-13-109(2)(b), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:11 INTENTIONALLY SETTING WILDFIRE

The elements of the crime of intentionally setting wildfire are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
- [4. without lawful authority,
5. set on fire, or caused to be set on fire, any woods, prairie, or grounds of any description,
6. other than his [her] own, and]
- [4. permitted a fire,
5. set or caused to be set by the defendant,
6. to pass from the defendant's own grounds to the grounds of another, and]
7. by so doing, placed another in danger of death or serious bodily injury or placed any building or occupied structure of another in danger of damage.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of intentionally setting wildfire.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of intentionally setting wildfire.

## COMMENT

1. *See* § 18-13-109.5(1), C.R.S. 2020.
2. *See* Instruction F:40 (defining “building”); Instruction F:185 (defining “intentionally”); Instruction F:248 (defining “occupied structure”); Instruction F:332 (defining “serious bodily injury”).

## 13:12 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (BOOK OR REGISTER)

The elements of the crime of unlawful purchase or sale of commodity metals (book or register) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle, or a collector of or dealer in junk, salvage, or other secondhand property, and
- [4. failed to keep a book or register detailing all transactions involving commodity metals.]
- [4. the defendant's book or register involving commodity metals did not include [insert a description of the relevant requirement(s) from section 18-13-111(1)(b)-(d)].]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (book or register).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful purchase or sale of commodity metals (book or register).

### COMMENT

1. See § 18-13-111(1)(a)-(d), (5), C.R.S. 2020.

2. See Instruction F:38.3 (defining “book or register”); Instruction F:57.8 (defining “commodity metal”); Instruction F:88.5 (defining “dealer”); Instruction F:263 (defining “peace officer” (sale of secondhand property)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes several exemptions from criminal liability. *See* § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:13 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (PEACE OFFICER)

The elements of the crime of unlawful purchase or sale of commodity metals (peace officer) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle, or a collector of or dealer in junk, salvage, or other secondhand property, and
  4. failed to make a book or register detailing all transactions involving commodity metals available to any peace officer for inspection at any reasonable time.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (peace officer).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful purchase or sale of commodity metals (peace officer).

### COMMENT

1. See § 18-13-111(1)(e), (5), C.R.S. 2020.
2. See Instruction F:38.3 (defining "book or register"); Instruction F:57.8 (defining "commodity metal"); Instruction F:88.5 (defining "dealer");

Instruction F:263 (defining “peace officer” (sale of secondhand property)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes several exemptions from criminal liability. *See* § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:14 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (FALSE INFORMATION)

The elements of the crime of unlawful purchase or sale of commodity metals (false information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. gave false information with respect to [insert a description of the relevant information that is required to be maintained in a book or register by section 18-13-111(1)(b)-(d)].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (false information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful purchase or sale of commodity metals (false information).

### COMMENT

1. See § 18-13-111(1), (5), C.R.S. 2020.
2. See Instruction F:38.3 (defining “book or register”); Instruction F:57.8 (defining “commodity metal”); Instruction F:195 (defining “knowingly”).

3. The statute includes several exemptions from criminal liability. *See* § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## **13:15 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (SCRAP THEFT ALERT SYSTEM)**

The elements of the crime of unlawful purchase or sale of commodity metals (scrap theft alert system) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a purchaser of commodity metals, and
- [4. failed to sign up with the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, to receive alerts regarding thefts of commodity metals in his [her] geographic area.]
- [4. failed to download and maintain the scrap metal theft alerts generated by the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated.]
- [4. failed to use the alerts generated by the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, to identify potentially stolen commodity metals.]
- [4. failed to train his [her] employees to use the alerts generated by the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated, during his [her] daily operations.]
- [4. failed to maintain for ninety days copies of any theft alerts received and downloaded pursuant to the scrap theft alert system maintained by the institute of scrap recycling industries, incorporated.]
- [4. failed to maintain documentation that he [she] educates employees about, and provides to employees, scrap theft alerts.]

- [5. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (scrap theft alert system).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful purchase or sale of commodity metals (scrap theft alert system).

#### COMMENT

1. See § 18-13-111(1.3), (5), C.R.S. 2020.
2. See Instruction F:57.8 (defining “commodity metal”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If the “institute of scrap recycling industries” has been replaced by a successor organization, the court should substitute the name of that organization in its place in the fourth element. See § 18-13-111(1.3)(a)(I), C.R.S. 2020.
4. The statute includes several exemptions from criminal liability. See § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:16 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (METHOD OF PAYMENT)

The elements of the crime of unlawful purchase or sale of commodity metals (method of payment) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle, or a collector of or dealer in junk, salvage, or other secondhand property, and
  4. paid the seller of [a] commodity metal[s] more than three hundred dollars, and
  5. did not pay the seller by check or by any process in which a picture of the seller was taken when the money was paid.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (method of payment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful purchase or sale of commodity metals (method of payment).

### COMMENT

1. See § 18-13-111(1.5), (5), C.R.S. 2020.

2. See Instruction F:57.8 (defining “commodity metal”); Instruction F:88.5 (defining “dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes several exemptions from criminal liability. *See* § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:17 UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS (RECORD RETENTION)

The elements of the crime of unlawful purchase or sale of commodity metals (record retention) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, keeper, or proprietor of a junk shop, junk store, salvage yard, or junk cart or other vehicle, or a collector of or dealer in junk, salvage, or other secondhand property, and
- [4. failed to make a digital photographic record, video record, or other record that identifies the seller and the commodity metal that the seller was selling.]
- [4. made a digital photographic record, video record, or other record that identifies the seller and the commodity metal that the seller was selling, but failed to retain it for one hundred eighty days.]
- [4. made a digital photographic record, video record, or other record that identifies the seller and the commodity metal that the seller was selling; was an owner; and did not permit a law enforcement officer to make inspections of the record.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful purchase or sale of commodity metals (record retention).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of unlawful purchase or sale of commodity metals (record retention).

#### COMMENT

1. *See* § 18-13-111(2), (5), C.R.S. 2020.
2. *See* Instruction F:57.8 (defining “commodity metal”); Instruction F:88.5 (defining “dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The statute includes several exemptions from criminal liability. *See* § 18-13-111(3), (4), (7), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 13:18.SP UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS – SPECIAL INSTRUCTION

Evidence that metal purchased by a dealer for the purpose of recycling had a value of fifty cents per pound or greater for purposes of recycling gives rise to a permissible inference that the metal was a commodity metal.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is warranted by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. *See* § 18-13-111(6), C.R.S. 2020.
2. *See* Instruction F:57.8 (defining “commodity metal”).
3. Although the statute speaks in terms of a rebuttable presumption, the concept should be explained as a permissible inference. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

### **13:19.INT UNLAWFUL PURCHASE OR SALE OF COMMODITY METALS – INTERROGATORY (VALUE)**

If you find the defendant not guilty of unlawful purchase or sale of commodity metals, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful purchase or sale of commodity metals, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the value of the commodity metal involved five hundred dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the value of the commodity metal involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-13-111(5), C.R.S. 2020.

## 13:20 HAZARDOUS WASTE VIOLATIONS (ABANDONING A VEHICLE)

The elements of the crime of hazardous waste violation (abandoning a vehicle) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. abandoned a vehicle containing hazardous waste,
4. upon a street, highway, right-of-way, or any other public property or upon any private property without the express consent of the owner or person in lawful charge of that private property.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hazardous waste violation (abandoning a vehicle).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hazardous waste violation (abandoning a vehicle).

### COMMENT

1. *See* § 18-13-112(1), C.R.S. 2020.
2. *See* Instruction F:03.3 (defining “abandon” (hazardous waste violations)); Instruction F:167.5 (defining “hazardous waste”); Instruction F:385.7 (defining “vehicle” (hazardous waste violations)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly

designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **13:21.SP HAZARDOUS WASTE VIOLATIONS – SPECIAL INSTRUCTION (INDICIA OF INTENT TO ABANDON A VEHICLE)**

Evidence of the following gives rise to a permissible inference of an intention not to retain possession of, or assert ownership or control over, a vehicle:

The vehicle had been left for more than three days unattended and unmoved; or license plates or other identifying marks had been removed from the vehicle; or the vehicle had been damaged or was deteriorated so extensively that it had value only for junk or salvage; or the owner had been notified by a law enforcement agency to remove the vehicle and it had not been removed within twenty-four hours after notification.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. *See* § 18-13-112(2)(a)(II), C.R.S. 2020.
2. This instruction should be used in conjunction with Instruction F:03.3 (defining “abandon” (hazardous waste materials)).

## **13:22 HAZARDOUS WASTE VIOLATIONS (INTENTIONALLY SPILLING)**

The elements of the crime of hazardous waste violation (intentionally spilling) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. spilled hazardous waste upon a street, highway, right-of-way, or any other public property or upon any private property,
5. without the express consent of the owner or person in lawful charge of that private property.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of hazardous waste violation (intentionally spilling).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of hazardous waste violation (intentionally spilling).

### COMMENT

1. See § 18-13-112(1), C.R.S. 2020.
2. See Instruction F:167.5 (defining "hazardous waste"); Instruction F:185 (defining "intentionally").

## 13:23 UNLAWFUL SALE OF METAL BEVERAGE CONTAINER WITH DETACHABLE OPENING DEVICE

The elements of the crime of unlawful sale of a metal beverage container with a detachable opening device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. sold or offered for sale at retail within Colorado,
4. any metal beverage container with a detachable opening device designed to detach from the beverage container when a user opens the beverage container in a manner reasonably calculated to gain access to its contents.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale of a metal beverage container with a detachable opening device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale of a metal beverage container with a detachable opening device.

### COMMENT

1. *See* § 18-13-113(2), C.R.S. 2020.
2. *See* Instruction F:31.5 (defining "beverage"); Instruction F:31.8 (defining "beverage container"); Instruction F:392.5 (defining "within Colorado"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable

mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute includes an exemption from criminal liability for “metal beverage containers with opening devices consisting of sensitized adhesive tape.” *See* § 18-13-113(3), C.R.S. 2020. However, the Committee has not drafted a model affirmative defense instruction.

## 13:24 UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (RECORDS)

The elements of the crime of unlawful sale or trade of secondhand property (records) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a secondhand dealer, and
- [4. failed to make a record containing all required information, as defined in these instructions,
5. of each sale or trade of secondhand property made by him [her], his [her] agent, or any person acting on his [her] behalf,
6. which sale or trade equaled or exceeded thirty dollars in value for each item.]
- [4. failed to make available to a peace officer for inspection at a reasonable time,
5. a record containing all required information, as defined in these instructions.]
- [4. failed to mail or deliver a record containing all required information, as defined in these instructions,
- [5. of a sale or trade of secondhand property made by him [her], his [her] agent, or any person acting on his [her] behalf,
6. which sale or trade equaled or exceeded thirty dollars in value for each item,
7. to a local law enforcement agency within three days of the date of such sale or trade.]

4. failed to keep a copy of a record containing all required information, as defined in these instructions,
  5. of a sale or trade of secondhand property made by him [her], his [her] agent, or any person acting on his [her] behalf,
  6. which sale or trade equaled or exceeded thirty dollars in value for each item,
  7. for at least one year after the date of the sale or trade.]
- [. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale or trade of secondhand property (records).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale or trade of secondhand property (records).

#### COMMENT

1. *See* § 18-13-114(1), (6)(a), C.R.S. 2020.
2. *See* Instruction F:199.8 (defining “local law enforcement agency” (sale of secondhand property)); Instruction F:265.3 (defining “peace officer” (sale of secondhand property)); Instruction F:329.2 (defining “secondhand dealer”); Instruction F:329.3 (defining “secondhand property”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Draft a special instruction explaining what information the defendant (or his or her agent) was required to record pursuant to section 18-13-114(2), C.R.S. 2020.

## 13:25 UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (FALSE INFORMATION)

The elements of the crime of unlawful sale or trade of secondhand property (false information) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a buyer or person who traded with a secondhand dealer, or was a secondhand dealer, and
4. knowingly,
5. gave false information with respect to [insert description of the information that is required by section 18-13-114(2) that the defendant is alleged to have falsified].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale or trade of secondhand property (false information).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale or trade of secondhand property (false information).

### COMMENT

1. See § 18-13-114(2), (6)(b), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:329.2 (defining “secondhand dealer”).

## **13:26 UNLAWFUL SALE OR TRADE OF SECONDHAND PROPERTY (FLEA MARKETS AND SIMILAR FACILITIES)**

The elements of the crime of unlawful sale or trade of secondhand property (flea markets and similar facilities) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an operator of a flea market or similar facility in which secondhand property was offered for sale or trade, and
4. failed to inform a secondhand dealer of [insert a description of the relevant requirement from section 18-13-114], or failed to provide a secondhand dealer with the forms for recording [insert a description of the information required by section 18-13-114(2)].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful sale or trade of secondhand property (flea markets and similar facilities).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful sale or trade of secondhand property (flea markets and similar facilities).

### COMMENT

1. See § 18-13-114(8) C.R.S. 2020.

2. See Instruction F:329.2 (defining “secondhand dealer”); Instruction F:329.3 (defining “secondhand property”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:27 SALE WITHOUT PROOF OF OWNERSHIP

The elements of the crime of sale without proof of ownership are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a secondhand dealer or a dealer and retailer of new goods who sold goods at a flea market or similar facility, and
  4. sold or offered for sale,
  5. [baby food of a type usually consumed by children under three years of age] [cosmetics] [devices] [drugs] [infant formula] [batteries] [razor blades],
  6. without proof of ownership.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sale without proof of ownership.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sale without proof of ownership.

### COMMENT

1. See § 18-13-114.5(1), C.R.S. 2020.
2. See Instruction F:75.8 (defining "cosmetic"); Instruction F:98.5 (defining "device"); Instruction F:111.5 (defining "drug" (sale without proof of ownership)); Instruction F:181.3 (defining "infant formula");

Instruction F:287.8 (defining “proof of ownership”); Instruction F:329.2 (defining “secondhand dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:28 FAILURE TO MAKE PROOF OF OWNERSHIP AVAILABLE

The elements of the crime of failure to make proof of ownership available are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a secondhand dealer or a dealer and retailer of new goods who sold goods at a flea market or similar facility, and
  4. sold or offered for sale,
  5. [baby food of a type usually consumed by children under three years of age] [cosmetics] [devices] [drugs] [infant formula] [batteries] [razor blades], and
  6. failed to make proof of ownership available to any peace officer for inspection at any reasonable time.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to make proof of ownership available.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to make proof of ownership available.

### COMMENT

1. See § 18-13-114.5(1), (2), C.R.S. 2020.

2. See Instruction F:75.8 (defining “cosmetic”); Instruction F:98.5 (defining “device”); Instruction F:111.5 (defining “drug” (sale without proof of ownership)); Instruction F:181.3 (defining “infant formula”); Instruction F:265.3 (defining “peace officer” (sale of secondhand property)); Instruction F:287.8 (defining “proof of ownership”); Instruction F:329.2 (defining “secondhand dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:29 FAILURE TO POST NOTICE

The elements of the crime of failure to post notice are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. was a secondhand dealer, and
4. failed to conspicuously post a notice in a place clearly visible to all buyers and traders,
5. which set forth the following information: [insert statement of information required by section 18-13-115(1)].]
- [3. was an operator of a flea market or similar facility, and
4. failed to post notice containing the following information: [insert statement of information required by section 18-13-115(1)],
5. in such a manner as to be obvious to all persons who entered the flea market or similar facility.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to post notice.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to post notice.

## COMMENT

1. *See* § 18-13-115(1), (3), C.R.S. 2020.
2. *See* Instruction F:329.2 (defining “secondhand dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

### **13:30 FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (UNLICENSED)**

The elements of the crime of failure to comply with sales tax license requirements (unlicensed) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a secondhand dealer,
4. not operating at a flea market or similar facility, and
5. failed to obtain a sales tax license for [insert a description of the applicable provision(s) from section 39-26-103].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to comply with sales tax license requirements (unlicensed).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to comply with sales tax license requirements (unlicensed).

#### COMMENT

1. See § 18-13-116(1), C.R.S. 2020.
2. See Instruction F:329.2 (defining "secondhand dealer"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

### **13:31 FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (FAILURE TO COLLECT AND REMIT)**

The elements of the crime of failure to comply with sales tax license requirements (failure to collect and remit) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a secondhand dealer or other person operating at a flea market or similar facility, and
4. failed to collect sales tax, or collected sales tax but failed to remit the proceeds to the operator of the flea market or similar facility.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to comply with sales tax license requirements (failure to collect and remit).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to comply with sales tax license requirements (failure to collect and remit).

#### COMMENT

1. See § 18-13-116(1), C.R.S. 2020.
2. See Instruction F:329.2 (defining "secondhand dealer"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may

nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

### **13:32 FAILURE TO COMPLY WITH SALES TAX LICENSE REQUIREMENTS (OPERATOR OF A FLEA MARKET OR SIMILAR FACILITY)**

The elements of the crime of failure to comply with sales tax license requirements (operator of a flea market or similar facility) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person operating at a flea market or similar facility, and
4. failed to,
5. obtain a sales tax license which was applicable to all sales occurring at the flea market or similar facility, collect the sales tax from each secondhand dealer operating therein who did not have his [her] own sales tax license, or remit such proceeds as provided by [insert description of relevant statutory provision for remittance of sales taxes].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to comply with sales tax license requirements (operator of a flea market or similar facility).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to comply with sales tax license requirements (operator of a flea market or similar facility).

## COMMENT

1. See § 18-13-116(1), C.R.S. 2020.
2. See Instruction F:329.2 (defining “secondhand dealer”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. For law pertaining to remittance of sales taxes, see sections 39-26-105.3 to -105.5, C.R.S. 2020.

## 13:33 FAILURE TO COMPLY WITH SALES RECORD REQUIREMENTS

The elements of the crime of failure to comply with sales record requirements are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a secondhand dealer, or a dealer of new goods as a retailer who sold such goods at a flea market or similar facility or any nonpermanent location, and
4. failed to,
5. keep and preserve suitable records of sales made by him [her] and such other books or accounts as may be necessary to determine the amount of tax for the collection of which he [she] was liable pursuant to [insert a relevant description from part 1 of article 26 of title 39]; keep and preserve for a period of three years all invoices of goods and merchandise purchased for resale, including a store credit, gift card, or merchandise card; or make available for examination all such books, invoices, or other records at any time by the executive director of the department of revenue, or his [her] duly authorized agent, or any peace officer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to comply with sales record requirements.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to comply with sales

record requirements.

#### COMMENT

1. *See* § 18-13-117(1)(a), C.R.S. 2020.
2. *See* Instruction F:265.3 (defining “peace officer” (sale of secondhand property)); Instruction F:329.2 (defining “secondhand dealer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The court may wish to modify the fifth element depending on the allegations at issue in the case.
4. In 2019, pursuant to a legislative amendment, the Committee added the phrase “including a store credit, gift card, or merchandise card” to the fifth element, and it modified the statutory citation in Comment 1. *See* Ch. 87, sec. 1, § 18-13-117(1)(a), 2019 Colo. Sess. Laws 322, 322.

### 13:33.4 FAILURE TO RECORD CREDIT PURCHASE

The elements of the crime of failure to record credit purchase are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a secondhand dealer, or a dealer of new goods as a retailer who sold such goods at a flea market or similar facility or any nonpermanent location, and
  4. failed to record the purchase of a store credit, gift card, or merchandise card for resale in a lawful register that is accessible to law enforcement.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to record credit purchase.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to record credit purchase.

#### COMMENT

1. See § 18-13-117(1)(b), C.R.S. 2020.
2. See Instruction F:329.2 (defining "secondhand dealer"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

3. If appropriate, the court should draft a supplemental instruction describing the requirements of the lawful register. *See* Instruction 13:33.5.SP; *see also* § 18-16-105, C.R.S. 2020; Instruction 16:03 (failure to maintain a register (requirements)).
4. The terms store credit, gift card, and merchandise card are not defined by statute.
5. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 87, sec. 1, § 18-13-117(1)(b), 2019 Colo. Sess. Laws 322, 322.

### **13:33.5.SP FAILURE TO RECORD CREDIT PURCHASE – SPECIAL INSTRUCTION (REGISTER REQUIREMENTS)**

One of the elements of the crime of failure to record credit purchase is that the defendant failed to record the purchase of a store credit, gift card, or merchandise card for resale in a lawful register that is accessible to law enforcement.

In order to qualify as lawful, the register must have been kept in a permanent, well-bound book, and it must have included the following information for each purchase: the signature of the seller; the name, address, and date of birth of the seller and his [her] driver's license number or other I.D. number from [insert other allowed form of identification pursuant to section 18-16-103, C.R.S. 2020]; the date, time, and place of the purchase; and an accurate and detailed account and description of each valuable article being purchased, including any trademark, identification number, serial number, model number, brand name, or other identifying marks on such articles and a description by weight and design of such articles.

#### COMMENT

1. See §§ 18-13-117(1)(b), 18-16-105(1), (2), C.R.S. 2020.
2. See Instruction F:306.7 (defining "purchase"); Instruction F:330.5 (defining "seller"); Instruction F:385.3 (defining "valuable article"); *see also* Instruction 16:03 (failure to maintain a register (requirements)).
3. The court should only give this instruction when there is a dispute regarding whether the defendant's register qualified as lawful. See § 18-13-117(1)(b) (requiring the dealer to record the purchase in a register "as described in section 18-16-105"). Additionally, if there is no dispute that the defendant's register satisfied certain requirements enumerated in the second paragraph, the court may remove the language highlighting those requirements from its instruction.

4. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 87, sec. 1, § 18-13-117(1)(b), 2019 Colo. Sess. Laws 322, 322.

### **13:33.6.INT FAILURE TO RECORD CREDIT PURCHASE – INTERROGATORY (VALUE)**

If you find the defendant not guilty of failure to record credit purchase, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to record credit purchase, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

[Was the value of the store credit, gift card, or merchandise card thirty dollars or greater? (Answer “Yes” or “No”)]

[Was the value of store credits, gift cards, or merchandise cards purchased in one transaction thirty dollars or greater? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the value beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### **COMMENT**

1. *See* § 18-13-117(2)(b), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The Committee added this instruction in 2019 pursuant to new legislation. *See* Ch. 87, sec. 1, § 18-13-117(2)(b), 2019 Colo. Sess. Laws 322, 323.

### **13:34 ABUSE OF HEALTH INSURANCE (FULL PAYMENT BY THIRD-PARTY PAYOR)**

The elements of the crime of abuse of health insurance (full payment by third-party payor) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. provided health care, and
  4. knowingly,
  5. accepted from any third-party payor, as payment in full for services rendered, the amount the third-party payor covered, and
  6. the effect was to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of health insurance (full payment by third-party payor).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of health insurance (full payment by third-party payor).

#### COMMENT

1. See § 18-13-119(3), C.R.S. 2020.

2. *See* Instruction F:195 (defining “knowingly”).
3. The statute includes several exemptions from criminal liability. *See* § 18-13-119(5), (6), (8), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

### **13:35 ABUSE OF HEALTH INSURANCE (INFLATION OF SUBMITTED FEE)**

The elements of the crime of abuse of health insurance (inflation of submitted fee) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. provided health care, and
  4. knowingly,
  5. submitted a fee to a third-party payor which was higher than the fee the defendant had agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment, and
  6. the effect was to eliminate the need for payment by the patient of any required deductible or copayment applicable in the patient's health benefit plan.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of health insurance (inflation of submitted fee).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of health insurance (inflation of submitted fee).

## COMMENT

1. *See* § 18-13-119(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”).
3. The statute includes several exemptions from criminal liability. *See* § 18-13-119(5), (6), (8), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

### **13:36.SP ABUSE OF HEALTH INSURANCE – SPECIAL INSTRUCTION (REGULAR BUSINESS PRACTICE)**

Evidence of the following gives rise to a permissible inference that a person was engaged in waiving the deductible or copayment as a regular business practice:

[A person provided health care and waived the deductible or copayment for more than one-fourth of his [her] patients during any calendar year [, excluding patients covered by [insert a description of the relevant exclusion from section 18-13-119(5)]]].]

[A person provided health care and advertised through newspapers, magazines, circulars, direct mail, directories, radio, television, or otherwise that he [she] would accept from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers.]

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. See § 18-13-119(6)(b), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

### **13:37 ABUSE OF PROPERTY INSURANCE (FEE INFLATION)**

The elements of the crime of abuse of property insurance (fee inflation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. provided repairs, goods, or services, and
4. knowingly,
5. submitted a fee to an insurer which was higher than a fee estimate the defendant had provided to the insured or which was higher than the fee the defendant had agreed to accept from the insured, and
6. the effect was to provide the insured a rebate or something of value to attract the insured to do business with the defendant and the cost of providing the rebate or thing of value was passed on to the insurer as a part of the higher fee.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of property insurance (fee inflation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of property insurance (fee inflation).

#### COMMENT

1. See § 18-13-119.5(3)(a), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).

### **13:38 ABUSE OF PROPERTY INSURANCE (IMPROPERLY PROVIDING TO INSURANCE COMPANY)**

The elements of the crime of abuse of property insurance (improperly providing to insurance company) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. provided repairs, goods, or services, and
4. knowingly,
5. provided a rebate or a gift, cash, or thing of value,
6. to an insurance company or its representative, agent, employee, or other acting on behalf of the insurance company,
7. in connection with any claim under an insurance policy which insured for property damage.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of property insurance (improperly providing to insurance company).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of property insurance (improperly providing to insurance company).

#### COMMENT

1. See § 18-13-119.5(3)(b), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).

### **13:39 ABUSE OF PROPERTY INSURANCE (ACCEPTING REBATE)**

The elements of the crime of abuse of property insurance (accepting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an insurance company, or its agent, employee, representative, or other person acting on behalf of the insurance company, and
4. knowingly,
5. accepted a rebate or a gift, cash, or thing of value,
6. from any person who provides repairs, goods, or services,
7. in connection with any claim under an insurance policy which insured for property damage.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abuse of property insurance (accepting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abuse of property insurance (accepting).

#### **COMMENT**

1. See § 18-13-119.5(4), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:371 (defining “thing of value”).

## 13:40 UNLAWFUL TRANSPORTATION OR STORAGE OF DRIP GASOLINE

The elements of the crime of unlawful transportation or storage of drip gasoline are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a producer, refiner, pipeline company, or owner or operator of a natural gas processing plant, or an authorized agent thereof, and
4. transported or stored drip gasoline in this state,
5. without having in his [her] possession a written instrument issued and signed by a licensed seller of gasoline, stating the names and addresses of the seller and purchaser, the date of sale, and the amount sold and paid for such drip gasoline, or a copy of a contract authorizing the loading and transportation of the drip gasoline.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful transportation or storage of drip gasoline.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful transportation or storage of drip gasoline.

## COMMENT

1. *See* § 18-13-120(2), C.R.S. 2020.
2. *See* Instruction F:108.5 (defining “drip gasoline”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:41 UNLAWFUL USE OF DRIP GASOLINE

The elements of the crime of unlawful use of drip gasoline are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. used drip gasoline in a motor vehicle operated on a highway of this state.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use of drip gasoline.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of drip gasoline.

### COMMENT

1. *See* § 18-13-120(3), C.R.S. 2020.
2. *See* Instruction F:108.5 (defining “drip gasoline”); Instruction F:236 (defining “motor vehicle”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:42 FURNISHING CIGARETTES, TOBACCO PRODUCTS, OR NICOTINE PRODUCTS TO A MINOR (UNLAWFUL SALE)

The elements of the crime of furnishing a cigarette, tobacco product, or nicotine product to a minor (unlawful sale) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. gave, sold, distributed, dispensed, or offered for sale a cigarette, tobacco product, or nicotine product to any person who was under + twenty-one years of age.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of furnishing a cigarette, tobacco product, or nicotine product to a minor (unlawful sale).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of furnishing a cigarette, tobacco product, or nicotine product to a minor (unlawful sale).

### COMMENT

1. See § 18-13-121(1)(a), C.R.S. 2020.
2. See Instruction F:53.5 (defining “cigarette, tobacco product, or nicotine product”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material

elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-13-121(1)(d), C.R.S. 2020, establishes an affirmative defense where the defendant “was presented with and reasonably relied upon a + government-issued photographic identification that identified the [buyer] as being twenty-one years of age or older.” However, the Committee has not drafted a model affirmative defense instruction.

4. + In 2020, pursuant to a legislative amendment, the Committee changed the recipient’s age in the third element from eighteen years to twenty-one years. *See* Ch. 302, sec. 1, § 18-13-121(1)(a), 2020 Colo. Sess. Laws 1502, 1502. Additionally, the Committee updated the statutory quotation in Comment 3. *See id.*, § 18-13-121(1)(d).

**13:43 FURNISHING CIGARETTES, TOBACCO PRODUCTS,  
OR NICOTINE PRODUCTS TO A MINOR  
(IDENTIFICATION)**

The elements of the crime of furnishing cigarettes, tobacco products, or nicotine products to a minor (identification) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. gave, sold, distributed, dispensed, or offered to sell to an individual a cigarette, tobacco product, or nicotine product,
4. without first requesting from the individual and examining a government-issued photographic identification that established that the individual was + twenty-one years of age or older.
- [5. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of furnishing cigarettes, tobacco products, or nicotine products to a minor (identification).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of furnishing cigarettes, tobacco products, or nicotine products to a minor (identification).

COMMENT

1. See § 18-13-121(1)(b), C.R.S. 2020.
2. See Instruction F:53.5 (defining “cigarette, tobacco product, or nicotine product”); see also § 18-1-503(2), C.R.S. 2020 (“Although no

culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. + In 2020, pursuant to a legislative amendment, the Committee changed the recipient’s age in the fourth element from eighteen years to twenty-one years. Additionally, the Committee removed the fifth element, which had previously required the prosecution to prove that the individual did not appear to be older than thirty years of age. *See* Ch. 302, sec. 1, § 18-13-121(1)(b), 2020 Colo. Sess. Laws 1502, 1502.

**13:44 PURCHASE OR ATTEMPTED PURCHASE OF  
CIGARETTES, TOBACCO PRODUCTS, OR NICOTINE  
PRODUCTS BY A MINOR**

COMMENT

1. + In 2020, the legislature repealed the crime of purchasing cigarettes, tobacco products, or nicotine products by a minor. *See* Ch. 302, sec. 1, § 18-13-121(2), 2020 Colo. Sess. Laws 1502, 1502-03. Accordingly, in 2020, the Committee deleted this instruction.

Furthermore, the Committee notes that this legislation became effective on July 14, 2020. *See* Ch. 302, sec. 19, 2020 Colo. Sess. Laws at 1519. Therefore, if the charges involve conduct allegedly committed before that date, the 2019 version of this instruction applies.

## 13:45 ILLEGAL POSSESSION OR CONSUMPTION OF ETHYL ALCOHOL BY AN UNDERAGE PERSON

The elements of the crime of illegal possession or consumption of ethyl alcohol by an underage person are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was under twenty-one years of age, and
4. possessed or consumed ethyl alcohol.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of illegal possession or consumption of ethyl alcohol by an underage person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of illegal possession or consumption of ethyl alcohol by an underage person.

### COMMENT

1. *See* § 18-13-122(3)(a), C.R.S. 2020 (specifying that this is a strict liability offense).
2. *See* Instruction F:129.5 (defining “ethyl alcohol”); Instruction F:281.2 (defining “possession of ethyl alcohol”).
3. *See* Instruction H:67.4 (affirmative defense of “reporting an emergency” (illegal possession or consumption of ethyl alcohol by an underage person)); *see also* Instruction H:32 (affirmative defense of

“reporting an emergency drug or alcohol overdose event,” based on section 18-1-711(3)(h), C.R.S. 2020, and incorporated by section 18-13-122(3)(a)).

4. Section 18-13-122(5), C.R.S. 2020, establishes affirmative defenses for certain specified circumstances (such as possession or consumption of ethyl alcohol while under supervision on private property, or while enrolled in an educational program). However, the Committee has not drafted model affirmative defense instructions. *See also* § 18-13-122(2)(a), (g) (defining the term “private property,” and the subsidiary term “establishment,” for purposes of section 18-13-122(5)(a)).

5. Section 18-13-122(6), C.R.S. 2020, establishes an exemption for possession or consumption of ethyl alcohol in conjunction with constitutionally protected “religious purposes.” However, the Committee has not drafted a model affirmative defense instruction.

## **13:46 ILLEGAL POSSESSION OR CONSUMPTION OF MARIJUANA BY AN UNDERAGE PERSON**

The elements of the crime of illegal possession or consumption of marijuana by an underage person are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was under twenty-one years of age, and
4. possessed one ounce or less of marijuana or consumed marijuana.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of illegal possession or consumption of marijuana by an underage person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of illegal possession or consumption of marijuana by an underage person.

### COMMENT

1. *See* § 18-13-122(3)(b), C.R.S. 2020 (specifying that this is a strict liability offense).
2. *See* Instruction F:208.5 (defining "marijuana" (possession or consumption by underage person)); Instruction F:281.3 (defining "possession of marijuana").

3. See Instruction H:67.4 (affirmative defense of “reporting an emergency” (illegal possession or consumption of marijuana by an underage person)); Instruction H:68 (affirmative defense of “medical marijuana”); *see also* Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event,” based on section 18-1-711(3)(h), C.R.S. 2020).

4. Section 18-13-122(6), C.R.S. 2020, establishes an exemption for possession or consumption of marijuana in conjunction with constitutionally protected “religious purposes.” However, the Committee has not drafted a model affirmative defense instruction.

## **13:47 ILLEGAL POSSESSION OF MARIJUANA PARAPHERNALIA BY AN UNDERAGE PERSON**

The elements of the crime of illegal possession of marijuana paraphernalia by an underage person are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was under twenty-one years of age, and
4. possessed marijuana paraphernalia, and
5. knew or reasonably should have known,
6. that the drug paraphernalia could be used in circumstances in violation of the laws of this state.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of illegal possession or consumption of marijuana paraphernalia by an underage person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of illegal possession or consumption of marijuana paraphernalia by an underage person.

### **COMMENT**

1. *See* § 18-13-122(3)(c), C.R.S. 2020 (specifying that this is a strict liability offense).

2. See Instruction F:195 (defining “knowingly”); Instruction F:209 (defining “marijuana accessories,” which, pursuant to section 18-13-122(2)(d), C.R.S. 2020, is synonymous with “marijuana paraphernalia”); Instruction F:281.3 (defining “possession of marijuana”).
3. See Instruction H:67.4 (affirmative defense of “reporting an emergency” (illegal possession of marijuana paraphernalia by an underage person)); Instruction H:68 (affirmative defense of “medical marijuana”); *see also* Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event,” based on section 18-1-711(3)(h), C.R.S. 2020).
4. Although section 18-13-122(3)(c) provides that this is a strict liability offense, it also requires that the defendant “knows or reasonably should know that the drug paraphernalia could be used in circumstances in violation of the laws of this state.” The Committee expresses no opinion on how to reconcile this knowledge requirement with the provision that this is a strict liability offense.
5. Section 18-13-122(6), C.R.S. 2020, establishes an exemption for possession or consumption of marijuana in conjunction with constitutionally protected “religious purposes.” However, the provision is not explicitly applicable to the offense of possession of marijuana *paraphernalia* by an underage person.

**13:48.SP ILLEGAL POSSESSION OR CONSUMPTION OF  
ETHYL ALCOHOL OR MARIJUANA, OR ILLEGAL  
POSSESSION OF MARIJUANA PARAPHERNALIA, BY AN  
UNDERAGE PERSON – SPECIAL INSTRUCTION  
(INFERENCES AS TO POSSESSION, CONSUMPTION, AND  
CONTENTS)**

[Evidence that the defendant was under the age of twenty-one years and possessed or consumed ethyl alcohol or marijuana or possessed marijuana paraphernalia anywhere in this state gives rise to a permissible inference of possession or consumption.]

[Evidence that the defendant was under the age of twenty-one years and manifested any of the characteristics commonly associated with [ethyl alcohol intoxication or impairment] [marijuana impairment] while present anywhere in this state gives rise to a permissible inference of consumption.]

[Evidence of a label which identifies the contents of any bottle, can, or other container as “beer”, “ale”, “malt beverage”, “fermented malt beverage”, “malt liquor”, “wine”, “champagne”, “whiskey” or “whisky”, “gin”, “vodka”, “tequila”, “schnapps”, “brandy”, “cognac”, “liqueur”, “cordial”, “alcohol”, or “liquor” gives rise to a permissible inference that the contents of the bottle, can, or other container was composed in whole or in part of ethyl alcohol.]

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

## COMMENT

1. See § 18-13-122(8), (9), C.R.S. 2020.
2. See *People in re R.M.D.*, 829 P.2d 852, 854 (Colo. 1992) (construing a “prima facie” proof provision as establishing a permissible inference); *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

### **13:49 UNLAWFUL ADMINISTRATION OF GAMMA HYDROXYBUTYRATE (GHB) OR KETAMINE**

The elements of the crime of unlawful administration of gamma hydroxybutyrate (GHB) or ketamine are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. caused or attempted to cause any other person to unknowingly consume or receive the direct administration of gamma hydroxybutyrate (GHB) or ketamine or the immediate chemical precursors or chemical analogs for either of such substances.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful administration of gamma hydroxybutyrate (GHB) or ketamine.

#### COMMENT

1. See § 18-13-123(3), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).
3. Section 18-13-123(4), C.R.S. 2020, establishes exemptions from liability for usage related to bona fide medical needs and the euthanizing of

animals. However, the Committee has not drafted model affirmative defense instructions.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## **13:50 DISSEMINATION OF FALSE INFORMATION TO OBTAIN HOSPITAL ADMITTANCE OR CARE**

The elements of the crime of dissemination of false information to obtain hospital [admittance] [care] are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. provided false identifying information,
  5. for the purpose of either obtaining admittance to, or health services from, a hospital or evading an obligation by the defendant to make payment to the hospital for services provided at the defendant's request.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dissemination of false information to obtain hospital [admittance] [care].

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dissemination of false information to obtain hospital [admittance] [care].

### COMMENT

1. See § 18-13-124(1), C.R.S. 2020.
2. See Instruction F:175.3 (defining "identifying information (hospital admittance)"); Instruction F:195 (defining "knowingly").

## 13:51 UNAUTHORIZED TRADING IN TELEPHONE RECORDS (PROCUREMENT)

The elements of the crime of unauthorized trading in telephone records (procurement) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. without lawful authorization,
  4. knowingly,
  5. procured or attempted to procure a telephone record.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized trading in telephone records (procurement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized trading in telephone records (procurement).

### COMMENT

1. See § 18-13-125(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:196.4 (defining "lawful authorization" (unauthorized trading in telephone records)); Instruction F:285.9 (defining "procure"); Instruction F:364.7 (defining "telephone record").

3. Sections 18-13-125(3), (5), C.R.S. 2020, establish exemptions from liability, under specified circumstances, for law enforcement and telecommunications providers. However, the Committee has not drafted model affirmative defense instructions.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 13:52 UNAUTHORIZED TRADING IN TELEPHONE RECORDS (BUYING OR SELLING)

The elements of the crime of unauthorized trading in telephone records (buying or selling) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. without lawful authorization,
5. sold, bought, offered to sell, or offered to buy a telephone record.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized trading in telephone records (buying or selling).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized trading in telephone records (buying or selling).

### COMMENT

1. See § 18-13-125(1)(b), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:196.4 (defining "lawful authorization" (unauthorized trading in telephone records)); Instruction F:364.7 (defining "telephone record").

3. Sections 18-13-125(3), (5), C.R.S. 2020, establish exemptions from liability, under specified circumstances, for law enforcement and telecommunications providers. However, the Committee has not drafted model affirmative defense instructions.

### **13:53 UNAUTHORIZED TRADING IN TELEPHONE RECORDS (POSSESSION)**

The elements of the crime of unauthorized trading in telephone records (possession) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. possessed a telephone record,
  4. with the intent,
  5. to use such record, or information contained in such record, to harm another person,
  6. without lawful authorization.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized trading in telephone records (possession).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized trading in telephone records (possession).

#### **COMMENT**

1. See § 18-13-125(1)(c), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:196.4 (defining "lawful authorization" (unauthorized trading in telephone

records)); Instruction F:281 (defining “possession”); Instruction F:364.7 (defining “telephone record”).

3. Sections 18-13-125(3), (5), C.R.S. 2020, establish exemptions from liability, under specified circumstances, for law enforcement and telecommunications providers. However, the Committee has not drafted model affirmative defense instructions.

## 13:54 UNAUTHORIZED TRADING IN TELEPHONE RECORDS (RECEIPT)

The elements of the crime of unauthorized trading in telephone records (receipt) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without lawful authorization,
4. received a telephone record of a resident of Colorado,
5. knowing,
6. that such record was obtained without lawful authorization or by fraud or deception.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized trading in telephone records (receipt).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized trading in telephone records (receipt).

### COMMENT

1. See § 18-13-125(1)(d), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:196.4 (defining “lawful authorization” (unauthorized trading in telephone records)); Instruction F:364.7 (defining “telephone record”).

3. Sections 18-13-125(3), (5), C.R.S. 2020, establish exemptions from liability, under specified circumstances, for law enforcement and telecommunications providers. However, the Committee has not drafted model affirmative defense instructions.

## 13:55 LOCATING PROTECTED PERSONS

The elements of the crime of locating a protected person are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. accepted money or other form of compensation to assist a restrained person from discovering the location of a protected person,
4. when the defendant knew or reasonably should have known,
5. that the restrained person was subject to a court order prohibiting contact with the protected person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of locating a protected person.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of locating a protected person.

### COMMENT

1. See § 18-13-126(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:293.5 (defining “protected person”); Instruction F:294.3 (defining “protection order” (locating protected persons)); Instruction F:319 (defining “restrained person”).

3. Section 18-13-126(1)(b), C.R.S. 2020, establishes exemptions from criminal liability for specified lawful activities conducted in connection with court proceedings. However, the Committee has not drafted model affirmative defense instructions. Similarly, the Committee has not drafted a model instruction for the affirmative defense established by section 18-13-126(3) (timely verification of no protection order).

4. In the third element, the word “from” is included exactly as it appears in section 18-13-126(1)(a), C.R.S. 2020. However, it appears the element could be made more comprehensible, without altering its meaning, by substituting the word “in.”

## 13:56 SMUGGLING OF HUMANS

### COMMENT

1. In *Fuentes-Espinoza v. People*, 2017 CO 98, 408 P.3d 445, the Colorado Supreme Court deemed this statute unconstitutional because it is preempted by federal law. Therefore, the Committee removed this instruction in 2018.

## 13:57 PROHIBITED BAIL BOND ACTIVITIES (SELECTION OF AN ATTORNEY)

The elements of the crime of prohibited bail bond activity (selection of an attorney) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. specified, suggested, or advised the employment of a particular attorney to represent the licensee's principal.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (selection of an attorney).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (selection of an attorney).

### COMMENT

1. *See* § 18-13-130(1)(a), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute does not define the term “licensee’s principal.” In the Committee’s view, however, this term likely refers to the person for whom the defendant surety posted the bond. See *People v. Joss*, 534 P.2d 358, 360–61 (Colo. App. 1975) (“A bail bond surety owes the court a duty to make some effort to see that *its principal* complies with orders of the court . . . but the fact that a surety has made substantial efforts to locate *a principal* does not compel the granting of any relief.” (omission in original) (emphases added) (quoting *United States v. Kelley*, 38 F.R.D. 320, 322 (D. Colo. 1965))); see also *Tassian v. People*, 731 P.2d 672, 673 n.2 (Colo. 1987) (describing an earlier version of the statute as criminalizing the behavior of “a bail bonds licensee” (emphasis added)). The court may wish to define the term for the jury.

## 13:58 PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO A PROHIBITED PERSON)

The elements of the crime of prohibited bail bond activity (payment to a prohibited person) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. paid a fee or rebate or gave or promised anything of value,
5. to a jailer, peace officer, clerk, deputy clerk, an employee of a court, district attorney or district attorney's employees, or any person who had power to arrest or to hold a person in custody.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (payment to a prohibited person).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (payment to a prohibited person).

### COMMENT

1. See § 18-13-130(1)(b), C.R.S. 2020.
2. See Instruction F:371 (defining "thing of value"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:59 PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO AN ATTORNEY)

The elements of the crime of prohibited bail bond activity (payment to an attorney) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was engaged in the business of writing bail bonds, and
  4. paid a fee or rebate or gave anything of value to an attorney in bail bond matters,
  5. and did not do so in defense of any action on a bond or as counsel to represent the person who wrote or posted the bond or the person's representative or employees.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (payment to an attorney).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (payment to an attorney).

### COMMENT

1. See § 18-13-130(1)(c), C.R.S. 2020.
2. See Instruction F:371 (defining "thing of value"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in

a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:60 PROHIBITED BAIL BOND ACTIVITIES (PAYMENT TO PERSON ON BOND)

The elements of the crime of prohibited bail bond activity (payment to person on bond) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. paid a fee or rebate or gave or promised to give anything of value,
5. to the person on whose bond the defendant was surety.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (payment to person on bond).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (payment to person on bond).

### COMMENT

1. *See* § 18-13-130(1)(d), C.R.S. 2020.
2. *See* Instruction F:371 (defining “thing of value”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all

of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **13:61 PROHIBITED BAIL BOND ACTIVITIES (ACCEPTING ANYTHING OF VALUE)**

The elements of the crime of prohibited bail bond activity (accepting anything of value) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was engaged in the business of writing bail bonds, and
  4. accepted anything of value other than the fee or premium on the bond,
  5. from a person on whose bond the defendant was surety or from others on behalf of the person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (accepting anything of value).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (accepting anything of value).

### COMMENT

1. See § 18-13-130(1)(e), C.R.S. 2020.
2. See Instruction F:371 (defining "thing of value"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-13-130(1)(e)(I)–(IV), C.R.S. 2020, establishes an exception for a producer or agent where collateral security or other indemnity is pledged under specified circumstances. Because the four criteria that constitute this exception appear in subsections that are separated from the definition of the offense, the Committee has not included these criteria as negative elements required to be disproved by the prosecution. *See People v. Reed*, 932 P.2d 842, 844 (Colo. App. 1996) (“When an exception is included in a statutory section defining the elements of the offense, it is generally the burden of the prosecution to prove that the exception does not apply. However, when an exception is found in a separate clause or is clearly disconnected from the definition of the offense, it is the defendant’s burden to claim it as an affirmative defense.”). Nor has the Committee drafted a model affirmative defense instruction.

## 13:62 PROHIBITED BAIL BOND ACTIVITIES (INDUCE TO COMMIT CRIME)

The elements of the crime of prohibited bail bond activity (induce to commit crime) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. coerced, suggested, aided and abetted, offered promise of favor, or threatened any person on whose bail bond the defendant was surety, or offered to become surety to induce that person to commit any crime.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (induce to commit crime).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (induce to commit crime).

### COMMENT

1. See § 18-13-130(1)(f), C.R.S. 2020.
2. See also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or

with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **13:63 PROHIBITED BAIL BOND ACTIVITIES (POSTING BOND WHILE RESTRICTED)**

The elements of the crime of prohibited bail bond activity (posting bond while restricted) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. posted a bail bond in any court of record in this state,
5. [while his [her] name was on a board established by a court to publicly post the name of compensated sureties who were prohibited from posting bail bonds] [under any circumstance where the defendant had failed to pay a bail forfeiture judgment after all applicable stays of execution had expired and the bond had not been exonerated or discharged].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (posting bond while restricted).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (posting bond while restricted).

### COMMENT

1. See § 18-13-130(1)(g), C.R.S. 2020.

2. *See also* § 16-4-114(5), C.R.S. 2020; § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:64 PROHIBITED BAIL BOND ACTIVITIES (FAILURE TO RETURN)

The elements of the crime of prohibited bail bond activity (failure to return) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. failed to return any nonforfeited collateral or security, other than the bond fee, within fourteen days after receipt of a copy of the court order that resulted in a release of the bond by the court, and
5. the collateral did not also secure another obligation, premium payment plan, or bail recovery fee, and
6. [three] [six] years had not yet elapsed from the date the bond was posted when the court released the bond.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (failure to return).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (failure to return).

### COMMENT

1. See § 18-13-130(1)(h), C.R.S. 2020.

2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. For the sixth element, the number of years hinges on whether the court granted an extension. *See* § 18-13-130(1)(h)(II), C.R.S. 2020.
4. The statute also provides for culpability where, “if the [person for whom the bond was posted] fails to appear and the [defendant] surety is exonerated, [the defendant surety] fails to return the collateral to the indemnitor upon request within fourteen days *after the three-year period.*” § 18-13-130(1)(h), C.R.S. 2020 (emphasis added). The statute, however, does not define “the three-year period.” Arguably, this time period refers to section 16-4-110(1)(e), C.R.S. 2020, which provides that a surety shall be exonerated if “three years have elapsed from the posting of the bond.” But it is unclear how this could be reconciled with section 18-13-130(1)(h)(II), which provides that a surety is *not* culpable if “[t]he later of three years or, if the court grants an extension, six years[,] have elapsed from the date the bond was posted.” In essence, the statute appears to both (1) provide for culpability following the expiration of a three-year period, and (2) provide for an exemption from culpability following the expiration of that same three-year period. Accordingly, the Committee has not drafted a model instruction for this aspect of the offense.

### **13:65 PROHIBITED BAIL BOND ACTIVITIES (ACCEPTING ANYTHING OF VALUE AS INDEMNITOR)**

The elements of the crime of prohibited bail bond activity (accepting anything of value as indemnitor) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. accepted anything of value, other than the premium,
5. from a person on whose bond the defendant was indemnitor or from another on behalf of the principal,
6. and accepting the thing of value was not authorized by [insert relevant provision from title 10, C.R.S.].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (accepting anything of value as indemnitor).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (accepting anything of value as indemnitor).

#### COMMENT

1. See § 18-13-130(1)(i), C.R.S. 2020.

2. See Instruction F:371 (defining “thing of value”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute does not define the term “principal.” In the Committee’s view, however, this term appears to refer to the person on whose bond the defendant was indemnitor. See *People v. Joss*, 534 P.2d 358, 360–61 (Colo. App. 1975) (“A bail bond surety owes the court a duty to make some effort to see that *its principal* complies with orders of the court . . . but the fact that a surety has made substantial efforts to locate *a principal* does not compel the granting of any relief.” (omission in original) (emphases added) (quoting *United States v. Kelley*, 38 F.R.D. 320, 322 (D. Colo. 1965))). The court may wish to define the term for the jury.

## **13:66 PROHIBITED BAIL BOND ACTIVITIES (BLANK BAIL BONDS)**

The elements of the crime of prohibited bail bond activity (blank bail bonds) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. signed or countersigned blank bail bonds.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (blank bail bonds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (blank bail bonds).

### COMMENT

1. *See* § 18-13-130(1)(j), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:67 PROHIBITED BAIL BOND ACTIVITIES (MULTIPLE BONDS)

The elements of the crime of prohibited bail bond activity (multiple bonds) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was engaged in the business of writing bail bonds, and
  4. had more than one bond posted at one time in one case on behalf of one person.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (multiple bonds).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (multiple bonds).

### COMMENT

1. *See* § 18-13-130(1)(k), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 13:68 PROHIBITED BAIL BOND ACTIVITIES (NO RECEIPT)

The elements of the crime of prohibited bail bond activity (no receipt) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was engaged in the business of writing bail bonds, and
4. failed to issue to the person from whom collateral or security was taken a receipt that included a description of the collateral or security when it was taken into custody.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited bail bond activity (no receipt).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited bail bond activity (no receipt).

### COMMENT

1. See § 18-13-130(1)(l), C.R.S. 2020.
2. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## + 13:69 MISUSE OF GAMETES

The elements of the crime of misuse of gametes are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a health care provider, and
4. knowingly,
5. treated or assisted in the treatment of a patient through assisted reproduction by using gametes from a donor, and
6. the patient did not expressly consent to the use of that donor's gametes.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of misuse of gametes.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of misuse of gametes.

### COMMENT

1. *See* § 18-13-131(1), C.R.S. 2020.
2. *See* Instruction F:23.7 (defining "assisted reproduction"); Instruction F:107.2 (defining "donor"); Instruction F:160.75 (defining "gametes"); Instruction F:169.5 (defining "health care provider"); Instruction F:195 (defining "knowingly").

3. + In 2020, the Committee added this instruction pursuant to new legislation. *See* Ch. 238, sec. 3, § 18-13-131(1), 2020 Colo. Sess. Laws 1153, 1155.



## CHAPTER 14

### UNLAWFUL NOTICE AT A HOTEL FACILITY

- [14:01](#) UNLAWFUL NOTICE AT A HOTEL FACILITY (FAILURE TO DISPLAY)
- [14:02](#) UNLAWFUL NOTICE AT A HOTEL FACILITY (FAILURE TO POST)
- [14:03](#) UNLAWFUL NOTICE AT A HOTEL FACILITY (SIGNAGE WITH UNAVAILABLE RATE)
- [14:04](#) UNLAWFUL NOTICE AT A HOTEL FACILITY (INCOMPLETE OR INADEQUATE FORM OF ADVERTISEMENT)
- [14:05](#) UNLAWFUL NOTICE AT A HOTEL FACILITY (FALSE OR MISLEADING)

### CHAPTER COMMENTS

1. Section 18-14-104, C.R.S. 2020, provides for liability for an owner who “violates, or causes to be violated, any of the provisions of this article.” Because the statutes in this chapter speak primarily in affirmative language, *see, e.g.*, § 18-14-102(1), C.R.S. 2020 (providing that “[t]here shall be displayed at each hotel facility” certain signage), the Committee has crafted instructions that pertain to a defendant who “fails” to comply with – or “causes to fail” to comply with – such required conduct.
2. The Committee added this chapter in 2016.

## **14:01 UNLAWFUL NOTICE AT A HOTEL FACILITY (FAILURE TO DISPLAY)**

The elements of the crime of unlawful notice at a hotel facility (failure to display) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, agent, lessee, or manager of a hotel facility, and
4. failed to display, or caused a failure to display,
5. in a conspicuous place,
6. at the hotel facility in its office or place of guest registration,
7. a sign which included, in letters and figures of the same size and prominence, the following information: the number of apartments, rooms, or units in the hotel facility and the rates charged for each; whether the rates quoted were for single or multiple occupancy where such fact affected the rates charged; and the dates during which rates were in effect.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful notice at a hotel facility (failure to display).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful notice at a hotel facility (failure to display).

## COMMENT

1. *See* §§ 18-14-102(1), 18-14-104, C.R.S. 2020.
2. *See* Instruction F:173.5 (defining “hotel facility”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 14:02 UNLAWFUL NOTICE AT A HOTEL FACILITY (FAILURE TO POST)

The elements of the crime of unlawful notice at a hotel facility (failure to post) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, agent, lessee, or manager of a hotel facility, and
4. failed to post, or caused a failure to post,
5. in a plainly legible fashion,
6. in a conspicuous place,
7. in, or at, each room, unit, and apartment of the hotel facility,
8. a sign showing: the maximum amount charged for occupancy and the maximum amount per person if the rate varied with the number of occupants; the amount charged for extra conveniences, more complete accommodations, or additional furnishings; and the dates during the year when such charges prevailed.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful notice at a hotel facility (failure to post).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful notice at a hotel facility (failure to post).

## COMMENT

1. *See* §§ 18-14-102(2), 18-14-104, C.R.S. 2020.
2. *See* Instruction F:173.5 (defining “hotel facility”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **14:03 UNLAWFUL NOTICE AT A HOTEL FACILITY (SIGNAGE WITH UNAVAILABLE RATE)**

The elements of the crime of unlawful notice at a hotel facility (signage with unavailable rate) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, agent, lessee, or manager of a hotel facility, and
4. displayed or caused to be displayed,
5. a sign which could have been seen from a public highway or street, and which included in dollars and cents a statement relating to the rates charged at a hotel facility, and
6. accommodations were not available at the rates quoted at all times such sign was posted.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful notice at a hotel facility (signage with unavailable rate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful notice at a hotel facility (signage with unavailable rate).

### COMMENT

1. See §§ 18-14-103(1), 18-14-104, C.R.S. 2020.

2. See Instruction F:171 (defining “highway”); Instruction F:173.5 (defining “hotel facility”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **14:04 UNLAWFUL NOTICE AT A HOTEL FACILITY (INCOMPLETE OR INADEQUATE FORM OF ADVERTISEMENT)**

The elements of the crime of unlawful notice at a hotel facility (incomplete or inadequate form of advertisement) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner, agent, lessee, or manager of a hotel facility, and
  4. published or caused to be published,
  5. an advertisement which included in dollars and cents a statement relating to rates charged at a hotel facility, and
  6. such advertisement did not include in letters or figures of similar size and prominence: the number of apartments or rooms in said hotel facility at the published rates; whether the rates quoted were for single or multiple occupancy where such fact affected the rates charged; the dates during which such rates were in effect; and an indication as to whether there were other rates in effect in said hotel facility, and
  7. the advertisement was not an advertisement or listing in a guide or directory which was published by a nonprofit hotel, motel, motor court, or apartment organization or similar association.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful notice at a hotel facility (incomplete or inadequate form of advertisement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful notice at a hotel facility (incomplete or inadequate form of advertisement).

#### COMMENT

1. *See* §§ 18-14-103(2), 18-14-104, C.R.S. 2020.
2. *See* Instruction F:173.5 (defining “hotel facility”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 14:05 UNLAWFUL NOTICE AT A HOTEL FACILITY (FALSE OR MISLEADING)

The elements of the crime of unlawful notice at a hotel facility (false or misleading) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner, agent, lessee, or manager of a hotel facility, and
  4. published or displayed, or caused to be published or displayed,
  5. any sign with regard to any hotel facility which could have been seen from a public highway or street and which contained any advertisement that contained false or misleading statements as to any matter whatsoever.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful notice at a hotel facility (false or misleading).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful notice at a hotel facility (false or misleading).

### COMMENT

1. See §§ 18-14-103(3), § 18-14-104, C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); Instruction F:173.5 (defining "hotel facility"); see also § 18-1-503(2), C.R.S. 2020 ("Although no

culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).



## CHAPTER 15

### UNLAWFUL LENDING PRACTICES

<a href="#"><u>15:01</u></a>	EXTORTIONATE EXTENSION OF CREDIT
<a href="#"><u>15:02.SP</u></a>	EXTORTIONATE EXTENSION OF CREDIT – SPECIAL INSTRUCTION (INFERENCE THAT CREDIT IS EXTORTIONATE)
<a href="#"><u>15:03</u></a>	CRIMINAL USURY
<a href="#"><u>15:04</u></a>	FINANCING EXTORTIONATE EXTENSIONS OF CREDIT
<a href="#"><u>15:05</u></a>	FINANCING CRIMINAL USURY
<a href="#"><u>15:06</u></a>	COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS
<a href="#"><u>15:07</u></a>	POSSESSION OR CONCEALMENT OF RECORDS OF CRIMINAL USURY
<a href="#"><u>15:08</u></a>	COLLECTION OF PROHIBITED FEES BY A LOAN FINDER

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## 15:01 EXTORTIONATE EXTENSION OF CREDIT

The elements of the crime of extortionate extension of credit are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. made an extension of credit in any amount regardless of the loan finance charge, and
  4. it was the understanding of the defendant and the debtor at the time the extension of credit was made that delay in making repayment or failure to make repayment would result in the use of extortionate means of collection.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of extortionate extension of credit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of extortionate extension of credit.

### COMMENT

1. See § 18-15-102, C.R.S. 2020.
2. See Instruction F:57.2 (defining "collect"); Instruction F:89.7 (defining "debtor"); Instruction F:135.5 (defining "extend credit"); Instruction F:136.5 (defining "extortionate means"); Instruction F:199.2 (defining "loan finance charge"); Instruction F:311.7 (defining "repayment"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all

of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. For the third element, the Committee has included the language that reads “in any amount regardless of the loan finance charge” because it appears in the statute. *See* § 18-15-102. The Committee notes, however, that this language is arguably superfluous, as to prove this element, the prosecution need only prove that the defendant “made an extension of credit.” Rather, this language presumably clarifies that a defendant may not claim as an affirmative defense that the extension of credit was de minimis.

**15:02.SP EXTORTIONATE EXTENSION OF CREDIT –  
SPECIAL INSTRUCTION (INFERENCE THAT CREDIT IS  
EXTORTIONATE)**

Evidence of all of the following gives rise to a permissible inference that an extension of credit was extortionate:

1. the extension of credit was made with a loan finance charge in excess of that established for criminal usury,
2. at the time credit was extended, the debtor reasonably believed that one or more extensions of credit by the defendant had been collected or attempted to be collected by extortionate means or the nonrepayment thereof had been punished by extortionate means, and
3. upon the making of the extension of credit, the total of the extensions of credit by the defendant to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is warranted by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. See § 18-15-103(2), C.R.S. 2020.
2. See Instruction F:57.2 (defining “collect”); Instruction F:78.5 (defining “creditor”); Instruction F:89.7 (defining “debtor”); Instruction F:135.5 (defining “extend credit”); Instruction F:136.5 (defining “extortionate

means"); Instruction F:199.2 (defining "loan finance charge"); Instruction 15:03 (criminal usury).

3. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. *See Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

4. *See also* § 18-15-103(4), C.R.S. 2020 ("Whether evidence introduced under [section 18-15-103(2)] giving rise to the presumption that the extension of credit was extortionate is sufficient to establish the guilt of the defendant beyond a reasonable doubt, if such evidence is not disputed, is a question to be determined by the jury under proper instructions or by the court if no jury trial is had. Where there is evidence tending to show the innocence of the transaction, the issue of whether the extension of credit was extortionate shall be submitted to the jury, if trial is to a jury, unless the court is satisfied that the evidence as a whole clearly negates the presumed offense.").

## 15:03 CRIMINAL USURY

The elements of the crime of usury are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. charged, took, or received any money or other property as a loan finance charge,
5. where the charge exceeded an annual percentage rate of forty-five percent or the equivalent for a longer or shorter period.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of usury.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of usury.

### COMMENT

1. See § 18-15-104(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:199.2 (defining “loan finance charge”).
3. See Instruction H:67.6 (affirmative defense of “rate not excessive”).

4. Section 18-15-104(4), C.R.S. 2020, includes exemptions for several types of lending practices. However, the Committee has not drafted model affirmative defense instructions.

## 15:04 FINANCING EXTORTIONATE EXTENSIONS OF CREDIT

The elements of the crime of financing an extortionate extension of credit are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. advanced money or property, whether as a gift, a loan, or an investment,
5. pursuant to a partnership or profit-sharing agreement, or otherwise,
6. to any person, with reasonable grounds to believe that it was the intention of the person to whom the advance was made to use the money or property, directly or indirectly, for the purpose of making an extortionate extension of credit.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of financing an extortionate extension of credit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of financing an extortionate extension of credit.

### COMMENT

1. See § 18-15-105, C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction 15:01 (extortionate extension of credit); *see also* Instruction 15:02.SP (extortionate extension of credit – special instruction (inference that credit is extortionate)).

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-15-105. The Committee notes, however, that the phrase “or otherwise” arguably renders the entire element superfluous, as the prosecution will never need to introduce evidence to prove this element. Similarly, the phrase “directly or indirectly” in the sixth element is arguably superfluous. Rather, these phrases presumably prevent a defendant from raising certain arguments as affirmative defenses (i.e., that the defendant was not acting pursuant to a profit-sharing agreement, or that the recipient of the advance intended to use the money only indirectly).

## 15:05 FINANCING CRIMINAL USURY

The elements of the crime of financing usury are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. advanced money or property, whether as a gift, a loan, or an investment,
5. pursuant to a partnership or profit-sharing agreement, or otherwise,
6. to any person, with reasonable grounds to believe that it was the intention of the person to whom the advance was made to use the money or property, directly or indirectly, for the purpose of engaging in criminal usury.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of financing usury.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of financing usury.

### COMMENT

1. See § 18-15-106, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction 15:03 (criminal usury).

3. The Committee has included the fifth element because its language appears in the statute. *See* § 18-15-106. The Committee notes, however, that the phrase “or otherwise” arguably renders the entire element superfluous, as the prosecution will never need to introduce evidence to prove this element. Similarly, the phrase “directly or indirectly” in the sixth element is arguably superfluous. Rather, these phrases presumably prevent a defendant from raising certain arguments as affirmative defenses (i.e., that the defendant was not acting pursuant to a profit-sharing agreement, or that the recipient of the advance intended to use the money only indirectly).

## 15:06 COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS

The elements of the crime of collection of extensions of credit by extortionate means are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. participated in any way, or conspired to do so,
5. in the use of any extortionate means to collect or to attempt to collect any extension of credit or to punish any person for the nonrepayment of any extension of credit.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of collection of extensions of credit by extortionate means.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of collection of extensions of credit by extortionate means.

### COMMENT

1. See § 18-15-107(1), (2), C.R.S. 2020.
2. See Instruction F:57.2 (defining "collect"); Instruction F:135.5 (defining "extend credit"); Instruction F:136.5 (defining "extortionate

means"); Instruction F:195 (defining "knowingly"); Instruction G2:05 (conspiracy).

3. It may be appropriate for the court to draft a limiting instruction where evidence is admitted pursuant to section 18-15-107(3), C.R.S. 2020 ("In any prosecution under this section for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment of an extension of credit was punished by extortionate means."); *see also* Instruction D:02 (evidence limited as to purpose).

4. In the absence of case law on point, the Committee takes no position on whether the word "attempt" in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 15:07 POSSESSION OR CONCEALMENT OF RECORDS OF CRIMINAL USURY

The elements of the crime of possession or concealment of records of criminal usury are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed or concealed any writing, paper, instrument, or article used to record criminally usurious transactions, and
- [4. knew or had reasonable grounds to know that the contents had been used, were being used, or were intended to be used to conduct a criminally usurious transaction.]
- [4. possessed or concealed such instruments with intent to aid, assist, or facilitate criminal usury.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession or concealment of records of criminal usury.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession or concealment of records of criminal usury.

### COMMENT

1. See § 18-15-108(1), C.R.S. 2020.

2. See Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction 15:03 (criminal usury).

3. The statute includes an exemption from criminal liability for possession of documents in conjunction with legal representation or judicial proceedings. See § 18-15-108(2), C.R.S. 2020. However, the Committee has not drafted model affirmative defense instructions.

## 15:08 COLLECTION OF PROHIBITED FEES BY A LOAN FINDER

The elements of the crime of collection of a prohibited fee by a loan finder are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a loan finder, and
4. charged or collected a fee from a borrower before the borrower actually received the agreed-upon loan.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of collection of a prohibited fee by a loan finder.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of collection of a prohibited fee by a loan finder.

### COMMENT

1. See § 18-15-109(2), C.R.S. 2020.
2. See Instruction F:38.7 (defining "borrower"); Instruction F:57.2 (defining "collect"); Instruction F:199.3 (defining "loan finder"); see also § 5-1-301(25), C.R.S. 2020 (defining "loan," and incorporated by reference by section 18-15-109(1)(b), C.R.S. 2020); § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the

commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. *See* Instruction H:67.8 (affirmative defense of “exempt person or organization”).



## CHAPTER 16

### UNLAWFUL PRACTICES FOR PURCHASERS OF VALUABLE ARTICLES

- [16:01](#) FAILURE TO IDENTIFY SELLER OF A VALUABLE ARTICLE
- [16:02](#) PURCHASING A VALUABLE ARTICLE FROM A MINOR
- [16:03](#) FAILURE TO MAINTAIN A REGISTER (REQUIREMENTS)
- [16:04](#) FAILURE TO MAINTAIN A REGISTER (INSPECTION)
- [16:05](#) FAILURE TO MAINTAIN A REGISTER (TIMEFRAME)
- [16:06](#) IMPROPER HOLDING OF A VALUABLE ARTICLE
- [16:07](#) IMPROPER TRANSFER OF BULLION OR COINS
- [16:08](#) FAILURE TO FILE REQUIRED REPORT OF PURCHASES OF VALUABLE ARTICLES (LOCAL LAW ENFORCEMENT AGENCY)
- [16:09](#) FAILURE TO FILE REQUIRED REPORT OF PURCHASES OF VALUABLE ARTICLES (SELLER'S LAW ENFORCEMENT AGENCY)
- [16:10](#) GIVING FALSE INFORMATION WITH RESPECT TO THE PURCHASE OF A VALUABLE ARTICLE

### CHAPTER COMMENTS

1. Each of the offenses in this chapter derives its criminal character from section 18-16-108, C.R.S. 2020, which provides as follows: "Any person who violates any of the provisions of [Article 16] commits a class 6 felony. Any person who knowingly gives false information with respect to the information required by sections 18-16-103 and 18-16-105 commits a class 6 felony." In *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 947-48 (Colo. 1985), the supreme court held that the mens rea of "knowingly" applies to both

sentences of section 18-16-108 (i.e., to every offense defined in Article 16). Therefore, the Committee has used a mens rea of “knowingly” for every instruction in this chapter.

2. Section 18-16-109, C.R.S. 2020, provides for exemptions from criminal liability for certain transactions by private collectors and certain purchases made exclusively in interstate commerce. However, the Committee has not drafted model affirmative defense instructions.

3. The Committee added this chapter in 2016.

## 16:01 FAILURE TO IDENTIFY SELLER OF A VALUABLE ARTICLE

The elements of the crime of failure to identify seller of a valuable article are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser, and
5. purchased a valuable article,
6. without first securing at least one of the following types of identification from the seller: a valid Colorado driver's license; an identification card issued by the Colorado Department of Revenue; a valid driver's license, containing a picture, issued by another state; a military identification card; a valid passport; an alien registration card; or a nonpicture identification document issued by a state or federal government entity where the defendant also obtained a clear imprint of the seller's right index finger.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to identify seller of a valuable article.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to identify seller of a valuable article.

## COMMENT

1. *See* §§ 18-16-103(1), 18-16-108, C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”); Instruction F:330.5 (defining “seller”); Instruction F:385.3 (defining “valuable article”); *see also* § 42-2-302, C.R.S. 2020 (Department of Revenue’s rules for issuing Colorado identification cards).

## 16:02 PURCHASING A VALUABLE ARTICLE FROM A MINOR

The elements of the crime of purchasing a valuable article from a minor are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a purchaser, and
  5. purchased a valuable article from a person under the age of eighteen years.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of purchasing a valuable article from a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of purchasing a valuable article from a minor.

### COMMENT

1. See §§ 18-16-104, 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:306.7 (defining "purchase"); Instruction F:306.8 (defining "purchaser"); Instruction F:385.3 (defining "valuable article").

## 16:03 FAILURE TO MAINTAIN A REGISTER (REQUIREMENTS)

The elements of the crime of failure to maintain a register (requirements) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser of valuable articles, and
- [5. failed to keep a register, in a permanent, well-bound book, that included the following information for each purchase: the signature of the seller; the name, address, and date of birth of the seller and his [her] driver's license number or other I.D. number from [insert other allowed form of identification pursuant to section 18-16-103]; the date, time, and place of the purchase; and an accurate and detailed account and description of each valuable article being purchased, including any trademark, identification number, serial number, model number, brand name, or other identifying marks on such articles and a description by weight and design of such articles.]
- [5. failed to obtain a written and signed declaration of the seller's ownership which stated whether the valuable article was totally owned by the seller, how long the seller had owned the article, whether the seller or someone else found the article, and, if the article was found, the details of its finding.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find

the defendant guilty of failure to maintain a register (requirements).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to maintain a register (requirements).

#### COMMENT

1. *See* §§ 18-16-105(1), (2), 18-16-108, C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”); Instruction F:330.5 (defining “seller”); Instruction F:385.3 (defining “valuable article”).

## **16:04 FAILURE TO MAINTAIN A REGISTER (INSPECTION)**

The elements of the crime of failure to maintain a register (inspection) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a purchaser of valuable articles, and
  5. failed to make his [her] register detailing the purchases of such articles available to any peace officer for inspection at any reasonable time.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to maintain a register (inspection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to maintain a register (inspection).

### COMMENT

1. See §§ 18-16-105(3), 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:265.2 (defining “peace officer” (purchases of valuable articles)); Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”); Instruction F:385.3 (defining “valuable article”).

## 16:05 FAILURE TO MAINTAIN A REGISTER (TIMEFRAME)

The elements of the crime of failure to maintain a register (timeframe) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was a purchaser of valuable articles, and
  5. failed to keep a register detailing the purchases of such articles for at least three years after the last date of purchase of valuable articles described therein.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to maintain a register (timeframe).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to maintain a register (timeframe).

### COMMENT

1. See §§ 18-16-105(4), 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:306.7 (defining "purchase"); Instruction F:306.8 (defining "purchaser"); Instruction F:385.3 (defining "valuable article").

## 16:06 IMPROPER HOLDING OF A VALUABLE ARTICLE

The elements of the crime of improper holding of a valuable article are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser, and
- [5. failed to hold a valuable article, other than stamped and assayed gold or silver bullion or gold coins, within the jurisdiction of purchase for a period of thirty days from the date of purchase.]
- [5. while holding a valuable article, other than stamped and assayed gold or silver bullion or gold coins, within the jurisdiction of purchase for a period of thirty days from the date of purchase, failed to hold the article separate and apart from any other transaction.]
- [5. while holding a valuable article, other than stamped and assayed gold or silver bullion or gold coins, within the jurisdiction of purchase for a period of thirty days from the date of purchase, changed in form or altered the article in any way.]
- [5. while holding a valuable article, other than stamped and assayed gold or silver bullion or gold coins, within the jurisdiction of purchase for a period of thirty days from the date of purchase, failed to permit a requesting law enforcement officer to inspect the article during the thirty-day period.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper holding of a valuable article.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper holding of a valuable article.

#### COMMENT

1. See §§ 18-16-106, 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”); Instruction F:385.3 (defining “valuable article”).
3. In *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 946 (Colo. 1985), the supreme court held that the word “bullion” was not unconstitutionally vague based on the following dictionary definition: “Gold or silver, considered merely as so much metal without regard to any value imparted by its form . . . specif., uncoined gold or silver, in the shape of bars, ingots, or the like” (alteration in original) (quoting *Merriam Webster’s New International Dictionary* (2d ed. 1959)). Likewise, the court held that the term “assayed” was sufficiently definite, citing the same dictionary: “To assay is to examine to determine the metal’s weight, measure, quality or other properties.” *Id.*

## 16:07 IMPROPER TRANSFER OF BULLION OR COINS

The elements of the crime of improper transfer of bullion or coins are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser, and
5. failed to record the identity of any person to whom he [she] transferred any stamped and assayed gold or silver bullion or gold coins, or failed to record the date, time, and place of such transfer.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper transfer of bullion or coins.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper transfer of bullion or coins.

### COMMENT

1. See §§ 18-16-106(2), 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:306.8 (defining “purchaser”).
3. In *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 946 (Colo. 1985), the supreme court held that the word “bullion” was not unconstitutionally

vague based on the following dictionary definition: “Gold or silver, considered merely as so much metal without regard to any value imparted by its form . . . specif., uncoined gold or silver, in the shape of bars, ingots, or the like” (alteration in original) (quoting *Merriam Webster’s New International Dictionary* (2d ed. 1959)). Likewise, the court held that the term “assayed” was sufficiently definite, citing the same dictionary: “To assay is to examine to determine the metal’s weight, measure, quality or other properties.” *Id.*

**16:08 FAILURE TO FILE REQUIRED REPORT OF  
PURCHASES OF VALUABLE ARTICLES (LOCAL LAW  
ENFORCEMENT AGENCY)**

The elements of the crime of failure to file required report of purchases of valuable articles (local law enforcement agency) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser of valuable articles, and
- [5. failed to provide the local law enforcement agency, on a weekly basis, with two records, on a form provided by the local law enforcement agency, of all valuable articles purchased during the preceding week.]
- [5. provided the local law enforcement agency with a form that failed to include [insert information required to be recorded in the purchaser's register pursuant to section 18-16-105, C.R.S. 2020], a physical description of the seller, or the dollar amount of the purchase.]
- [5. failed to provide the local law enforcement agency with one copy of the seller's declaration of ownership.]
- [5. provided to the local law enforcement agency a form detailing all valuable articles purchased during the preceding week that was not signed by [the seller] [the defendant] [the defendant's agent who participated in the purchase] at the time of purchase.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to file required report of purchases of valuable articles (local law enforcement agency).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to file required report of purchases of valuable articles (local law enforcement agency).

#### COMMENT

1. *See* §§ 18-16-107(1), 18-16-108, C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:199.7 (defining “local law enforcement agency” (purchases of valuable articles)); Instruction F:306.7 (defining “purchase”); Instruction F:306.8 (defining “purchaser”); Instruction F:330.5 (defining “seller”); Instruction F:385.3 (defining “valuable article”).

**16:09 FAILURE TO FILE REQUIRED REPORT OF  
PURCHASES OF VALUABLE ARTICLES (SELLER'S LAW  
ENFORCEMENT AGENCY)**

The elements of the crime of failure to file required report of purchases of valuable articles (seller's law enforcement agency) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was a purchaser of valuable articles, and
- [5. failed to forward to the law enforcement agency having jurisdiction in the area where the seller resides, on a weekly basis, two records, on a form provided by the purchaser's local law enforcement agency, of all valuable articles purchased during the preceding week.]
- [5. forwarded to the law enforcement agency having jurisdiction in the area where the seller resides a form that failed to include [insert information required to be recorded in the purchaser's register pursuant to section 18-16-105, C.R.S. 2020], a physical description of the seller, or the dollar amount of the purchase.]
- [5. failed to forward to the law enforcement agency having jurisdiction in the area where the seller resides one copy of the seller's declaration of ownership.]
- [5. forwarded to the law enforcement agency having jurisdiction in the area where the seller resides a form detailing all valuable articles purchased during the preceding week that was not signed by [the seller] [the defendant] [the defendant's agent who participated in the purchase] at the time of purchase.]
- [6. and that the defendant's conduct was not legally authorized by

the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to file required report of purchases of valuable articles (seller's law enforcement agency).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to file required report of purchases of valuable articles (seller's law enforcement agency).

#### COMMENT

1. See §§ 18-16-107(2), 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:199.7 (defining "local law enforcement agency" (purchases of valuable articles)); Instruction F:306.7 (defining "purchase"); Instruction F:306.8 (defining "purchaser"); Instruction F:330.5 (defining "seller"); Instruction F:385.3 (defining "valuable article").
3. Section 18-16-107(1) details certain reporting requirements for purchasers to their "local law enforcement agency." See Instruction 16:08. That local law enforcement agency is defined by statute as "any marshal's office, police department, or sheriff's office with jurisdiction in the locality *in which the purchaser makes the purchase*" (emphasis added). In addition, section 18-16-107(2) provides that "[a] copy of such record and the seller's declaration of ownership shall also be forwarded to the local law enforcement agency *having jurisdiction in the area where the seller resides*" (emphasis added). Thus, where subsection (1) requires the purchaser to file a particular form with his own (i.e., local) law enforcement agency, subsection (2) requires him to forward that form to the seller's agency. Therefore, this instruction mirrors the prior instruction, except that it removes the word "local" before the phrase "law enforcement agency," as this crime involves failure to properly report to the seller's agency. Note, however, that the first bracketed alternative in the fifth element still

contains the phrase “local law enforcement agency” because the purchaser obtains the form from his own agency rather than the seller’s.

## 16:10 GIVING FALSE INFORMATION WITH RESPECT TO THE PURCHASE OF A VALUABLE ARTICLE

The elements of the crime of giving false information with respect to the purchase of a valuable article are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. gave false information with respect to [insert description of the relevant information required by section 18-16-103 or section 18-16-105, C.R.S. 2020].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of giving false information with respect to the purchase of a valuable article.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to file required reports giving false information with respect to the purchase of a valuable article.

### COMMENT

1. See § 18-16-108, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:306.8 (defining “purchaser”); Instruction F:385.3 (defining “valuable article”).



## CHAPTER 17

### COLORADO ORGANIZED CRIME CONTROL ACT

- [17:01](#) COLORADO ORGANIZED CRIME CONTROL ACT  
(USE OF PROCEEDS)
- [17:02](#) COLORADO ORGANIZED CRIME CONTROL ACT  
(ACQUIRING AN INTEREST)
- [17:03](#) COLORADO ORGANIZED CRIME CONTROL ACT  
(EMPLOYED BY, OR ASSOCIATED WITH, AN  
ENTERPRISE)
- [17:04.INT](#) COLORADO ORGANIZED CRIME CONTROL ACT –  
INTERROGATORY (TREBLE FINE)

## 17:01 COLORADO ORGANIZED CRIME CONTROL ACT (USE OF PROCEEDS)

The elements of the crime of use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt, and
  5. used or invested, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of proceeds from derived from a pattern of racketeering activity or the collection of an unlawful debt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt.

## COMMENT

1. See § 18-17-104(1)(a), C.R.S. 2020.
2. See Instruction F:125 (defining “enterprise”); Instruction F:195 (defining “knowingly”); Instruction F:261 (defining “pattern of racketeering activity”); Instruction F:307 (defining “racketeering activity”); Instruction F:380 (defining “unlawful debt”).
3. Section 18-17-104(4) makes it unlawful to “conspire” to violate section 18-17-104(1). See Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to “endeavor” to violate section 18-17-104(1), and a division of the court of appeals has equated an “endeavor” with an “attempt.” See *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); see also Instruction G2:01 (criminal attempt).

Thus, there may be cases in which a defendant who is charged with conspiring to violate, conspiring to attempt to violate, or attempting to violate section 18-17-104(1) is not also separately charged with conspiracy, in violation of section 18-2-201, or attempt, in violation of section 18-2-101. In such circumstances, give the jury the elemental instruction for conspiracy and/or attempt (but without the two concluding paragraphs that explain the burden of proof). Place the elemental instruction(s) for conspiracy and/or attempt immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms for conspiracy and/or attempt.

4. Section 18-17-104(1)(b), C.R.S. 2020, includes an exemption from criminal liability for certain types of securities purchases. However, the Committee has not drafted a model affirmative defense instruction.

## 17:02 COLORADO ORGANIZED CRIME CONTROL ACT (ACQUIRING AN INTEREST)

The elements of the crime of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. through a pattern of racketeering activity or through the collection of an unlawful debt,
5. acquired or maintained, directly or indirectly, any interest in or control of any enterprise or real property.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt.

### COMMENT

1. See § 18-17-104(2), C.R.S. 2020.
2. See Instruction F:125 (defining "enterprise"); Instruction F:195 (defining "knowingly"); Instruction F:261 (defining "pattern of

racketeering activity”); Instruction F:307 (defining “racketeering activity”); Instruction F:380 (defining “unlawful debt”).

3. Section 18-17-104(4) makes it unlawful to “conspire” to violate section 18-17-104(2). *See* Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to “endeavor” to violate section 18-17-104(2), and a division of the court of appeals has equated an “endeavor” with an “attempt.” *See New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); *see also* Instruction G2:01 (criminal attempt).

## **17:03 COLORADO ORGANIZED CRIME CONTROL ACT (EMPLOYED BY, OR ASSOCIATED WITH, AN ENTERPRISE)**

The elements of the crime of a pattern of racketeering activity or collection of an unlawful debt (employed by, or associated with, an enterprise) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was employed by, or associated with, any enterprise, and
  5. conducted or participated, directly or indirectly, in such enterprise through a pattern of racketeering activity or through the collection of an unlawful debt.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of a pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of a pattern of racketeering activity or through the collection of an unlawful debt (employed by, or associated with, an enterprise).

### COMMENT

1. See § 18-17-104(3), C.R.S. 2020.

2. See Instruction F:125 (defining “enterprise”); Instruction F:195 (defining “knowingly”); Instruction F:261 (defining “pattern of racketeering activity”); Instruction F:307 (defining “racketeering activity”); Instruction F:380 (defining “unlawful debt”).

3. Section 18-17-104(4) makes it unlawful to “conspire” to violate section 18-17-104(3). See Instruction G2:05 (conspiracy). Section 18-17-104(4) also makes it unlawful to “endeavor” to violate section 18-17-104(3), and a division of the court of appeals has equated an “endeavor” with an “attempt.” See *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1373 (Colo. App. 1993); see also Instruction G2:01 (criminal attempt).

## 17:04.INT COLORADO ORGANIZED CRIME CONTROL ACT – INTERROGATORY (TREBLE FINE)

If you find the defendant not guilty of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Was the gain or loss extraordinarily large? (Answer “Yes” or “No”)

The gain or loss was extraordinarily large only if:

1. the defendant, through commission of [use of proceeds derived from a pattern of racketeering activity or the collection of an unlawful debt] [acquiring an interest through a pattern of racketeering activity or through the collection of an unlawful debt] [pattern of racketeering activity or the collection of an unlawful debt (employed by, or associated with, an enterprise)], derived pecuniary value, or caused personal injury or property damage or other loss, with a gross value gained, or a gross value of loss caused, that was [equal to] [at least] [insert an amount that is greater than \$333,333].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has

met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. See § 18-17-105(2), C.R.S. 2020.
2. See Instruction F:266 (defining “pecuniary value”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Section 18-17-105(2), C.R.S. 2020, authorizes a court to impose a fine equal to three times the gross amount of the gain or loss that the defendant caused (plus court costs, and the costs of investigation and prosecution), and section 18-17-105(3), states that the court “shall hold a hearing to determine the amount of the fine.” However, in cases where there is the potential for the trebled amount to exceed the maximum authorized fine, *see* § 18-1.3-401(1)(a)(III)(A), C.R.S. 2020 (the maximum fine for a class two felony conviction is one million dollars), the issue should be submitted to the jury. *See S. Union Co. v. United States*, 567 U.S. 132 (2012) (fines implicate the Sixth Amendment right to a jury trial and are thus subject to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).



## CHAPTER 18

### OFFENSES RELATED TO CONTROLLED SUBSTANCES

- [18:01](#) UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE
- [18:02.INT](#) UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (SPECIFIED SUBSTANCE)
- [18:03.INT](#) UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (OTHER SPECIFIED SUBSTANCES)
- [18:04](#) UNLAWFUL USE OF A CONTROLLED SUBSTANCE
- [18:05](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE
- [18:06.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF A SCHEDULE I OR II CONTROLLED SUBSTANCE)
- [18:07.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF METHAMPHETAMINE, HEROIN, KETAMINE, OR CATHINONES)
- [18:08.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (CONTEMPORANEOUS CONSUMPTION)
- [18:09.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF FLUNITRAZEPAM)
- [18:10.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF A SCHEDULE III OR IV CONTROLLED SUBSTANCE)
- [18:11.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (SCHEDULE III OR IV CONTROLLED SUBSTANCE, WITHOUT REMUNERATION)

- [18:12.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (SCHEDULE V CONTROLLED SUBSTANCE)
- [18:13.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (MINOR)
- [18:14](#) SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)
- [18:15](#) SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN SIX OUNCES, BUT NOT MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN THREE OUNCES, BUT NOT MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)
- [18:16](#) SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN ONE OUNCE, BUT NOT MORE THAN SIX OUNCES OF MARIJUANA; OR MORE THAN ONE-HALF OUNCE, BUT NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE)
- [18:17](#) SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (NOT MORE THAN ONE OUNCE OF MARIJUANA, OR NOT MORE THAN ONE-HALF OUNCE OF MARIJUANA CONCENTRATE)
- [18:18](#) PROCESSING OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE
- [18:19](#) DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE
- [18:20.INT](#) DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE – INTERROGATORY (SPECIFIED QUANTITY)
- [18:21](#) CULTIVATING OR GROWING MARIJUANA

<a href="#"><u>18:22.INT</u></a>	CULTIVATING OR GROWING MARIJUANA – INTERROGATORY (NUMBER OF PLANTS)
<a href="#"><u>18:22.3</u></a>	CULTIVATING OR GROWING MARIJUANA (MORE THAN TWELVE PLANTS)
<a href="#"><u>18:22.7.INT</u></a>	CULTIVATING OR GROWING MARIJUANA (MORE THAN TWELVE PLANTS) – INTERROGATORY (NUMBER OF PLANTS)
<a href="#"><u>18:23</u></a>	POSSESSION OF MORE THAN TWELVE OUNCES OF MARIJUANA OR MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE
<a href="#"><u>18:24</u></a>	POSSESSION OF MORE THAN SIX OUNCES OF MARIJUANA, OR POSSESSION OF MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE
<a href="#"><u>18:25</u></a>	POSSESSION OF MORE THAN TWO OUNCES BUT NOT MORE THAN SIX OUNCES OF MARIJUANA OR NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE
<a href="#"><u>18:26</u></a>	POSSESSION OF MORE THAN ONE OUNCE BUT NOT MORE THAN TWO OUNCES OF MARIJUANA
<a href="#"><u>18:27</u></a>	OPEN AND PUBLIC DISPLAY, CONSUMPTION, OR USE OF LESS THAN TWO OUNCES OF MARIJUANA
<a href="#"><u>18:28</u></a>	TRANSFERRING OR DISPENSING NOT MORE THAN TWO OUNCES OF MARIJUANA FOR NO CONSIDERATION
<a href="#"><u>18:28.5</u></a>	TRANSFER OF MARIJUANA OR MARIJUANA CONCENTRATE AT NO COST RELATED TO REMUNERATION
<a href="#"><u>18:29</u></a>	UNLAWFUL USE OR POSSESSION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM
<a href="#"><u>18:30</u></a>	UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM
<a href="#"><u>18:31</u></a>	UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM (INDUCING, ATTEMPTING, OR CONSPIRING)
<a href="#"><u>18:32</u></a>	UNLAWFUL CULTIVATION OF SALVIA DIVINORUM

- [18:33.INT](#) SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM OFFENSES – INTERROGATORY (MINOR)
- [18:34](#) FRAUDULENT REPRESENTATION OF A MEDICAL CONDITION RELATED TO MEDICAL MARIJUANA
- [18:35](#) FRAUDULENT USE OR THEFT OF A MARIJUANA REGISTRY IDENTIFICATION CARD
- [18:36](#) FRAUDULENTLY PRODUCING, COUNTERFEITING, OR TAMPERING WITH A MARIJUANA REGISTRY IDENTIFICATION CARD
- [18:37](#) UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY THE MEDICAL MARIJUANA REGISTRY
- [18:38](#) UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY A LICENSED MEDICAL MARIJUANA BUSINESS
- [18:38.5](#) UNLAWFUL ADVERTISING OF MARIJUANA
- [18:39](#) UNLAWFUL USE OF MARIJUANA IN A DETENTION FACILITY
- [18:39.5](#) MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE
- [18:39.7](#) ALLOWING MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE
- [18:40.INT](#) ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (PATTERN, SUBSTANTIAL SOURCE, AND SPECIAL SKILL)
- [18:41.INT](#) ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (CONSPIRACY)
- [18:42.INT](#) ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (INTRODUCING OR IMPORTING OVER A SPECIFIED AMOUNT)

- [18:43.INT](#) ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(DEADLY WEAPON OR FIREARM)
- [18:44.INT](#) UNLAWFUL DISTRIBUTION, MANUFACTURING,  
DISPENSING, SALE, OR POSSESSION FOR THE  
PURPOSES OF SALE OF ANY CONTROLLED  
SUBSTANCE – INTERROGATORY (USE OF A  
CHILD)
- [18:45.INT](#) ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(CONTINUING CRIMINAL ENTERPRISE WITH FIVE  
OR MORE OTHER PERSONS)
- [18:46.INT](#) SELLING, DISTRIBUTING, POSSESSING WITH  
INTENT TO DISTRIBUTE, MANUFACTURING, OR  
ATTEMPTING TO MANUFACTURE ANY  
CONTROLLED SUBSTANCE – INTERROGATORY  
(PROTECTED AREA)
- [18:47](#) KEEPING, MAINTAINING, CONTROLLING,  
RENTING, OR MAKING AVAILABLE PROPERTY  
FOR UNLAWFUL DISTRIBUTION OR  
TRANSPORTATION OF CONTROLLED  
SUBSTANCES
- [18:48](#) MAINTAINING A PLACE FOR UNLAWFUL  
MANUFACTURE OF CONTROLLED SUBSTANCES
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- [18:50](#) ABUSING TOXIC VAPORS
- [18:51](#) UNLAWFUL POSSESSION OF MATERIALS TO  
MAKE METHAMPHETAMINE AND AMPHETAMINE
- [18:52](#) SALE OR DISTRIBUTION OF MATERIALS TO  
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- [18:54](#) PURCHASE OF AN EXCESS AMOUNT OF  
METHAMPHETAMINE PRECURSOR DRUGS  
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<a href="#"><u>18:55</u></a>	RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (IMPROPER DISPLAY)
<a href="#"><u>18:56</u></a>	RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR
<a href="#"><u>18:57</u></a>	UNAUTHORIZED POSSESSION OF A PRESCRIBED OR DISPENSED CONTROLLED SUBSTANCE
<a href="#"><u>18:58</u></a>	UNAUTHORIZED POSSESSION OR DISPENSING OF A SCHEDULE I CONTROLLED SUBSTANCE
<a href="#"><u>18:59</u></a>	UNAUTHORIZED DISPENSING OF A SCHEDULE II CONTROLLED SUBSTANCE
<a href="#"><u>18:60</u></a>	UNAUTHORIZED DISPENSING OF A SCHEDULE III, IV, OR V CONTROLLED SUBSTANCE
<a href="#"><u>18:61</u></a>	DISPENSING MARIJUANA OR MARIJUANA CONCENTRATE
<a href="#"><u>18:62</u></a>	EXCESSIVE REFILLING
<a href="#"><u>18:63</u></a>	FAILURE TO FILE AND RETAIN A PRESCRIPTION
<a href="#"><u>18:64</u></a>	FAILURE TO RECORD AND MAINTAIN A RECORD OF HOSPITAL DISPENSING
<a href="#"><u>18:65</u></a>	REFUSAL TO MAKE A RECORD OR FILE AVAILABLE FOR INSPECTION
<a href="#"><u>18:66</u></a>	FAILURE TO KEEP RECORDS
<a href="#"><u>18:67</u></a>	FAILURE TO OBTAIN A LICENSE OR REGISTRATION
<a href="#"><u>18:68</u></a>	DISPENSING WITHOUT LABELING
<a href="#"><u>18:69</u></a>	DISPENSING WITHOUT LABELING BY A PRACTITIONER
<a href="#"><u>18:70</u></a>	UNLAWFUL ADMINISTRATION OF A CONTROLLED SUBSTANCE
<a href="#"><u>18:71</u></a>	UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE BY A PRACTITIONER OR PHARMACY
<a href="#"><u>18:72</u></a>	UNLAWFUL TRANSFER OF DRUG PRECURSORS
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<a href="#"><u>18:74</u></a>	UNLAWFULLY FURNISHING OR OMITTING MATERIAL INFORMATION
<a href="#"><u>18:75</u></a>	REFUSAL OF ENTRY FOR AN INSPECTION
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<a href="#"><u>18:77</u></a>	MAKING A FALSE STATEMENT RELATED TO A CONTROLLED SUBSTANCE
<a href="#"><u>18:78</u></a>	FALSE ACT FOR THE PURPOSE OF OBTAINING A CONTROLLED SUBSTANCE
<a href="#"><u>18:79</u></a>	MAKING OR UTTERING A FALSE OR FORGED ORDER
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<a href="#"><u>18:81</u></a>	INDUCING CONSUMPTION BY FRAUDULENT MEANS
<a href="#"><u>18:82</u></a>	MANUFACTURING OR DISTRIBUTING AN IMITATION CONTROLLED SUBSTANCE, OR POSSESSING AN IMITATION CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE
<a href="#"><u>18:83</u></a>	DISTRIBUTING AN IMITATION CONTROLLED SUBSTANCE TO A MINOR
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<a href="#"><u>18:85.SP</u></a>	IMITATION CONTROLLED SUBSTANCE OFFENSES – SPECIAL INSTRUCTION (ERRONEOUS BELIEF NO DEFENSE)
<a href="#"><u>18:86</u></a>	MANUFACTURING OR DELIVERING A COUNTERFEIT CONTROLLED SUBSTANCE, OR POSSESSING A COUNTERFEIT CONTROLLED SUBSTANCE WITH INTENT TO MANUFACTURE OR DELIVER
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<a href="#"><u>18:88</u></a>	POSSESSION OF DRUG PARAPHERNALIA
<a href="#"><u>18:89</u></a>	MANUFACTURE, SALE, OR DELIVERY OF DRUG PARAPHERNALIA
<a href="#"><u>18:90</u></a>	ADVERTISEMENT OF DRUG PARAPHERNALIA

## CHAPTER COMMENTS

1. See § 18-18-431, C.R.S. 2020 (“The common law defense known as the ‘procuring agent defense’ is not a defense to any crime in this title.”); see also *People v. Farris*, 812 P.2d 654, 656 (Colo. App. 1991) (tracing the demise

of the “procuring agent defense” prior to the enactment, in 1992, of section 18-18-431).

2. Section 18-18-302(2), (3)(a)-(c), C.R.S. 2020, exempts from criminal liability persons who are “registered by the board” as manufacturers or distributors of controlled substances, and it identifies other persons who are exempt from criminal liability without being subject to the registration requirement (such as persons possessing a controlled substance pursuant to a lawful order of a practitioner). However, the Committee has not drafted model affirmative defense instructions for these exemptions.

## 18:01 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful possession of a controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed a controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a controlled substance.

### COMMENT

1. *See* § 18-18-403.5(1), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. *See* Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”).

4. Section 18-18-428(1)(b), C.R.S. 2020, establishes an exemption from criminal liability for “any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe” if the location of the needle or syringe is disclosed in specified circumstances.

5. In 2015, the Committee added Comment 4. *See* Ch. 76, sec. 1, § 18-18-428(1)(b), 2015 Colo. Sess. Laws 200, 200-01.

6. In 2019, the Committee corrected the statutory citation in Comment 1.

## 18:02.INT UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (SPECIFIED SUBSTANCE)

If you find the defendant not guilty of unlawful possession of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful possession of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant unlawfully possess [insert “flunitrazepam,” “ketamine,” “gamma hydroxybutyrate, including its salts, isomers, and salts of isomers,” “cathinones,” or “more than four grams of a controlled substance listed in schedule I or II”]? (Answer “Yes” or “No”)

The defendant unlawfully possessed [insert “flunitrazepam,” “gamma hydroxybutyrate, including its salts, isomers, and salts of isomers,” “ketamine,” “cathinones,” or “more than four grams of a controlled substance listed in schedule I or II”] only if:

1. the controlled substance unlawfully possessed by the defendant was any material, compound, mixture, or preparation that contained any quantity of [insert “flunitrazepam,” “ketamine,” “gamma hydroxybutyrate, including its salts, isomers, and salts of isomers,” “cathinones,” or “more than four grams of a controlled substance listed in schedule I or II”].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-403.5(2)(a), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2019, pursuant to a legislative amendment, the Committee added the phrase “gamma hydroxybutyrate, including its salts, isomers, and salts of isomers,” throughout this instruction; it also changed the phrase “a controlled substance listed in schedule I or II” to “more than four grams of a controlled substance listed in schedule I or II” throughout the instruction. *See* Ch. 291, sec. 1, § 18-18-403.5(2)(a), 2019 Colo. Sess. Laws 2676, 2676.

Additionally, the Committee notes that these changes go into effect on March 1, 2020. *See id.*

## 18:03.INT UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE – INTERROGATORY (OTHER SPECIFIED SUBSTANCES)

If you find the defendant not guilty of unlawful possession of a controlled substance, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful possession of a controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant unlawfully possess [not more than four grams of a controlled substance listed in schedule I or II] [a controlled substance listed in schedule III, IV, or V, except flunitrazepam, gamma hydroxybutyrate, or ketamine]? (Answer “Yes” or “No”)

The defendant unlawfully possessed [not more than four grams of a controlled substance listed in schedule I or II] [a controlled substance listed in schedule III, IV, or V, except flunitrazepam, gamma hydroxybutyrate, or ketamine] only if:

1. the controlled substance unlawfully possessed by the defendant was any material, compound, mixture, or preparation that contained [not more than four grams of a controlled substance listed in schedule I or II] [any quantity of a controlled substance listed in schedule III, IV, or V, except flunitrazepam, gamma hydroxybutyrate, or ketamine].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-403.5(2)(c), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In 2019, pursuant to a legislative amendment, the Committee added the first bracketed alternative throughout this instruction, and it added “gamma hydroxybutyrate” to the excepting language in the second bracketed alternative. *See* Ch. 291, sec. 1, § 18-18-403.5(2)(c), 2019 Colo. Sess. Laws 2676, 2676.

Additionally, the Committee notes that these changes go into effect on March 1, 2020. *See id.*

## 18:04 UNLAWFUL USE OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful use of a controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. used any controlled substance, and
4. the controlled substance was not dispensed by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense the controlled substance for bona fide medical needs.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of a controlled substance.

### COMMENT

1. *See* § 18-18-404(1)(a), C.R.S. 2020.
2. *See* Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:100 (defining "dispense"); Instruction F:268 (defining "person").

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”).

## 18:05 UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE

The elements of the crime of unlawful distribution, manufacturing, dispensing, or sale are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. manufactured, dispensed, sold, or distributed a controlled substance.]
- [4. possessed a controlled substance with intent to manufacture, dispense, sell, or distribute.]
- [4. induced, attempted to induce, or conspired with one or more other persons to manufacture, dispense, sell, or distribute a controlled substance.]
- [4. induced, attempted to induce, or conspired with one or more other persons to possess a controlled substance with intent to manufacture, dispense, sell, or distribute.]
- [4. possessed one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale.

## COMMENT

1. See § 18-18-405(1), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:100 (defining “dispense”); Instruction F:102 (defining “distribute”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:268 (defining “person”); Instruction F:281 (defining “possession”); Instruction F:327 (defining “sale”); Instruction G2:05 (conspiracy).
3. See *People v. Abiodun*, 111 P.3d 462, 466 (Colo. 2005) (“The one-sentence proscription [in section 18-18-405(1)(a)] is structured as a series of acts, with reference to the same controlled substance and governed by a common mens rea. The acts chosen for specific inclusion are not themselves mutually exclusive but overlap in various ways and cover a continuum of conduct from the production of a controlled substance to its delivery to another person, under any of a number of circumstances.”).
4. Section 18-18-405(1) excepts from criminal liability acts “authorized by part 1 of article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)], part 2 of article 80 of title 27 [(alcohol and drug abuse treatment programs)], or part 2 or 3 of this article 18 [(standards, schedules, and regulation)].” However, the Committee has not drafted model affirmative defense instructions.
5. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. See Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

7. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. *See* Ch. 136, sec. 106, § 18-18-405(1)(a), 2019 Colo. Sess. Laws 613, 1679.

## **18:06.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF A SCHEDULE I OR II CONTROLLED SUBSTANCE)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than two hundred twenty-five grams and contained a schedule I or schedule II controlled substance? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fourteen grams, but not more than two hundred twenty-five grams, and contained a schedule I or schedule II controlled substance? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than fourteen grams and contained a schedule I or schedule II controlled substance? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the schedule I or schedule II controlled substance beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has

met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-405(2)(a)(I)(A), (b)(I)(A), (c)(I), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2020 (“When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones, or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense.”). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See, e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2020 (aggregation and charging of multiple thefts “in a single count”); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.
4. In cases where the amount of the controlled substance is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one quantity question.

For example, in a case involving an interrogatory with three quantity questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], unlawful distribution, manufacturing, dispensing, or sale.

---

FOREPERSON\*

II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], unlawful distribution, manufacturing, dispensing, or sale.

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FOREPERSON\*

We further find, with respect to the verdict question[s] for this count, as follows:

\*\*1. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than two hundred twenty-five grams and contained a schedule I or schedule II controlled substance?

Yes       No

\*\*2. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fourteen grams, but not more than two hundred twenty-five grams, and contained a schedule I or schedule II controlled substance]?

Yes             No

- \*\*3. Did the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed fourteen grams or less and contained a schedule I or schedule II controlled substance]?

Yes             No

---

FOREPERSON\*

\* The foreperson should use ink to sign on one of the two lines indicating a verdict of "not guilty" or "guilty." If the verdict is "guilty," the foreperson should use ink to mark the appropriate space(s) indicating the answer(s) to the verdict question(s), and then sign on the line following the verdict question[s].

\*\* Although you may answer "No" to more than one question, you may not answer "Yes" to more than one question. Further, if you answer "Yes" to any question, you should not answer the other question[s].

6. In 2015, the Committee appended "Answer 'Yes' or 'No'" parentheticals to each interrogatory.

**18:07.INT UNLAWFUL DISTRIBUTION, MANUFACTURING,  
DISPENSING, OR SALE – INTERROGATORY (QUANTITY  
OF METHAMPHETAMINE, HEROIN, KETAMINE, OR  
CATHINONES)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than one hundred twelve grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than seven grams, but not more than one hundred twelve grams, and contained [methamphetamine] [heroin] [ketamine] [cathinones]? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than seven grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the [methamphetamine] [heroin] [ketamine] [cathinones] beyond a reasonable

doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-18-405(2)(a)(I)(B), (b)(I)(B), (c)(II), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2020 (“When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones, or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense.”). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See, e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2020 (aggregation and charging of multiple thefts “in a single count”); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.
4. In cases where the amount of methamphetamine, heroin, ketamine, or cathinones is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity

question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.

5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one quantity question. *See* Instruction 18:06.INT, Comment 5.

6. The Committee has not drafted a model instruction defining “cathinones” because the statutory definition is lengthy. *See* § 18-18-102(3.5), C.R.S. 2020. The court should draft a special instruction based on the relevant portion(s) of the statutory definition.

7. In 2015, the Committee appended “Answer ‘Yes’ or ‘No’” parentheticals to each interrogatory.

**18:08.INT UNLAWFUL DISTRIBUTION, MANUFACTURING,  
DISPENSING, OR SALE – INTERROGATORY  
(CONTEMPORANEOUS CONSUMPTION)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, and you further find that the distribution, manufacturing, dispensing, or sale was of any material, compound, mixture, or preparation that weighed [not more than fourteen grams and contained a schedule I or schedule II controlled substance] [not more than seven grams and contained [methamphetamine] [heroin] [ketamine] [cathinones]] you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form.

- [\_]. Did the defendant distribute or transfer not more than four grams of a schedule I or II controlled substance for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer? (Answer “Yes” or “No”)]
  
- [\_]. Did the defendant distribute or transfer not more than two grams of [methamphetamine] [heroin] [ketamine] [cathinones] for the purpose of consuming all of the [methamphetamine] [heroin] [ketamine] [cathinones] with another person or persons at a time substantially contemporaneous with the transfer? (Answer “Yes” or “No”)]

The prosecution has the burden to prove, beyond a reasonable doubt, either that the transfer was of [more than four grams of a schedule I or II controlled substance] [more than two grams of [methamphetamine] [heroin] [ketamine] [cathinones]], or that the transfer was not for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-405(2)(d)(II), C.R.S. 2020.
2. *See* Instruction F:268 (defining “person”); *see, e.g.*, Instruction E:28 (special verdict form).
3. As indicated by means of the “further find” provision in the second paragraph, this instruction is designed to accompany either Instruction 18:06.INT or Instruction 18:07.INT in cases involving the smallest amounts of the specified substances. However, this instruction should not be given without Instruction 18:06.INT or Instruction 18:07.INT because doing so deprives the jury of a way to make a finding that, although the amount of the controlled substance was sufficiently small to meet the statutory requirement, the distribution or transfer was not for the purpose of consuming all of the controlled substance with another person or persons at a time substantially contemporaneous with the transfer.

## **18:09.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF FLUNITRAZEPAM)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

[\_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than fifty milligrams and contained flunitrazepam? (Answer “Yes” or “No”)]

[\_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than ten milligrams, but not more than fifty milligrams, and contained flunitrazepam? (Answer “Yes” or “No”)]

[\_. Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than ten milligrams and contained flunitrazepam? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the flunitrazepam beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-405(2)(a)(I)(C), (b)(I)(C), (c)(III), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. It may be necessary to modify the model interrogatory in light of the rule of aggregation established by section 18-18-405(5), C.R.S. 2020 (“When a person commits unlawful distribution, manufacture, dispensing, sale, or possession with intent to manufacture, dispense, sell, or distribute any schedule I or schedule II controlled substance, as listed in section 18-18-203 or 18-18-204, flunitrazepam, ketamine, or cathinones or conspires with one or more persons to commit the offense, pursuant to subsection (1) of this section, twice or more within a period of six months, without having been placed in jeopardy for the prior offense or offenses, the aggregate amount of the schedule I or schedule II controlled substance, flunitrazepam, ketamine, or cathinones involved may be used to determine the level of drug offense.”). However, note that this rule of aggregation relates only to sentence enhancement; it does not authorize, or require, the aggregation of multiple acts in a single count. *See, e.g.*, § 18-4-401(4)(a), (b), C.R.S. 2020 (aggregation and charging of multiple thefts “in a single count”); Instructions 4-4:14, 4-4:15. Therefore, do not modify the model elemental instruction defining the substantive offense.
4. In cases where the amount of flunitrazepam is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.
5. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that

repeats the admonition that the jury cannot answer “Yes” to more than one quantity question. *See* Instruction 18:06.INT, Comment 5.

6. In 2015, the Committee appended “Answer ‘Yes’ or ‘No’” parentheticals to each interrogatory.

## **18:10.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (QUANTITY OF A SCHEDULE III OR IV CONTROLLED SUBSTANCE)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_ . Did the unlawful distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed more than four grams and contained a schedule III or IV controlled substance? (Answer “Yes” or “No”)]
  
- [\_ . Did the unlawful the distribution, manufacturing, dispensing, or sale involve any material, compound, mixture, or preparation that weighed not more than four grams and contained a schedule III or IV controlled substance? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the schedule III or IV controlled substance beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-18-405(2)(c)(IV), (2)(d)(I), (e)(II), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In cases where the amount of schedule III or IV controlled substance(s) is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes a bracketed example for a lesser quantity question.
4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one quantity question. *See* Instruction 18:06.INT, Comment 5.
5. In 2015, the Committee appended “Answer ‘Yes’ or ‘No’” parentheticals to each interrogatory.

**18:11.INT UNLAWFUL DISTRIBUTION, MANUFACTURING,  
DISPENSING, OR SALE – INTERROGATORY (SCHEDULE  
III OR IV CONTROLLED SUBSTANCE, WITHOUT  
REMUNERATION)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, and you further find that the distribution, manufacturing, dispensing, or sale was of any material, compound, mixture, or preparation that weighed not more than four grams and contained a schedule III or IV controlled substance, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form.

1. Did the defendant transfer, with no remuneration, not more than four grams of a schedule III or IV controlled substance?  
(Answer “Yes” or “No”)

The prosecution has the burden to prove, beyond a reasonable doubt, either that the transfer was of more than four grams of a schedule III or IV controlled substance, or that the transfer was with remuneration.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**COMMENT**

1. See § 18-18-405(2)(e)(II), C.R.S. 2020.

2. See Instruction F:310 (defining “remuneration”); *see, e.g.*, Instruction E:28 (special verdict form).

3. As indicated by means of the “further find” provision in the second paragraph, this instruction is designed to accompany Instruction 18:10.INT. This instruction should not be given without Instruction 18:10.INT, because doing so deprives the jury of a way to make a finding that, although the amount of the controlled substance was sufficiently small to meet the statutory requirement, the transfer was with remuneration.

## **18:12.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (SCHEDULE V CONTROLLED SUBSTANCE)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a schedule V controlled substance? (Answer “Yes” or “No”)

The offense involved a schedule V controlled substance only if:

1. the defendant unlawfully distributed, manufactured, dispensed, or sold a schedule V controlled substance.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-18-405(2)(e)(I), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

### **18:13.INT UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE – INTERROGATORY (MINOR)**

If you find the defendant not guilty of unlawful distribution, manufacturing, dispensing, or sale, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of unlawful distribution, manufacturing, dispensing, or sale, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a minor? (Answer “Yes” or “No”)

The offense involved a minor only if:

1. the defendant was an adult, and
- [2. he [she] sold, dispensed, distributed, or otherwise transferred any quantity of a schedule I or schedule II controlled substance or any material, compound, mixture, or preparation that contained any amount of a schedule I or schedule II controlled substance, other than marijuana or marijuana concentrate, to a minor, and]
- [2. he [she] sold, dispensed, distributed, or otherwise transferred any quantity of a schedule III or schedule IV controlled substance or any material, compound, mixture, or preparation that contained any amount of a schedule III or schedule IV controlled substance to a minor, and]
3. the minor was at least two years younger than the defendant.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have

the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-405(2)(a)(II), (b)(II), C.R.S. 2020.
2. *See* Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Article 18 does not define the terms “adult” and “minor.”

**18:14 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)**

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an adult, and
  4. sold, transferred, or dispensed more than two and one half pounds of marijuana, or more than one pound of marijuana concentrate,
  5. to a minor who was at least two years younger than the defendant.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (more than two and one-half pounds of marijuana, or more than one pound of marijuana concentrate).

## COMMENT

1. *See* § 18-18-406(1)(a), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:327 (defining “sale”).
3. Article 18 does not define the terms “adult” and “minor.” *Cf.* Colo. Const. Art. XVIII, § 14(6)(a)–(i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) (“Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.”).

**18:15 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN SIX OUNCES, BUT NOT MORE THAN TWO AND ONE-HALF POUNDS OF MARIJUANA; OR MORE THAN THREE OUNCES, BUT NOT MORE THAN ONE POUND OF MARIJUANA CONCENTRATE)**

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an adult, and
  4. sold, transferred, or dispensed more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate,
  5. to a minor who was at least two years younger than the defendant.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (more than six ounces, but not more than two and one-half pounds of marijuana, or more than three ounces, but not more than one pound of marijuana concentrate).

#### COMMENT

1. *See* § 18-18-406(1)(b), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:327 (defining “sale”).
3. Article 18 does not define the terms “adult” and “minor.” *Cf.* Colo. Const. Art. XVIII, § 14(6)(a)–(i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) (“Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.”).

**18:16 SELLING, TRANSFERRING, OR DISPENSING MARIJUANA TO A MINOR (MORE THAN ONE OUNCE, BUT NOT MORE THAN SIX OUNCES OF MARIJUANA; OR MORE THAN ONE-HALF OUNCE, BUT NOT MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE)**

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an adult, and
  4. sold, transferred, or dispensed more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate,
  5. to a minor who was at least two years younger than the defendant.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or

dispensing marijuana to a minor (more than one ounce, but not more than six ounces of marijuana, or more than one-half ounce, but not more than three ounces of marijuana concentrate).

#### COMMENT

1. *See* § 18-18-406(1)(c), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:327 (defining “sale”).
3. Article 18 does not define the terms “adult” and “minor.” *Cf.* Colo. Const. Art. XVIII, § 14(6)(a)–(i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) (“Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.”).

**18:17 SELLING, TRANSFERRING, OR DISPENSING  
MARIJUANA TO A MINOR (NOT MORE THAN ONE  
OUNCE OF MARIJUANA, OR NOT MORE THAN ONE-HALF  
OUNCE OF MARIJUANA CONCENTRATE)**

The elements of the crime of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an adult, and
4. sold, transferred, or dispensed not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate,
5. to a minor who was at least two years younger than the defendant.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of selling, transferring, or dispensing marijuana to a minor (not more than one ounce of marijuana or not more than one-half ounce of marijuana concentrate).

## COMMENT

1. *See* § 18-18-406(1)(d), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:327 (defining “sale”).
3. Article 18 does not define the terms “adult” and “minor.” *Cf.* Colo. Const. Art. XVIII, § 14(6)(a)–(i) (defining the conditions that must be met in order for a person under eighteen to be a medical marijuana patient); Colo. Const. Art. XVIII, § 16, (6)(c) (“Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.”).

## 18:18 PROCESSING OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE

The elements of the crime of processing or manufacturing marijuana or marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. processed or manufactured any marijuana or marijuana concentrate or allowed marijuana or marijuana concentrate to be processed or manufactured on land owned, occupied, or controlled by him [her].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of processing or manufacturing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of processing or manufacturing marijuana or marijuana concentrate.

### COMMENT

1. See § 18-18-406(2)(a)(I), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”).

3. See Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).
4. Section 18-18-406(2)(a)(I) excepts from criminal liability acts “authorized pursuant to part 1 of article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)], or part 2 of article 80 of title 27 [(alcohol and drug abuse treatment programs)].” However, the Committee has not drafted model affirmative defense instructions.
5. Sections 18-18-406(6), (7), C.R.S. 2020, establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.
6. Article 18 does not define the term “process.”
7. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. See Ch. 136, sec. 107, § 18-18-406(2)(a)(I), 2019 Colo. Sess. Laws 613, 1679.

## **18:19 DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE**

The elements of the crime of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. dispensed, sold, distributed, or possessed with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.]
- [4. attempted, induced, attempted to induce, or conspired with one or more other persons, to dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

## COMMENT

1. *See* § 18-18-406(2)(b)(I), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:102 (defining “distribute”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:268 (defining “person”); Instruction F:281 (defining “possession”); Instruction F:327 (defining “sale”); Instruction G2:05 (conspiracy).
3. *See* Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).
4. Section 18-18-406(2)(b)(I) excepts from criminal liability acts “authorized by part 1 of article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)], part 2 of article 80 of title 27 [(alcohol and drug abuse treatment programs)], or part 2 or 3 of this article 18 [(standards, schedules, and regulation)].” However, the Committee has not drafted model affirmative defense instructions.
5. Sections 18-18-406(6), (7), C.R.S. 2020, establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.
6. Article 18 does not define the term “process.”
7. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

8. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 7.

9. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. *See* Ch. 136, sec. 107, § 18-18-406(2)(b)(I), 2019 Colo. Sess. Laws 613, 1679.

**18:20.INT DISPENSING, SELLING, DISTRIBUTING, OR  
MANUFACTURING MARIJUANA OR MARIJUANA  
CONCENTRATE – INTERROGATORY (SPECIFIED  
QUANTITY)**

If you find the defendant not guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_]. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than fifty pounds of marijuana or more than twenty-five pounds of marijuana concentrate? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than five pounds but not more than fifty pounds of marijuana or more than two and one-half pounds but not more than twenty-five pounds of marijuana concentrate? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than twelve ounces but not more than five pounds of marijuana or more than six ounces but not more than two and one-half pounds of marijuana concentrate? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful dispensing, selling, distributing, or manufacturing involve more than four ounces but not more

than twelve ounces of marijuana, or more than two ounces but not more than six ounces of marijuana concentrate?  
(Answer “Yes” or “No”)]

The prosecution has the burden to prove the amount of the marijuana or marijuana concentrate beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-406(2)(b)(III)(A)-(D), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).
3. In cases where the amount of marijuana or marijuana concentrate is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes bracketed examples for lesser quantity questions.
4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one quantity question.

For example, in a case involving an interrogatory with three quantity questions (and no separate interrogatories asking about other sentence enhancement factors), the relevant portion of the special verdict form would read as follows:

I. We, the jury, find the defendant, [insert name], NOT GUILTY of Count No. [ ], dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

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FOREPERSON\*

II. We, the jury, find the defendant, [insert name], GUILTY of Count No. [ ], dispensing, selling, distributing, or manufacturing marijuana or marijuana concentrate.

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FOREPERSON\*

We further find, with respect to the verdict question[s] for this count, as follows:

\*\*1. Did the dispensing, selling, distributing, or manufacturing involve more than fifty pounds of marijuana or more than twenty-five pounds of marijuana concentrate?

Yes       No

\*\*2. Did the dispensing, selling, distributing, or manufacturing involve more than five pounds but not more than fifty pounds of marijuana, or more than two and one-half pounds but not more than twenty-five pounds of marijuana concentrate?

Yes       No

\*\*3. Did the dispensing, selling, distributing, or manufacturing involve more than twelve ounces but not more than five pounds of marijuana or more than six ounces but not more than two and one-half pounds of marijuana concentrate?

Yes       No

---

FOREPERSON\*

\* The foreperson should use ink to sign on one of the two lines indicating a verdict of “not guilty” or “guilty.” If the verdict is “guilty,” the foreperson should use ink to mark the appropriate space indicating the answer to the verdict question, and then sign on the line following the verdict question[s].

\*\* Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].

5. In 2015, the Committee appended “Answer ‘Yes’ or ‘No’” parentheticals to each interrogatory.

## 18:21 CULTIVATING OR GROWING MARIJUANA

The elements of the crime of cultivating or growing marijuana are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. cultivated, grew, or produced a marijuana plant or allowed a marijuana plant to be cultivated, grown, or produced on land that he [she] owned, occupied, or controlled.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cultivating or growing marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cultivating or growing marijuana.

### COMMENT

1. *See* § 18-18-406(3)(a)(I), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:208 (defining “marijuana”); Instruction F:279.3 (defining “plant”).
3. *See* Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. Sections 18-18-406(6), (7), C.R.S. 2020, establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.

5. In 2017, the Committee modified the citation in Comment 1 and added the cross-reference to Instruction F:279.3 in Comment 2 pursuant to a legislative amendment. *See* Ch. 402, sec. 2, § 18-18-406(3)(a)(I), (3)(c)(II), 2017 Colo. Sess. Laws 2094, 2095.

## 18:22.INT CULTIVATING OR GROWING MARIJUANA – INTERROGATORY (NUMBER OF PLANTS)

If you find the defendant not guilty of cultivating or growing marijuana, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of cultivating or growing marijuana, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form. [Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other question[s].]

- [\_]. Did the unlawful cultivating or growing of marijuana involve more than thirty plants? (Answer “Yes” or “No”)]
  
- [\_]. Did the unlawful cultivating or growing of marijuana involve more than six but not more than thirty plants? (Answer “Yes” or “No”)]

The prosecution has the burden to prove the number of plants beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 18-18-406(3)(a)(III), C.R.S. 2020.

2. See Instruction F:279.3 (defining “plant”); see, e.g., Instruction E:28 (special verdict form).
3. In cases where the number of marijuana plants is a disputed issue, one or both of the parties may assert that there is an evidentiary basis for submitting more than one quantity question as part of the interrogatory. Accordingly, the above interrogatory includes a bracketed example for a lesser quantity question.
4. Where more than one quantity question is included as part of the interrogatory, use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one quantity question. See Instruction 18:06.INT, Comment 5.
5. In 2015, the Committee appended “Answer ‘Yes’ or ‘No’” parentheticals to each interrogatory.
6. In 2017, the Committee modified the citation in Comment 1 and added the cross-reference to Instruction F:279.3 in Comment 2 pursuant to a legislative amendment. See Ch. 402, sec. 2, § 18-18-406(3)(a)(III), (3)(c)(II), 2017 Colo. Sess. Laws 2094, 2096.

### **18:22.3 CULTIVATING OR GROWING MARIJUANA (MORE THAN TWELVE PLANTS)**

The elements of the crime of cultivating or growing marijuana (more than twelve plants) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. cultivated, grew, or produced more than twelve marijuana plants on or in a residential property.]
- [4. allowed more than twelve marijuana plants to be cultivated, grown, or produced on or in a residential property.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cultivating or growing marijuana (more than twelve plants).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cultivating or growing marijuana (more than twelve plants).

#### **COMMENT**

1. See § 18-18-406(3)(a)(II)(A), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:208 (defining “marijuana”); Instruction F:279.3 (defining “plant”); Instruction F:317.5 (defining “residential property”).

3. See Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”). Regarding these affirmative defenses, section 18-18-406(3)(a)(II)(A) provides that the behavior proscribed by this statute is unlawful “[r]egardless of whether the plants are for medical or recreational use.” The Committee expresses no opinion on any potential conflict between this statute and the affirmative defenses authorized under the state constitution.

4. Section 18-18-406(3)(a)(II)(B) provides an exemption where “a county, municipality, or city and county law expressly permits” such cultivation “in an enclosed and locked space and within the limit set by the county, municipality, or city and county where the plants are located.” However, the Committee has not drafted model affirmative defense instructions.

5. Sections 18-18-406(6), (7) establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.

6. The Committee added this instruction in 2017 pursuant to new legislation. See Ch. 402, sec. 2, § 18-18-406(3)(a)(II), 2017 Colo. Sess. Laws 2094, 2095.

**18:22.7.INT CULTIVATING OR GROWING MARIJUANA  
(MORE THAN TWELVE PLANTS) – INTERROGATORY  
(NUMBER OF PLANTS)**

If you find the defendant not guilty of cultivating or growing marijuana (more than twelve plants), you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of cultivating or growing marijuana (more than twelve plants), you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form.

1. Did the unlawful cultivating or growing of marijuana involve more than twenty-four plants? (Answer “Yes” or “No”)

The prosecution has the burden to prove the number of plants beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

**COMMENT**

1. *See* § 18-18-406(3)(a)(IV), C.R.S. 2020.
2. *See* Instruction F:279.3 (defining “plant”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The statute only provides for sentence enhancement for “a second or subsequent offense.” Therefore, the court should only provide this interrogatory if it finds, as a matter of fact, that the defendant was

previously convicted of this offense. *Cf. People v. Nunn*, 148 P.3d 222, 228 (Colo. App. 2006) (holding that, under the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the defendant in habitual criminal proceedings “had no right to have a jury determine whether he was the person convicted in the prior cases”).

4. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 402, sec. 2, § 18-18-406(3)(a)(IV), 2017 Colo. Sess. Laws 2094, 2096.

## **18:23 POSSESSION OF MORE THAN TWELVE OUNCES OF MARIJUANA OR MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE**

The elements of the crime of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than twelve ounces of marijuana or more than three ounces of marijuana concentrate.

### COMMENT

1. See § 18-18-406(4)(a), C.R.S. 2020.
2. See Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof,

if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. Sections 18-18-406(6), (7), C.R.S. 2020, establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.

5. This instruction does not apply to crimes committed on or after March 1, 2020.

6. In 2019, the Committee added Comment 5 pursuant to a legislative amendment. See Ch. 291, sec. 2, § 18-18-406(4), 2019 Colo. Sess. Laws 2676, 2677.

## 18:24 POSSESSION OF MORE THAN SIX OUNCES OF MARIJUANA, OR POSSESSION OF MORE THAN THREE OUNCES OF MARIJUANA CONCENTRATE

The elements of the crime of possession of more than six ounces but not more than twelve ounces of marijuana, or possession of not more than three ounces of marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed more than six ounces of marijuana or more than three ounces of marijuana concentrate.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than six ounces of marijuana, or possession of more than three ounces of marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than six ounces of marijuana, or possession of more than three ounces of marijuana concentrate.

### COMMENT

1. See § 18-18-406(4)(b), C.R.S. 2020.
2. See Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a

culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. Sections 18-18-406(6), (7), C.R.S. 2020, establish exemptions based on “group C guidelines of the national cancer institute” and “dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a federal food and drug administration approved drug product.” However, the Committee has not drafted model affirmative defense instructions.

5. Previously, this instruction applied to possession of more than six ounces *but not more than twelve ounces* of marijuana, or to possession of *not* more than three ounces of marijuana concentrate. In 2019, the General Assembly deleted the “but not more than twelve ounces” language, and it changed “*not* more than three ounces of marijuana concentrate” to “*more* than three ounces of marijuana concentrate. See Ch. 291, sec. 2, § 18-18-406(4)(b), 2019 Colo. Sess. Laws 2676, 2677 (emphasis added). Therefore, in 2019, the Committee modified this instruction accordingly.

Additionally, the Committee notes that these modifications take effect on or after March 1, 2020. See *id.*

**18:25 POSSESSION OF MORE THAN TWO OUNCES BUT  
NOT MORE THAN SIX OUNCES OF MARIJUANA OR NOT  
MORE THAN THREE OUNCES OF MARIJUANA  
CONCENTRATE**

The elements of the crime of possession of more than two ounces but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed more than two ounces but not more than six ounces of marijuana, or not more than three ounces of marijuana concentrate.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than two ounces but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than two ounces but not more than six ounces of marijuana or not more than three ounces of marijuana concentrate.

**COMMENT**

1. See § 18-18-406(4)(c), C.R.S. 2020.

2. See Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”); Instruction F:281 (defining “possession”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).
4. See also § 18-18-406(5)(b)(II), C.R.S. 2020 (“Open and public display, consumption, or use of more than two ounces of marijuana or any amount of marijuana concentrate is deemed possession thereof, and violations shall be punished as provided for in subsection (4) of this section.”).
5. In 2019, pursuant to a legislative amendment, the Committee added the phrase “or not more than three ounces of marijuana concentrate” throughout this instruction. See Ch. 291, sec. 2, § 18-18-406(4)(c), 2019 Colo. Sess. Laws 2676, 2677.

Additionally, the Committee notes that this amendment takes effect on or after March 1, 2020. See *id.*

## 18:26 POSSESSION OF MORE THAN ONE OUNCE BUT NOT MORE THAN TWO OUNCES OF MARIJUANA

The elements of the crime of possession of more than one ounce but not more than two ounces of marijuana are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed more than one ounce but not more than two ounces of marijuana.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of more than one ounce but not more than two ounces of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of more than one ounce but not more than two ounces of marijuana.

### COMMENT

1. See § 18-18-406(5)(a)(I), C.R.S. 2020; *see also* Colo. Const. Art. XVIII, § 16, (3)(a) (possession of one ounce or less of marijuana by an adult is not unlawful, notwithstanding any other provision of law).

2. See Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of

that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. See also § 18-18-406(5)(b)(III), C.R.S. 2020 (“Except as otherwise provided for in subparagraph (I) of this paragraph (b) [ (openly and publicly displaying, consuming, or using two ounces or less of marijuana)], consumption or use of marijuana or marijuana concentrate is deemed possession thereof, and violations must be punished as provided for in paragraph (a) of this subsection (5) and subsection (4) of this section.”).

5. The statute provides for exemptions from liability for licensed marijuana hospitality businesses. See § 18-18-406(5)(b)(IV), (V). However, the Committee has not drafted model affirmative defense instructions.

6. In 2019, the Committee added Comment 5 pursuant to new legislation. See Ch. 340, secs. 9, 23, § 18-18-406(5)(b)(IV), (V), 2019 Colo. Sess. Laws 3105, 3116, 3127.

## 18:27 OPEN AND PUBLIC DISPLAY, CONSUMPTION, OR USE OF LESS THAN TWO OUNCES OF MARIJUANA

The elements of the crime of open and public display, consumption, or use of less than two ounces of marijuana are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. openly and publicly displayed, consumed, or used,
4. two ounces or less of marijuana.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of open and public display, consumption, or use of less than two ounces of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of open and public display, consumption, or use of less than two ounces of marijuana.

### COMMENT

1. *See* § 18-18-406(5)(b)(I), C.R.S. 2020.
2. *See* Instruction F:208 (defining “marijuana”).
3. *See* Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the

material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

4. The statute provides for exemptions from liability for licensed marijuana hospitality businesses. *See* § 18-18-406(5)(b)(IV), (V). However, the Committee has not drafted model affirmative defense instructions.

5. In 2019, the Committee added Comment 4 pursuant to new legislation. *See* Ch. 340, secs. 9, 23, § 18-18-406(5)(b)(IV), (V), 2019 Colo. Sess. Laws 3105, 3116, 3127.

## **18:28 TRANSFERRING OR DISPENSING NOT MORE THAN TWO OUNCES OF MARIJUANA FOR NO CONSIDERATION**

The elements of the crime of transferring or dispensing not more than two ounces of marijuana for no consideration are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. transferred or dispensed,
  4. not more than two ounces of marijuana to another person,
  5. for no consideration.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transferring or dispensing not more than two ounces of marijuana for no consideration.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transferring or dispensing not more than two ounces of marijuana for no consideration.

### COMMENT

1. *See* § 18-18-406(5)(c), C.R.S. 2020.
2. *See* Instruction F:208 (defining "marijuana"); Instruction F:268 (defining "person"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material

elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. In cases where both the defendant and the recipient were at least twenty-one years old at the time of the transfer or dispensing, the court should modify the third element as follows: “more than ounce but not more than two ounces of marijuana to another person.” See Colo. Const. Art. XVIII, § 16(3)(c) (“Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older: . . . [t]ransfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.”).

5. The term “consideration” is not defined in Article 18. See, e.g., *Black’s Law Dictionary* 370 (10th ed. 2014) (defining “consideration” as: “Something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee.”). The definition that appears in section 4-3-303(b), C.R.S. 2020, should not be used because it is limited to contracts.

6. The statute provides for exemptions from liability for licensed marijuana hospitality businesses. See § 18-18-406(5)(b)(IV), (V). However, the Committee has not drafted model affirmative defense instructions.

7. In 2019, the Committee added Comment 6 pursuant to new legislation. See Ch. 340, secs. 9, 23, § 18-18-406(5)(b)(IV), (V), 2019 Colo. Sess. Laws 3105, 3116, 3127.

## 18:28.5 TRANSFER OF MARIJUANA OR MARIJUANA CONCENTRATE AT NO COST RELATED TO REMUNERATION

The elements of the crime of transfer of marijuana or marijuana concentrate at no cost related to remuneration are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. transferred marijuana or marijuana concentrate at no cost to a person, and
  4. the transfer was in any way related to remuneration for any other service or product.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transfer of marijuana or marijuana concentrate at no cost related to remuneration.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transfer of marijuana or marijuana concentrate at no cost related to remuneration.

### COMMENT

1. *See* § 18-18-406(5.5), C.R.S. 2020.
2. *See* Instruction F:208 (defining "marijuana"); Instruction F:210 (defining "marijuana concentrate"); Instruction F:268 (defining "person"); Instruction F:310 (defining "remuneration"); *see also* § 18-1-503(2), C.R.S.

2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”); Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”).

4. The Colorado Constitution provides for an exemption from liability where both the transferor and recipient are twenty-one years of age or older and the amount of marijuana transferred is less than one ounce. See Colo. Const. Art. XVIII, § 16(3)(c) (“Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older: . . . [t]ransfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.”). However, the Committee has not drafted a model affirmative defense instruction.

5. The Committee added this instruction in 2016 pursuant to new legislation. See Ch. 338, sec. 11, § 18-18-406(5.5), 2016 Colo. Sess. Laws 1372, 1378.

## 18:29 UNLAWFUL USE OR POSSESSION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM

The elements of the crime of unlawful use or possession of synthetic cannabinoids or salvia divinorum are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. used or possessed any amount of any synthetic cannabinoid or salvia divinorum.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use or possession of synthetic cannabinoids or salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use or possession of synthetic cannabinoids or salvia divinorum.

### COMMENT

1. See § 18-18-406.1(1), C.R.S. 2020.
2. See Instruction F:281 (defining "possession"); Instruction F:328 (defining "salvia divinorum"); Instruction F:359 (defining "synthetic cannabinoid"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof,

if the proscribed conduct necessarily involves such a culpable mental state.”).

3. See Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”).

## **18:30 UNLAWFUL MANUFACTURING, DISPENSING, SALE, OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM**

The elements of the crime of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. manufactured, dispensed, sold, or distributed, or possessed with intent to manufacture, dispense, sell, or distribute,
5. any amount of any synthetic cannabinoid or salvia divinorum.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids salvia divinorum.

### COMMENT

1. See § 18-18-406.2(1)(a), C.R.S. 2020.
2. See Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent");

Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:281 (defining “possession”); Instruction F:327 (defining “sale”); Instruction F:328 (defining “salvia divinorum”); Instruction F:359 (defining “synthetic cannabinoid”).

**18:31 UNLAWFUL MANUFACTURING, DISPENSING, SALE,  
OR DISTRIBUTION OF SYNTHETIC CANNABINOIDS OR  
SALVIA DIVINORUM (INDUCING, ATTEMPTING, OR  
CONSPIRING)**

The elements of the crime of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. induced, attempted to induce, or conspired with one or more other persons,
5. to manufacture, dispense, sell, or distribute, or possess with intent to manufacture, dispense, sell, or distribute,
6. any amount of any synthetic cannabinoid or salvia divinorum.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful manufacturing, dispensing, sale, or distribution of synthetic cannabinoids or salvia divinorum (inducing, attempting, or conspiring).

## COMMENT

1. *See* § 18-18-406.2(1)(b), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:102 (defining “distribute”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:268 (defining “person”); Instruction F:281 (defining “possession”); Instruction F:328 (defining “salvia divinorum”); Instruction F:359 (defining “synthetic cannabinoid”); Instruction G2:05 (conspiracy).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
4. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 3.

## 18:32 UNLAWFUL CULTIVATION OF SALVIA DIVINORUM

The elements of the crime of unlawful cultivation of salvia divinorum are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. cultivated salvia divinorum,
5. with intent to dispense, sell, or distribute any amount of the salvia divinorum.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful cultivation of salvia divinorum.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful cultivation of salvia divinorum.

### COMMENT

1. See § 18-18-406.2(1)(c), C.R.S. 2020.
2. See Instruction F:100 (defining "dispense"); Instruction F:102 (defining "distribute"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly"); Instruction F:327 (defining "sale"); Instruction F:328 (defining "salvia divinorum").

## **18:33.INT SYNTHETIC CANNABINOIDS OR SALVIA DIVINORUM OFFENSES – INTERROGATORY (MINOR)**

If you find the defendant not guilty of [insert name of offense relating to synthetic cannabinoids or salvia divinorum from section 18-18-406.2(1)(a)-(c)], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name of offense relating to synthetic cannabinoids or salvia divinorum from section 18-18-406.2(1)(a)-(c)], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant dispense, sell, or distribute to a minor? (Answer “Yes” or “No”)

The defendant dispensed, sold, or distributed to a minor only if:

1. the defendant dispensed, sold, or distributed synthetic cannabinoid or salvia divinorum to a minor who was less than eighteen years of age, and
2. the defendant was at least eighteen years of age and at least two years older than the minor.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-18-406.2(3)(a), (b), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

## **18:34 FRAUDULENT REPRESENTATION OF A MEDICAL CONDITION RELATED TO MEDICAL MARIJUANA**

The elements of the crime of fraudulent representation of a medical condition related to medical marijuana are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. fraudulently,
4. represented a medical condition to a physician, the Department of Public Health and Environment, or a state or local law enforcement official,
5. for the purpose of falsely obtaining a marijuana registry identification card from the Department of Public Health and Environment, or for the purpose of avoiding arrest and prosecution for a marijuana-related offense.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulent representation of a medical condition related to medical marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulent representation of a medical condition related to medical marijuana.

### COMMENT

1. See § 18-18-406.3(2)(a), C.R.S. 2020.

2. *See also* Colo. Const. Art. XVIII, § 14(1)(h) (defining “state health agency” in a manner that is consistent with the use of the term “the department” in section 18-18-406.3, C.R.S. 2020).

## 18:35 FRAUDULENT USE OR THEFT OF A MARIJUANA REGISTRY IDENTIFICATION CARD

The elements of the crime of fraudulent use or theft of a marijuana registry identification card are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. fraudulently used, or committed theft of,
4. any person's marijuana registry identification card [(including any card that was required to be returned to the Department of Public Health and Environment)].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulent use or theft of a marijuana registry identification card.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulent use or theft of a marijuana registry identification card.

### COMMENT

1. *See* § 18-18-406.3(3), C.R.S. 2020.
2. *See* Instruction F:268 (defining "person"); Instruction F:308.5 (defining "registry identification card"); Instruction 4-4:01 (theft); *see also* Colo. Const. Art. XVIII, § 14(1)(h) (defining "state health agency" in a

manner that is consistent with the use of the term “the department” in section 18-18-406.3, C.R.S. 2020).

3. If the defendant is not separately charged with theft, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 4-4:01. Place the elemental instruction for theft immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for theft.

4. It may be necessary to draft a special instruction explaining when a marijuana registry identification card must be returned. *See* Colo. Const. Art. XVIII, § 14.

**18:36 FRAUDULENTLY PRODUCING, COUNTERFEITING,  
OR TAMPERING WITH A MARIJUANA REGISTRY  
IDENTIFICATION CARD**

The elements of the crime of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. fraudulently,
4. produced, counterfeited, or tampered with,
5. a marijuana registry identification card.
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of fraudulently producing, counterfeiting, or tampering with a marijuana registry identification card.

COMMENT

1. *See* § 18-18-406.3(4), C.R.S. 2020.
2. *See* Instruction F:308.5 (defining “registry identification card”).

## **18:37 UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY THE MEDICAL MARIJUANA REGISTRY**

The elements of the crime of unauthorized release of confidential information provided to or by the marijuana registry are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. released or made public,
4. any confidential record or any confidential information contained in any such record that was provided to or by the marijuana registry or primary caregiver registry of the Department of Public Health and Environment,
5. without the written authorization of the marijuana registry patient.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of confidential information provided to or by the marijuana registry.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of confidential information provided to or by the marijuana registry.

### COMMENT

1. See § 18-18-406.3(5), C.R.S. 2020.

2. See Instruction F:259 (defining “patient”); see also Colo. Const. Art. XVIII, § 14(1)(h) (defining “state health agency” in a manner that is consistent with the use of the term “the department” in section 18-18-406.3, C.R.S. 2020).

3. It may be necessary to draft a special instruction explaining that section 18-18-406.3(5) applies to “[a]ny person including, but not limited to, any officer, employee, or agent of the department, or any officer, employee, or agent of any state or local law enforcement agency.”

4. In 2015, the Committee added the words “or primary caregiver registry” to the fourth element. See Ch. 199, sec. 6, § 18-18-406.3(5), 2015 Colo. Sess. Laws 681, 688.

## **18:38 UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY A LICENSED MEDICAL MARIJUANA BUSINESS**

The elements of the crime of unauthorized release of confidential information provided to or by a licensed medical marijuana business are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner, officer, employee of a business licensed pursuant to the Colorado Marijuana Code, or an employee of the state medical marijuana licensing authority, a local medical marijuana licensing authority, or the Department of Public Health and Environment, and
  4. released or made public,
  5. a patient's medical record or any confidential information contained in any patient's medical record that was provided to or by a business licensed pursuant to the Colorado Marijuana Code,
  6. without the written authorization of the patient.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized release of confidential information provided to or by a licensed medical marijuana business.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized release of confidential information provided to or by a licensed medical marijuana

business.

## COMMENT

1. See § 18-18-406.3(7), C.R.S. 2020.
2. See Instruction F:259 (defining “patient”); see also Colo. Const. Art. XVIII, § 14(1)(h) (defining “state health agency” in a manner that is consistent with the use of the term “the department” in section 18-18-406.3, C.R.S. 2020).
3. The statute includes exceptions from criminal liability. See § 18-18-406.3(7), C.R.S. 2020 (“except that the owner, officer, or employee shall release the records or information upon request by the state or local medical marijuana licensing authority. The records or information produced for review by the state or local licensing authority shall not become public records by virtue of the disclosure and may be used only for a purpose authorized by article 10 of title 44, or for another state or local law enforcement purpose. The records or information shall constitute medical data as defined by section 24-72-204(3)(a)(I), C.R.S. The state or local medical marijuana licensing authority may disclose any records or information so obtained only to those persons directly involved with any investigation or proceeding authorized by article 10 of title 44, or for any state or local law enforcement purpose.”). However, the Committee has not drafted model affirmative defense instructions.
4. In 2018, the Committee modified the parenthetical quotation in Comment 3 pursuant to a legislative amendment. See Ch. 55, sec. 13, § 18-18-406.3(7), 2018 Colo. Sess. Laws 502, 587.
5. In 2019, pursuant to a legislative amendment, the Committee changed the phrase “Colorado Medical Marijuana Code” in the third and fifth elements to “Colorado Marijuana Code,” and it again modified the parenthetical quotation in Comment 3. See Ch. 315, sec. 17, § 18-18-406.3(7), 2019 Colo. Sess. Laws 2823, 2937–38.

## 18:38.5 UNLAWFUL ADVERTISING OF MARIJUANA

The elements of unlawful advertising of marijuana are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was not licensed to sell medical marijuana or retail marijuana,  
and
5. advertised in a newspaper, magazine, handbill, or other  
publication or on the internet,
6. the unlawful sale of marijuana, marijuana concentrate, or a  
marijuana product by a person not licensed to sell marijuana,  
marijuana concentrate, or a marijuana product.
- [7. and that the defendant's conduct was not legally authorized by  
the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful advertising of marijuana.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful advertising of marijuana.

### COMMENT

1. See § 18-18-406.4(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”).

3. Regarding the fourth element, the statute does not apply to persons who are licensed to sell marijuana *either* in Colorado, *see* Title 44, Article 10 (Colorado Marijuana Code), *or* in another state.
4. The statute exempts from liability primary caregivers who advertise that they are available to be primary caregivers to patients. *See* § 18-18-406.4(2), C.R.S.; Instruction F:259 (defining “patient”); Instruction F:285 (defining “primary care-giver”). However, the Committee has not drafted model affirmative defense instructions.
5. The Committee added this instruction in 2017 pursuant to new legislation. *See* Ch. 104, sec. 1, § 18-18-406.4, 2017 Colo. Sess. Laws 383, 383.
6. In 2019, pursuant to a legislative amendment, the Committee changed the phrase “marijuana-infused product” in the sixth element to “marijuana product,” and it modified the statutory cross-reference in Comment 3. *See* Ch. 315, sec. 18, § 18-18-406.4(1), 2019 Colo. Sess. Laws 2823, 2938. However, the Committee notes that these legislative changes did not take affect until January 1, 2020; therefore, if the charges involve conduct occurring prior to that date, the court should use the 2018 version of this instruction, which uses the phrase “marijuana-infused product” rather than “marijuana product.”

## 18:39 UNLAWFUL USE OF MARIJUANA IN A DETENTION FACILITY

The elements of the crime of unlawful use of marijuana in a detention facility are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was confined in any detention facility in Colorado, and
4. possessed or used marijuana.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful use of marijuana in a detention facility.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful use of marijuana in a detention facility.

### COMMENT

1. *See* § 18-18-406.5(1), C.R.S. 2020.
2. *See* Instruction F:97 (defining “detention facility”); Instruction F:208 (defining “marijuana”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 18:39.5 MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE

The elements of the crime of manufacture of marijuana concentrate using an inherently hazardous substance are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. manufactured marijuana concentrate using an inherently hazardous substance, and
  5. was not a licensed manufacturer pursuant to the Colorado Marijuana Code.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacture of marijuana concentrate using an inherently hazardous substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacture of marijuana concentrate using an inherently hazardous substance.

### COMMENT

1. See § 18-18-406.6(1), C.R.S. 2020.
2. See Instruction F:181.5 (defining “inherently hazardous substance”); Instruction F:210 (defining “marijuana concentrate”).

3. The Committee added this instruction in 2015. *See* Ch. 242, sec. 2, § 18-18-406.6(1), 2015 Colo. Sess. Laws 895, 896.

4. In 2019, pursuant to a legislative amendment, the Committee changed the phrase “the Colorado Medical Marijuana Code or the Colorado Retail Marijuana Code” in the fifth element to “the Colorado Marijuana Code.” *See* Ch. 315, sec. 19, § 18-18-406.6(1), 2019 Colo. Sess. Laws 2823, 2938.

## **18:39.7 ALLOWING MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE**

The elements of the crime of manufacture of allowing marijuana concentrate using an inherently hazardous substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. allowed marijuana concentrate to be manufactured on any premises using an inherently hazardous substance, and
5. owned, managed, operated, or otherwise controlled the use of the premises, and
6. was not a licensed manufacturer pursuant to the Colorado Marijuana Code.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of allowing manufacture of marijuana concentrate using an inherently hazardous substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of allowing manufacture of marijuana concentrate using an inherently hazardous substance.

### **COMMENT**

1. See § 18-18-406.6(2), C.R.S. 2020.

2. See Instruction F:181.5 (defining “inherently hazardous substance”); Instruction F:195 (defining “knowingly”); Instruction F:210 (defining “marijuana concentrate”).

3. The Committee added this instruction in 2015. See Ch. 242, sec. 2, § 18-18-406.6(2), 2015 Colo. Sess. Laws 895, 896.

4. In 2019, pursuant to a legislative amendment, the Committee changed the phrase “the Colorado Medical Marijuana Code or the Colorado Retail Marijuana Code” in the sixth element to “the Colorado Marijuana Code.” See Ch. 315, sec. 19, § 18-18-406.6(2), 2019 Colo. Sess. Laws 2823, 2938.

**18:40.INT ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(PATTERN, SUBSTANTIAL SOURCE, AND SPECIAL SKILL)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense as part of a pattern? (Answer “Yes” or “No”)

The defendant committed the offense as part of a pattern only if:

1. the defendant committed the offense of [insert name(s) of felony offense(s) from Article 18, Part 4] as part of a pattern of manufacturing, sale, dispensing, or distributing controlled substances,
2. which constituted a substantial source of his [her] income, and
3. in which he [she] manifested special skill or expertise.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-18-407(1)(a), C.R.S. 2020.
2. *See* Instruction F:260 (defining “pattern”); Instruction F:347 (defining “special skill or expertise”); Instruction F:355 (defining “substantial source of that person’s income”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Section 18-18-407(2)(a), C.R.S. 2020, provides as follows: “In support of the findings under paragraph (a) of subsection (1) of this section, it may be shown that the defendant has had in his or her own name or under his or her control income or property not explained as derived from a source other than such manufacture, sale, dispensing, or distribution of controlled substances.” However, nothing in this provision suggests that the admission of such evidence gives rise to a permissible inference of illicit activity.

**18:41.INT ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(CONSPIRACY)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense as part of a conspiracy?  
(Answer “Yes” or “No”)

The defendant committed the offense as part of a conspiracy only if:

1. the defendant committed the [insert name(s) of felony offense(s) from Article 18, Part 4] in the course of, or in furtherance of, a conspiracy with one or more persons to engage in a pattern of unlawful manufacturing, sale, dispensing, or distributing a controlled substance, and
2. did, or agreed that he [she] would, initiate, organize, plan, finance, direct, manage, or supervise all or part of the conspiracy, manufacture, sale, dispensing, distributing, or give or receive a bribe, or use force in connection with the manufacture, sale, dispensing, or distribution.

The prosecution has the burden to prove each numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has

failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-407(1)(b), C.R.S. 2020.
2. *See* Instruction F:260 (defining “pattern”); Instruction F:268 (defining “person”); Instruction G2:05 (conspiracy); *see, e.g.*, Instruction E:28 (special verdict form).

**18:42.INT ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(INTRODUCING OR IMPORTING OVER A SPECIFIED  
AMOUNT)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant introduce or import more than [fourteen grams of any schedule I or II controlled substance] [seven grams of [methamphetamine] [heroin] [ketamine] [cathinones]] [ten milligrams of flunitrazepam]? (Answer “Yes” or “No”)

The defendant introduced or imported more than [insert quantity and name of controlled substance] only if:

1. in the course of committing [insert name(s) of felony offense(s) from Article 18, Part 4], the defendant introduced or imported into the state of Colorado more than [fourteen grams of any schedule I or II controlled substance] [seven grams of methamphetamine] [heroin] [ketamine] [cathinones]] [ten milligrams of flunitrazepam].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place,

and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-407(1)(c), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

**18:43.INT ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(DEADLY WEAPON OR FIREARM)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a deadly weapon or firearm? (Answer “Yes” or “No”)

The offense involved a deadly weapon or firearm only if:

- [1. the defendant used, displayed, or possessed on his [her] person or within his [her] immediate reach, a deadly weapon, as that term is defined in your instructions, at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].]
- [1. the defendant or a confederate of the defendant possessed a firearm, as that term is defined in your instructions, to which the defendant or confederate had access in a manner that posed a risk to others or in a vehicle the defendant was occupying at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].]

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-407(1)(d)(I), (II), C.R.S. 2020.
2. *See* Instruction F:88 (defining “deadly weapon”); Instruction F:154 (defining “firearm”); *see, e.g.*, Instruction E:28 (special verdict form).

**18:44.INT UNLAWFUL DISTRIBUTION, MANUFACTURING,  
DISPENSING, SALE, OR POSSESSION FOR THE PURPOSES  
OF SALE OF ANY CONTROLLED SUBSTANCE –  
INTERROGATORY (USE OF A CHILD)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve use of a child? (Answer “Yes” or “No”)

The offense involved use of a child only if:

1. the defendant solicited, induced, encouraged, intimidated, employed, hired, or procured a child under the age of eighteen, whether or not the defendant knew the age of the child, to act as his [her] agent to assist in the unlawful distribution, manufacturing, dispensing, sale, or possession for the purposes of sale of any controlled substance at the time of the commission of [insert name(s) of felony offense(s) from Article 18, Part 4].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

## COMMENT

1. *See* § 18-18-407(1)(e), C.R.S. 2020.
2. *See* Instruction F:13 (defining “agent”); Instruction F:14 (defining “assist”); *see, e.g.*, Instruction E:28 (special verdict form).

**18:45.INT ANY FELONY CONTROLLED SUBSTANCE  
CONVICTION UNDER PART 4 – INTERROGATORY  
(CONTINUING CRIMINAL ENTERPRISE WITH FIVE OR  
MORE OTHER PERSONS)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the offense involve a criminal enterprise? (Answer  
“Yes” or “No”)

The offense involved a criminal enterprise only if:

1. the defendant engaged in a continuing criminal enterprise by committing [insert name of felony offense from Article 18, Part 4], and
2. the [repeat name of offense] was part of a continuing series, in which, on separate occasions, two or more of the following offenses were committed: [insert name(s) of felony offense(s) from Article 18, Part 4], and
3. the continuing series of offenses was undertaken by the defendant in concert with five or more other persons with respect to whom the defendant occupied a position of organizer, supervisor, or any other position of management, and
4. the defendant obtained substantial income or resources from the continuing series of offenses.

The prosecution has the burden to prove each numbered condition

beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-407(1)(f), C.R.S. 2020.
2. *See* Instruction F:268 (defining “person”); *see, e.g.*, Instruction E:28 (special verdict form).

**18:46.INT SELLING, DISTRIBUTING, POSSESSING WITH INTENT TO DISTRIBUTE, MANUFACTURING, OR ATTEMPTING TO MANUFACTURE ANY CONTROLLED SUBSTANCE – INTERROGATORY (PROTECTED AREA)**

If you find the defendant not guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of [insert name(s) of felony offense(s) from Article 18, Part 4], you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Did the defendant commit the offense in a protected area? (Answer “Yes” or “No”)

The defendant committed the offense in a protected area only if:

1. the defendant committed the selling, distributing, possessing with intent to distribute, manufacturing, or attempt to manufacture any controlled substance, [within or upon the grounds of any public or private elementary school, middle school, junior high school, high school, vocational school, or public housing development] [within one thousand feet of the perimeter of any such school or public housing development grounds on any street, alley, parkway, sidewalk, public park, playground, or other area or premises that was accessible to the public] [within any private dwelling that was accessible to the public for the purpose of the unlawful sale, distribution, use, exchange, manufacture, or attempted manufacture of any controlled substance] [in any school vehicle, while the school vehicle was engaged in the transportation of students].

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has

met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

#### COMMENT

1. *See* § 18-18-407(1)(g), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:300 (defining “public housing development”); *see, e.g.*, Instruction E:28 (special verdict form).
3. The term “school vehicle” is defined in section 42-1-102(88.5), C.R.S. 2020.

**18:47 KEEPING, MAINTAINING, CONTROLLING,  
RENTING, OR MAKING AVAILABLE PROPERTY FOR  
UNLAWFUL DISTRIBUTION OR TRANSPORTATION OF  
CONTROLLED SUBSTANCES**

The elements of the crime of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or intentionally,
4. kept, maintained, controlled, rented, leased, or made available for use any store, shop, warehouse, dwelling, building, vehicle, vessel, aircraft, room, enclosure, or other structure or place,
5. which he [she] knew was resorted to for the purpose of unlawfully keeping for distribution, transporting for distribution, or distributing controlled substances.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of keeping, maintaining, controlling, renting, or making available property for unlawful distribution or transportation of controlled substances.

## COMMENT

1. *See* § 18-18-411(1), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:102 (defining “distribute”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”).
3. *See* Instruction H:70 (defining the affirmative defenses of “lack of knowledge” and “reported conduct”).
4. If the defendant is not charged with one of the referenced controlled substance offenses, give the jury the elemental instruction for the referenced offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the referenced offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense(s).

## **18:48 MAINTAINING A PLACE FOR UNLAWFUL MANUFACTURE OF CONTROLLED SUBSTANCES**

The elements of the crime of maintaining a place for unlawful manufacture of controlled substances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or intentionally,
4. opened or maintained any place,
5. knowing that it was resorted to for the purpose of unlawfully manufacturing a controlled substance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of maintaining a place for unlawful manufacture of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of maintaining a place for unlawful manufacture of controlled substances.

### COMMENT

1. *See* § 18-18-411(2)(a), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”).

3. See Instruction H:70 (defining the affirmative defenses of “lack of knowledge” and “reported conduct”).

4. If the defendant is not charged with unlawful manufacture of a controlled substance, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

## **18:49 PROVIDING A PLACE FOR UNLAWFUL MANUFACTURE OF CONTROLLED SUBSTANCES**

The elements of the crime of providing a place for unlawful manufacture of controlled substances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or intentionally,
4. managed or controlled any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and
5. rented, leased, or made available for use, with or without compensation, the building, room, or enclosure,
6. knowing that it was resorted to for the purpose of unlawfully manufacturing a controlled substance.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing a place for unlawful manufacture of controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing a place for unlawful manufacture of controlled substances.

### COMMENT

1. See § 18-18-411(2)(b), C.R.S. 2020.

2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”).

3. See Instruction H:70 (defining the affirmative defenses of “lack of knowledge” and “reported conduct”).

4. If the defendant is not charged with unlawfully manufacturing a controlled substance, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. See Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

## 18:50 ABUSING TOXIC VAPORS

The elements of the crime of abusing toxic vapors are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. smelled or inhaled the fumes of toxic vapors; or possessed, bought, or used the fumes of toxic vapors; or aided any other person to use the fumes of toxic vapors,
5. for the purpose of causing a condition of euphoria, excitement, exhilaration, stupefaction, or dulled senses of the nervous system.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of abusing toxic vapors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of abusing toxic vapors.

### COMMENT

1. See § 18-18-412(1), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:268 (defining “person”); Instruction F:281 (defining “possession”).
3. The Committee has not drafted a model instruction defining “toxic vapors” because the list of qualifying substances is lengthy. See § 18-18-

412(3), C.R.S. 2020. The court should draft an instruction based on the relevant portion(s) of the statutory definition.

4. The statute includes an exemption from criminal liability. *See* § 18-18-412(1), C.R.S. 2020 (“This subsection (1) shall not apply to the inhalation of anesthesia or other substances for medical or dental purposes.”). However, the Committee has not drafted a model affirmative defense instruction.

## 18:51 UNLAWFUL POSSESSION OF MATERIALS TO MAKE METHAMPHETAMINE AND AMPHETAMINE

The elements of the crime of unlawful possession of materials to make methamphetamine and amphetamine are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers,
4. with the intent to use the product as an immediate precursor in the manufacture of any controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of materials to make methamphetamine and amphetamine.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of materials to make methamphetamine and amphetamine.

### COMMENT

1. See § 18-18-412.5, C.R.S. 2020.
2. See Instruction F:179 (defining "immediate precursor"); Instruction F:185 (defining "with intent"); Instruction F:281 (defining "possession").

## 18:52 SALE OR DISTRIBUTION OF MATERIALS TO MANUFACTURE CONTROLLED SUBSTANCES

The elements of the crime of sale or distribution of materials to manufacture controlled substances are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. sold or distributed,
4. chemicals, supplies, or equipment, and
5. knew, or reasonably should have known or believed, that a person intended to use the chemicals, supplies, or equipment to illegally manufacture a controlled substance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of sale or distribution of materials to manufacture controlled substances.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of sale or distribution of materials to manufacture controlled substances.

### COMMENT

1. *See* § 18-18-412.7(1), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S.

2020); Instruction F:102 (defining “distribute”); Instruction F:327 (defining “sale”).

3. If the defendant is not charged with unlawful manufacture of a controlled substance, give the jury the elemental instruction for that offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 18:05 (unlawful manufacture of a controlled substance). Place the elemental instruction for that offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for unlawfully manufacturing a controlled substance.

## **18:53 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (DELIVERY OF AN EXCESS AMOUNT WITHIN TWENTY-FOUR HOURS)**

The elements of the crime of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. delivered in or from a store,
5. to the same individual,
6. during any twenty-four-hour period,
7. more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail sale of methamphetamine precursor drugs (delivery of an excess amount within twenty-four hours).

## COMMENT

1. See § 18-18-412.8(2)(a), C.R.S. 2020.
2. See Instruction F:91 (defining “deliver”); Instruction F:195 (defining “knowingly”); Instruction F:229 (defining “methamphetamine precursor drug”); Instruction F:353 (defining “store”); *see also* Instruction F:269 (defining “person,” as used in section 18-18-412.8(2)(a)).
3. See Instruction H:72 (affirmative defense of “lack of knowledge and participation”).

**18:54 PURCHASE OF AN EXCESS AMOUNT OF  
METHAMPHETAMINE PRECURSOR DRUGS WITHIN  
TWENTY-FOUR HOURS**

The elements of the crime purchase of an excess amount methamphetamine precursor drugs within twenty-four hours are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. purchased more than three and six-tenths grams of a methamphetamine precursor drug or a combination of two or more methamphetamine precursor drugs,
5. during any twenty-four-hour period.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of purchase of an excess amount methamphetamine precursor drugs within twenty-four hours.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of purchase of an excess amount methamphetamine precursor drugs within twenty-four hours.

COMMENT

1. See § 18-18-412.8(2)(b), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:229 (defining “methamphetamine precursor drug”); *see also* Instruction F:269 (defining “person,” as used in section 18-18-412.8(2)(b)).

## 18:55 RETAIL SALE OF METHAMPHETAMINE PRECURSOR DRUGS (IMPROPER DISPLAY)

The elements of the crime of retail sale of methamphetamine precursor drugs (improper display) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. offered for retail sale,
5. in or from a store,
6. a methamphetamine precursor drug,
7. that was offered for sale or stored or displayed prior to sale in an area of the store to which the public was allowed access.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail sale of methamphetamine precursor drugs (improper display).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail sale of methamphetamine precursor drugs (improper display).

### COMMENT

1. See § 18-18-412.8(2)(c), C.R.S. 2020.

2. *See* Instruction F:195 (defining “knowingly”); Instruction F:229 (defining “methamphetamine precursor drug”); Instruction F:353 (defining “store”).
3. *See* Instruction H:72 (affirmative defense of “lack of knowledge and participation”).

## 18:56 RETAIL DELIVERY OF METHAMPHETAMINE PRECURSOR DRUGS TO A MINOR

The elements of the crime of retail delivery of methamphetamine precursor drugs to a minor are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. delivered in a retail sale in or from a store,
  5. a methamphetamine precursor drug,
  6. to a minor under eighteen years of age.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of retail delivery of methamphetamine precursor drugs to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of retail delivery of methamphetamine precursor drugs to a minor.

### COMMENT

1. See § 18-18-412.8(2.5)(a), (3)(a), C.R.S. 2020.
2. See Instruction F:91 (defining "deliver"); Instruction F:195 (defining "knowingly"); Instruction F:229 (defining "methamphetamine precursor drug"); Instruction F:327 (defining "sale"); Instruction F:353 (defining

“store”); *see also* Instruction F:269 (defining “person,” as used in section 18-18-412.8(2.5)(a)).

3. *See* Instruction H:71 (affirmative defense of “reasonable reliance on identification”); Instruction H:72 (affirmative defense of “lack of knowledge and participation”).

## 18:57 UNAUTHORIZED POSSESSION OF A PRESCRIBED OR DISPENSED CONTROLLED SUBSTANCE

The elements of the crime of unauthorized possession of a prescribed or dispensed controlled substance are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. possessed any controlled substance that had been prescribed or dispensed by a practitioner,
  4. other than in the container in which it was delivered to him [her], and
  5. was not the legal owner, or a person acting at the direction of the legal owner of the controlled substance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession of a prescribed or dispensed controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession of a prescribed or dispensed controlled substance.

### COMMENT

1. See § 18-18-413, C.R.S. 2020.
2. See Instruction F:73 (defining "controlled substance" by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S.

2020); Instruction F:100 (defining “dispense”); Instruction F:268 (defining “person”); Instruction F:282 (defining “practitioner”).

3. See *People v. Gonzales*, 2017 COA 62, ¶ 15, 415 P.3d 846, 849 (rejecting the argument that this crime functions as an affirmative defense to the crime of unlawful possession of a controlled substance, and stating instead that this crime “is itself a separate offense, and the exception for ‘a person acting at the direction of the legal owner of the controlled substance’ is an element the prosecution must disprove when charging someone”).

4. In 2019, the Committee added Comment 3.

## 18:58 UNAUTHORIZED POSSESSION OR DISPENSING OF A SCHEDULE I CONTROLLED SUBSTANCE

The elements of the crime of unauthorized possession or dispensing of a schedule I controlled substance are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. dispensed or possessed a schedule I controlled substance, and
  4. was not a researcher who was registered under federal law to conduct research with that schedule I controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession or dispensing of a schedule I controlled substance

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession or dispensing of a schedule I controlled substance.

### COMMENT

1. See § 18-18-414(1)(a), C.R.S. 2020.
2. See Instruction F:100 (defining "dispense"); Instruction F:281 (defining "possession"); Instruction F:282 (defining "practitioner"); Instruction F:315 (defining "researcher"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required

for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:59 UNAUTHORIZED DISPENSING OF A SCHEDULE II CONTROLLED SUBSTANCE

The elements of the crime of unauthorized dispensing of a schedule II controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. dispensed any schedule II controlled substance,
4. other than from a pharmacy pursuant to a written order or an order electronically transmitted in accordance with [insert description of relevant provision(s) from 21 C.F.R. 1311], by any practitioner in the course of his [her] professional practice, or by a pharmacist in an emergency situation who [insert a description of relevant requirements from section 18-18-414(2)].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized dispensing of a schedule II controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized dispensing of a schedule II controlled substance.

### COMMENT

1. See § 18-18-414(1)(b), (2), C.R.S. 2020.

2. See Instruction F:100 (defining “dispense”); Instruction F:255 (defining “order”); Instruction F:275 (defining “pharmacy”); Instruction F:282 (defining “practitioner”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.
4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. See Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:60 UNAUTHORIZED DISPENSING OF A SCHEDULE III, IV, OR V CONTROLLED SUBSTANCE

The elements of the crime of unauthorized dispensing of a schedule III, IV, or V controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. dispensed any schedule III, IV, or V controlled substance,
4. other than from a pharmacy pursuant to a written, oral, mechanically produced, computer generated, electronically transmitted, or facsimile transmitted order or as a practitioner in the course of his [her] professional practice.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized dispensing of a schedule III, IV, or V controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized dispensing of a schedule III, IV, or V controlled substance.

### COMMENT

1. See § 18-18-414(1)(c), C.R.S. 2020.
2. See Instruction F:100 (defining "dispense"); Instruction F:255 (defining "order"); Instruction F:275 (defining "pharmacy"); Instruction F:282 (defining "practitioner").

3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:61 DISPENSING MARIJUANA OR MARIJUANA CONCENTRATE

The elements of the crime of dispensing marijuana or marijuana concentrate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. dispensed any marijuana or marijuana concentrate.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing marijuana or marijuana concentrate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing marijuana or marijuana concentrate.

### COMMENT

1. *See* § 18-18-414(1)(d), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”); Instruction F:208 (defining “marijuana”); Instruction F:210 (defining “marijuana concentrate”).
3. *See* Instruction H:68 (affirmative defense of “medical marijuana”); Instruction H:69 (affirmative defense of “recreational marijuana”); *see also* Colo. Const. Art. XVIII, § 16, (4) (“Lawful operation of marijuana-related facilities”); § 18-18-433, C.R.S. 2020 (“The provisions of this part 4 do not apply to a person twenty-one years of age or older acting in conformance

with section 16 of article XVIII of the state constitution and do not apply to a person acting in conformance with section 14 of article XVIII of the state constitution).

4. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

5. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:62 EXCESSIVE REFILLING

The elements of the crime of excessive refilling are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. refilled a prescription for any schedule III, IV, or V controlled substance,
4. more than six months after the date on which the prescription had been issued or more than five times.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of excessive refilling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of excessive refilling.

### COMMENT

1. *See* § 18-18-414(1)(e), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists

numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:63 FAILURE TO FILE AND RETAIN A PRESCRIPTION

The elements of the crime of failure to file and retain a prescription are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a pharmacy, and
4. failed to file and retain a prescription as required in [insert a description of the relevant requirement(s) from section 12-280-134, C.R.S. 2020].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to file and retain a prescription.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to file and retain a prescription.

### COMMENT

1. See § 18-18-414(1)(f), C.R.S. 2020.
2. See Instruction F:275 (defining "pharmacy").
3. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)]," and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons

using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the statutory citation in the fourth element, along with the quotation in Comment 3, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(f), 2019 Colo. Sess. Laws 613, 1680.

## 18:64 FAILURE TO RECORD AND MAINTAIN A RECORD OF HOSPITAL DISPENSING

The elements of the crime of failure to record and maintain a record of hospital dispensing are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a hospital, and
4. failed to record and maintain a record of dispensing as provided in [insert a description of the relevant requirement(s) from section 12-280-134 or 27-80-210, C.R.S. 2020].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to record and maintain a record of hospital dispensing.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to record and maintain a record of hospital dispensing.

### COMMENT

1. *See* § 18-18-414(1)(g), C.R.S. 2020.
2. *See* Instruction F:100 (defining “dispense”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists

numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the statutory citation in the fourth element, along with the quotation in Comment 3, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(g), 2019 Colo. Sess. Laws 613, 1680.

## **18:65 REFUSAL TO MAKE A RECORD OR FILE AVAILABLE FOR INSPECTION**

The elements of the crime of refusal to make a record or file available for inspection are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27], and
4. refused to make available for inspection and to accord full opportunity to check,
5. any record or file of [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal to make a record or file available for inspection.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal to make a record or file available for inspection.

### COMMENT

1. See § 18-18-414(1)(h), C.R.S. 2020.
2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article 18 or in article 280 of title 12 [(pharmacists, pharmacy

businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

3. In 2019, the Committee updated the statutory citations in the third and fifth elements, along with the quotation in Comment 2, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(h), 2019 Colo. Sess. Laws 613, 1680.

## 18:66 FAILURE TO KEEP RECORDS

The elements of the crime of failure to keep records are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27], and
4. failed to keep records of [insert description of requirement(s) from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to keep records.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to keep records.

### COMMENT

1. *See* § 18-18-414(1)(i), C.R.S. 2020.
2. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

3. In 2019, the Committee updated the statutory citations in the third and fourth elements, along with the quotation in Comment 2, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(i), 2019 Colo. Sess. Laws 613, 1680.

## 18:67 FAILURE TO OBTAIN A LICENSE OR REGISTRATION

The elements of the crime of failure to obtain a license or registration are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27], and
4. failed to obtain a license or registration to [insert description of requirement(s) from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to obtain a license or registration.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to obtain a license or registration.

### COMMENT

1. See § 18-18-414(1)(j), C.R.S. 2020.
2. Section 18-18-414(1) excepts from criminal liability acts authorized by "this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)]," and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons

using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

3. In 2019, the Committee updated the statutory citations in the third and fourth elements, along with the quotation in Comment 2, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(j), 2019 Colo. Sess. Laws 613, 1680.

## 18:68 DISPENSING WITHOUT LABELING

The elements of the crime of dispensing without labeling are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. dispensed a controlled substance,
  4. other than as a practitioner for direct administration in the course of his [her] practice or for administration to [a] hospital inpatient[s], and
  5. failed to affix to the immediate container a label stating the name and address of the person from whom the controlled substance was dispensed; the date on which the controlled substance was dispensed; the number of the prescription as filed in the prescription files of the pharmacy which dispensed the prescription; the name of the prescribing practitioner; the directions for use of the controlled substance as contained in the prescription; and the name of the patient, and, if for an animal, the name of the owner.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing without labeling.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing without labeling.

### COMMENT

1. See § 18-18-414(1)(k), C.R.S. 2020.

2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:100 (defining “dispense”); Instruction F:268 (defining “person”); Instruction F:282 (defining “practitioner”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.
4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. See Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:69 DISPENSING WITHOUT LABELING BY A PRACTITIONER

The elements of the crime of dispensing without labeling by a practitioner are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a practitioner, and
  4. dispensed a controlled substance,
  5. other than by direct administration in the course of his [her] practice,
  6. without affixing to the immediate container a label bearing directions for use of the controlled substance, the practitioner's name and registry number, the name of the patient, the date, and, if for an animal, the name of the owner.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of dispensing without labeling by a practitioner.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of dispensing without labeling by a practitioner.

### COMMENT

1. See § 18-18-414(1)(l), C.R.S. 2020.

2. See Instruction F:09 (defining “administer”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:100 (defining “dispense”); Instruction F:282 (defining “practitioner”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.
4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. See Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:70 UNLAWFUL ADMINISTRATION OF A CONTROLLED SUBSTANCE

The elements of the crime of unlawful administration of a controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. administered a controlled substance,
4. other than to the patient for whom it was prescribed.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful administration of a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful administration of a controlled substance.

### COMMENT

1. *See* § 18-18-414(1)(m), C.R.S. 2020.
2. *See* Instruction F:09 (defining “administer”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their

official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

4. In 2019, the Committee updated the quotation in Comment 3 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## **18:71 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE BY A PRACTITIONER OR PHARMACY**

The elements of the crime of unlawful possession of a controlled substance by a practitioner or pharmacy are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. was a practitioner, and
4. possessed a controlled substance,
5. which was not obtained from a pharmacy and which was received from a person who was not licensed as a manufacturer, distributor, or practitioner.]
- [3. was a pharmacy, and
4. possessed a controlled substance,
5. which was received from any person who was not licensed as a manufacturer or distributor, and which was not bought from another pharmacy.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful possession of a controlled substance by a practitioner or pharmacy.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful possession of a controlled substance by a practitioner or pharmacy.

## COMMENT

1. See § 18-18-414(1)(n), C.R.S. 2020.
2. See Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:104 (defining “distributor”); Instruction F:268 (defining “person”); Instruction F:275 (defining “pharmacy”); Instruction F:281 (defining “possession”); Instruction F:282 (defining “practitioner”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The term “manufacture” is defined by section 18-18-102(17), C.R.S. 2020. See Instruction F:206 (defining “manufacture”). However, the term “manufacturer” is not separately defined for purposes of Article 18 of title 18.
4. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.
5. In 2019, the Committee added Comment 4.

## 18:72 UNLAWFUL TRANSFER OF DRUG PRECURSORS

The elements of the crime of unlawful transfer of drug precursors are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. transferred drug precursors,
5. to any person who used them for an unlawful activity.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful transfer of drug precursors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful transfer of drug precursors.

### COMMENT

1. *See* § 18-18-414(1)(o), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:269 (defining “person”).
3. The term “drug precursors” is not defined by statute.
4. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists

numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

5. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:73 UNLAWFULLY OBTAINING DRUG PRECURSORS

The elements of the crime of unlawfully obtaining drug precursors are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. acquired or obtained, or attempted to acquire or obtain, possession of a drug precursor,
5. by misrepresentation, fraud, forgery, deception, or subterfuge.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully obtaining drug precursors.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully obtaining drug precursors.

### COMMENT

1. *See* § 18-18-414(1)(q), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. The term “drug precursors” is not defined by statute.

4. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

5. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

6. In 2015, the Committee removed the reference to Instruction G2:01 in Comment 2, and it added Comment 5.

7. In 2019, the Committee updated the quotation in Comment 4 to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1), 2019 Colo. Sess. Laws 613, 1680.

## 18:74 UNLAWFULLY FURNISHING OR OMITTING MATERIAL INFORMATION

The elements of the crime of unlawfully furnishing or omitting material information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. furnished false or fraudulent material information in, or omitted any material information from,
5. a[n] [insert description of application, report, or other document required to be kept or filed under article 18 of title 18; part 1 of article 280 of title 12; part 2 of article 80 of title 27; or any record required to be kept by article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawfully furnishing or omitting material information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawfully furnishing or omitting material information.

### COMMENT

1. See § 18-18-414(1)(r), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”).
3. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.
4. In 2019, the Committee updated the statutory citations in the fifth element, along with the quotation in Comment 3, to reflect a legislative amendment. See Ch. 136, sec. 109, § 18-18-414(1)(r), 2019 Colo. Sess. Laws 613, 1680.

## 18:75 REFUSAL OF ENTRY FOR AN INSPECTION

The elements of the crime of refusal of entry for an inspection are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27], and
4. refused entry into any premises,
5. for an inspection authorized by [insert description from article 18 of title 18; part 1 of article 280 of title 12; or part 2 of article 80 of title 27].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of refusal of entry for an inspection.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of refusal of entry for an inspection.

### COMMENT

1. See § 18-18-414(1)(t), C.R.S. 2020.
2. Section 18-18-414(1) excepts from criminal liability acts authorized by “this article 18 or in article 280 of title 12 [(pharmacists, pharmacy businesses, and pharmaceuticals)],” and section 18-18-418, C.R.S. 2020, lists numerous exemptions (e.g., governmental officials acting pursuant to their official duties, teachers and students of chemistry classes, and persons

using peyote in religious ceremonies). However, the Committee has not drafted model affirmative defense instructions.

3. In 2019, the Committee updated the statutory citations in the third and fifth elements, along with the quotation in Comment 2, to reflect a legislative amendment. *See* Ch. 136, sec. 109, § 18-18-414(1)(t), 2019 Colo. Sess. Laws 613, 1680.

## 18:76 OBTAINING A CONTROLLED SUBSTANCE BY FRAUD OR DECEIT

The elements of the crime of obtaining a controlled substance by fraud or deceit are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. obtained a controlled substance or procured the administration of a controlled substance,
4. by fraud, deceit, misrepresentation, or subterfuge; or by the forgery or alteration of an order; or by the concealment of a material fact; or by the use of a false name or the giving of a false address.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of obtaining a controlled substance by fraud or deceit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of obtaining a controlled substance by fraud or deceit.

### COMMENT

1. See § 18-18-415(1)(a), C.R.S. 2020.
2. See Instruction F:09 (defining "administer"); Instruction F:73 (defining "controlled substance" by referring users to the statutory

schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:255 (defining “order”).

## 18:77 MAKING A FALSE STATEMENT RELATED TO A CONTROLLED SUBSTANCE

The elements of the crime of making a false statement related to a controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. made a false statement in any required order, report, or record of [insert a description of the requirement, from article 18 of title 18].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making a false statement related to a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making a false statement related to a controlled substance.

### COMMENT

1. *See* § 18-18-415(1)(c), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:195 (defining “willfully”); Instruction F:255 (defining “order”).

## 18:78 FALSE ACT FOR THE PURPOSE OF OBTAINING A CONTROLLED SUBSTANCE

The elements of the crime of false act for the purpose of obtaining a controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. for the purpose of obtaining a controlled substance,
4. falsely assumed the title of, or represented himself [herself] to be, a manufacturer, distributor, practitioner, or other person authorized by law to obtain a controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false act for the purpose of obtaining a controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false act for the purpose of obtaining a controlled substance.

### COMMENT

1. *See* § 18-18-415(1)(d), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:104 (defining “distributor”); Instruction F:282 (defining “practitioner”).

3. The term “manufacture” is defined by § 18-18-102(17), C.R.S. 2020. *See* Instruction F:206 (defining “manufacture”). However, the term “manufacturer” is not separately defined for purposes of Article 18 of title 18.

## 18:79 MAKING OR UTTERING A FALSE OR FORGED ORDER

The elements of the crime of making or uttering a false or forged order are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. made or uttered,
4. any false or forged order.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making or uttering a false or forged order.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making or uttering a false or forged order.

### COMMENT

1. *See* § 18-18-415(1)(e), C.R.S. 2020.
2. *See* Instruction F:255 (defining "order"); *see also* Instruction F:385 (defining "utter," for purposes of forgery and impersonation offenses).

## 18:80 AFFIXING A FALSE OR FORGED LABEL

The elements of the crime of affixing a false or forged label are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. affixed any false or forged label,
4. to a package or receptacle containing a controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of affixing a false or forged label.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of affixing a false or forged label.

### COMMENT

1. *See* § 18-18-415(1)(f), C.R.S. 2020.
2. *See* Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020).

## 18:81 INDUCING CONSUMPTION BY FRAUDULENT MEANS

The elements of the crime of inducing consumption by fraudulent means are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. surreptitiously, or by means of fraud, misrepresentation, suppression of truth, deception, or subterfuge,
4. caused any other person to unknowingly consume or receive the direct administration of any controlled substance.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of inducing consumption by fraudulent means.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of inducing consumption by fraudulent means.

### COMMENT

1. *See* § 18-18-416(1), C.R.S. 2020.
2. *See* Instruction F:09 (defining “administer”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020).
3. The statute includes an exemption from criminal liability. *See* § 18-18-416(1), C.R.S. 2020 (“except that nothing in this section shall diminish

the scope of health care authorized by law”). However, the Committee has not drafted a model affirmative defense instruction.

**18:82 MANUFACTURING OR DISTRIBUTING AN  
IMITATION CONTROLLED SUBSTANCE, OR POSSESSING  
AN IMITATION CONTROLLED SUBSTANCE WITH INTENT  
TO DISTRIBUTE**

The elements of the crime of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. manufactured, distributed, or possessed with intent to distribute an imitation controlled substance.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing or distributing an imitation controlled substance, or possessing an imitation controlled substance with intent to distribute.

COMMENT

1. See § 18-18-422(1)(a), C.R.S. 2020.
2. See Instruction F:103 (defining "distribute"); Instruction F:177 (defining "imitation controlled substance," and incorporating the

considerations enumerated in section 18-18-421(1)); Instruction F:207 (defining “manufacture”); Instruction F:281 (defining “possession”); Instruction F:185 (defining “with intent”).

3. Section 18-18-424, C.R.S. 2020, establishes exemptions from criminal liability for persons who are licensed, registered, or otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

4. Section 18-18-421(1), C.R.S. 2020, lists five factors that the trier of fact may consider, in addition to all other relevant factors, in determining whether a substance is an imitation controlled substance. Rather than include these factors in a special instruction, the Committee has included them in Instruction F:177 (defining “imitation controlled substance”).

5. In *People v. Moore*, 674 P.2d 354, 358 (Colo. 1984), and *People v. Pharr*, 696 P.2d 235, 236 (Colo. 1984), the supreme court held, under an earlier version of the imitation controlled substances statute, that a mens rea of “knowingly” was implied. However, in *People v. Taylor*, 131 P.3d 1158, 1163 (Colo. App. 2005), a division of the court of appeals held that, because “the General Assembly amended the statute to eliminate any reference to express or implied representations concerning the nature of the imitation controlled substance,” there no longer is a “requirement that a defendant knowingly purport that a substance is a controlled substance.”

## 18:83 DISTRIBUTING AN IMITATION CONTROLLED SUBSTANCE TO A MINOR

The elements of the crime of distributing an imitation controlled substance to a minor are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an adult, and
4. distributed an imitation controlled substance to a minor who was at least two years younger than the defendant.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of distributing an imitation controlled substance to a minor.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of distributing an imitation controlled substance to a minor.

### COMMENT

1. *See* § 18-18-422(2)(a), C.R.S. 2020.
2. *See* Instruction F:103 (defining “distribute”); Instruction F:177 (defining “imitation controlled substance,” and incorporating the considerations enumerated in section 18-18-421(1)).
3. *See* Instruction 18:82, Comments 3–5.

4. Article 18 does not define the terms “adult” and “minor.”

## 18:84 ADVERTISING AN IMITATION CONTROLLED SUBSTANCE

The elements of the crime of advertising an imitation controlled substance are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. placed in a newspaper, magazine, handbill, or other publication or posted or distributed in any public place,
4. an advertisement or solicitation which he [she] knew would promote the distribution of imitation controlled substances.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of advertising an imitation controlled substance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of advertising an imitation controlled substance.

### COMMENT

1. See § 18-18-422(3)(a), C.R.S. 2020.
2. See Instruction F:103 (defining "distribute"); Instruction F:177 (defining "imitation controlled substance," and incorporating the considerations enumerated in section 18-18-421(1)).
3. See Instruction 18:82, Comments 3-5.

**18:85.SP IMITATION CONTROLLED SUBSTANCE  
OFFENSES – SPECIAL INSTRUCTION (ERRONEOUS BELIEF  
NO DEFENSE)**

A defendant's belief that an imitation controlled substance was a genuine controlled substance is not a defense to [insert name(s) of imitation controlled substance offense(s)].

COMMENT

1. *See* § 18-18-422(4), C.R.S. 2020.

**18:86 MANUFACTURING OR DELIVERING A  
COUNTERFEIT CONTROLLED SUBSTANCE, OR  
POSSESSING A COUNTERFEIT CONTROLLED  
SUBSTANCE WITH INTENT TO MANUFACTURE OR  
DELIVER**

The elements of the crime of manufacturing or delivering a counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver, are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or intentionally,
4. manufactured, delivered, or possessed with intent to manufacture or deliver,
5. a controlled substance which, or the container or labeling of which, without authorization, bore the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser, other than the person who in fact manufactured, distributed, or dispensed the substance.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacturing or delivering a counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacturing or delivering a

counterfeit controlled substance, or possessing a counterfeit controlled substance with intent to manufacture or deliver.

#### COMMENT

1. *See* § 18-18-423(1), C.R.S. 2020.
2. *See* Instruction F:101 (defining “dispenser”); Instruction F:73 (defining “controlled substance” by referring users to the statutory schedules referenced in section § 18-18-102(5), C.R.S. 2020); Instruction F:185 (defining “intentionally” and “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:281 (defining “possession”); Instruction F:373 (defining “trademark”).
3. Section 18-18-424, C.R.S. 2020, establishes exemptions from criminal liability for persons who are licensed, registered, or otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

## 18:87 MAKING, DISTRIBUTING, OR POSSESSING A COUNTERFEIT DRUG IMPLEMENT

The elements of the crime of making, distributing, or possessing a counterfeit drug implement are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly or intentionally,
4. made, distributed, or possessed a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of making, distributing, or possessing a counterfeit drug implement.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of making, distributing, or possessing a counterfeit drug implement.

### COMMENT

1. See § 18-18-423(2), C.R.S. 2020.

2. See Instruction F:112 (defining “drug”); Instruction F:185 (defining “intentionally”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”); Instruction F:373 (defining “trademark”).

3. Section 18-18-424, C.R.S. 2020, establishes exemptions from criminal liability for persons who are licensed, registered, or otherwise authorized. However, the Committee has not drafted model affirmative defense instructions.

## 18:88 POSSESSION OF DRUG PARAPHERNALIA

The elements of the crime of possession of drug paraphernalia are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. possessed drug paraphernalia, and
5. knew or reasonably should have known that the drug paraphernalia could be used under circumstances to commit the offense[s] of [insert name(s) of controlled substance offense(s)].
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of drug paraphernalia.

### COMMENT

1. See § 18-18-428(1), C.R.S. 2020.
2. See Instruction F:113 (defining “drug paraphernalia”); Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).

3. *See Lee v. Smith*, 772 P.2d 82, 87 (Colo. 1989) (construing the offense of possession of drug paraphernalia, then codified at section 12-22-504, as requiring a culpable mental state of “knowingly”).

4. Section 18-18-428(1)(b), C.R.S. 2020, establishes an exemption from criminal liability for “any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe” if the location of the needle or syringe is disclosed in specified circumstances. However, the Committee has not drafted a model affirmative defense instruction.

5. Section 18-18-430.5, C.R.S. 2020, establishes an exemption for any person “[p]articipating as an employee, volunteer, or participant in an approved syringe exchange program created pursuant to section 25-1-520.” + It also exempts “a pharmacist or pharmacy technician who sells nonprescription syringes or needles pursuant to section 12-280-123(4).” However, the Committee has not drafted model affirmative defense instructions.

6. Section 18-18-427(1), C.R.S. 2020, enumerates several factors that a court may consider in determining whether an object is drug paraphernalia. And section 18-18-427(2) states that: “In the event a case brought pursuant to sections 18-18-425 to 18-18-430 is tried before a jury, the court shall hold an evidentiary hearing on issues raised pursuant to this section. Such hearing shall be conducted in camera.”

7. *See* § 18-18-426(2), C.R.S. 2020 (“Drug paraphernalia” does not include any marijuana accessories as defined in section 16(2)(g) of article XVIII of the state constitution.”).

8. *See* Instruction H:32 (affirmative defense of “reporting an emergency drug or alcohol overdose event”).

9. If the defendant is not charged with the referenced controlled substance offense(s), give the jury the elemental instruction(s) for the controlled substance offense(s) without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction(s) for the controlled substance offense(s) immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions

defining the relevant terms and theories of criminal liability for the controlled substance offense(s).

10. In 2015, the Committee added Comment 4 and renumbered the remaining comments. *See* Ch. 76, sec. 1, § 18-18-428(1)(b), 2015 Colo. Sess. Laws 200, 200-01.

11. + In 2020, pursuant to a legislative amendment, the Committee updated its discussion of section 18-18-430.5 in Comment 5. *See* Ch. 287, sec. 6, § 18-18-430.5(1)(b), 2020 Colo. Sess. Laws 1419, 1420.

## 18:89 MANUFACTURE, SALE, OR DELIVERY OF DRUG PARAPHERNALIA

The elements of the crime of manufacture, sale, or delivery of drug paraphernalia are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. sold or delivered, or possessed or manufactured with intent to sell or deliver,
5. equipment, products, or materials,
6. knowing, or under circumstances where one reasonably should have known, that the equipment, products, or materials could be used as drug paraphernalia.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of manufacture, sale, or delivery of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of manufacture, sale, or delivery of drug paraphernalia.

### COMMENT

1. See § 18-18-429, C.R.S. 2020.

2. See Instruction F:113 (defining “drug paraphernalia”); Instruction F:185 (defining “with intent”); Instruction F:195 (defining “knowingly”); Instruction F:206 (defining “manufacture”); Instruction F:281 (defining “possession”); Instruction F:327 (defining “sale”).

3. See Instruction 18:88, Comments 3–6.

## 18:90 ADVERTISEMENT OF DRUG PARAPHERNALIA

The elements of the crime of advertisement of drug paraphernalia are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. placed an advertisement in any newspaper, magazine, handbill, or other publication, and
  4. intended thereby to promote the sale in Colorado of equipment, products, or materials designed and intended for use as drug paraphernalia.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of advertisement of drug paraphernalia.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of advertisement of drug paraphernalia.

### COMMENT

1. See § 18-18-430, C.R.S. 2020.
2. See Instruction F:113 (defining "drug paraphernalia"); Instruction F:185 (defining "intentionally" and "with intent").
3. See Instruction 18:88, Comments 5-7.

## CHAPTER 20

### OFFENSES RELATED TO LIMITED GAMING

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## CHAPTER COMMENTS

1. Many offenses in this chapter revolve around conduct required or prohibited by the Limited Gaming Act of 1991, §§ 44-30-101 to -1515, C.R.S. 2020 (“the Act”). Where appropriate, the court should review the pertinent provisions of the Act. It should then provide the jury with a special instruction explaining the relevant law and allowing the jury to apply that law to the facts of the case.

For example, the third element of Instruction 20:02 requires the jury to determine whether the defendant “failed to pay tax due under the Limited Gaming Act of 1991 within thirty days after the date the tax became due.” This raises a question of how tax becomes due under the Act. Therefore, the court should provide a special instruction explaining this process for the jury. See §§ 44-30-601 to -605, C.R.S. 2020. Armed with this instruction, the jury can then determine (1) whether a tax was due, and (2) whether the defendant in fact failed to pay it within the thirty-day timeframe.

2. Several offenses within this chapter provide for increased sentences where the defendant is a “repeating gambling offender,” as defined in section 18-20-102(2), C.R.S. 2020. The court should not ask the jury to make a finding regarding whether a defendant is a “repeating gambling offender.” Although COLJI-Crim. 27:13, 27:14, and 27:15 (1983) defined three separate offenses of “repeating gambling offender” based on section 18-10-102(9), C.R.S. 2020, the Committee is now of the view that the trial court should make this determination at sentencing. See *People v. Nunn*, 148 P.3d 222, 228 (Colo. App. 2006) (holding that, under the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the defendant in habitual criminal proceedings “had no right to have a jury determine whether he was the person convicted in the prior cases”).

3. Section 18-20-115, C.R.S. 2020, provides as follows: “Nothing contained in this article shall be construed to modify, amend, or otherwise

affect the validity of any provisions contained in” Chapter 10, Gambling Offenses. To the extent that this provision gives rise to any affirmative defenses, the Committee has not drafted model instructions for such defenses.

4. The Committee added this chapter in 2016.

5. In 2018, the Committee modified the statutory citations in Comment 1 to conform with a legislative reorganization. *See* Ch. 14, secs. 2, 4, §§ 44-30-101 to -1407, 2018 Colo. Sess. Laws 167, 168, 237 (repealing and relocating the Act).

6. In 2019, the Committee modified the statutory citation in Comment 1 pursuant to new legislation. *See* Ch. 347, sec. 12, §§ 44-30-1501 to -1515, 2019 Colo. Sess. Laws 3209, 3216–31.

## **20:01 FAILURE TO PAY GAMING TAX (EVASION)**

The elements of the crime of failure to pay gaming tax (evasion) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. in attempting to defeat or evade a tax imposed by the Limited Gaming Act of 1991,
4. made a false or fraudulent return.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay gaming tax (evasion).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay gaming tax (evasion).

### COMMENT

1. *See* § 18-20-103(1)(a), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Regarding whether a tax was imposed by the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on

this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

4. By its terms, this crime applies to “any person.” § 18-20-103(1). For the purposes of this offense, subsection (2) defines “person” as including “corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to” the Limited Gaming Act of 1991. Because that definition is inclusive rather than exclusive, the Committee has not included an element requiring that the defendant is a “person.” If the parties dispute whether the defendant qualifies as a “person” for the purposes of this crime, the court may give Instruction F:268.5 (defining “person” (limited gaming offenses)).

5. In the absence of case law on point, the Committee takes no position on whether the word “attempting” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

## 20:02 FAILURE TO PAY GAMING TAX (PAY)

The elements of the crime of failure to pay gaming tax (pay) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. failed to pay tax due under the Limited Gaming Act of 1991 within thirty days after the date the tax became due.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay gaming tax (pay).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay gaming tax (pay).

### COMMENT

1. *See* § 18-20-103(1)(b), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Regarding whether a tax payment was due under the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

4. The statute provides for a sentence enhancer when a person commits this crime “two or more times in any twelve-month period.” § 18-20-103(1)(d) (citing § 44-30-603(1)(b), C.R.S. 2020, which features the same language proscribed by this instruction). Because the court can constitutionally make this determination rather than the jury, and because the General Assembly has not specifically required a jury determination, the Committee has not drafted a model interrogatory. *See People v. Nunn*, 148 P.3d 222, 228 (Colo. App. 2006) (holding that, under the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the defendant in habitual criminal proceedings “had no right to have a jury determine whether he was the person convicted in the prior cases”).

5. By its terms, this crime applies to “any person.” § 18-20-103(1). For the purposes of this offense, subsection (2) defines “person” as including “corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to” the Limited Gaming Act of 1991. Because that definition is inclusive rather than exclusive, the Committee has not included an element requiring that the defendant is a “person.” If the parties dispute whether the defendant qualifies as a “person” for the purposes of this crime, the court may give Instruction F:268.5 (defining “person” (limited gaming offenses)).

6. In 2018, the Committee modified the parenthetical citation in Comment 4 pursuant to a legislative amendment. *See* Ch. 14, sec. 16, § 18-20-103(1)(d), 2018 Colo. Sess. Laws 167, 241.

## 20:03 FAILURE TO PAY GAMING TAX (FILE RETURN)

The elements of the crime of failure to pay gaming tax (file return) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. failed to file a return required by the Limited Gaming Act of 1991 within thirty days after the date the return was due.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to pay gaming tax (file return).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to pay gaming tax (file return).

### COMMENT

1. *See* § 18-20-103(1)(c), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Regarding whether a return was required by the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

4. The statute provides for a sentence enhancer when a person commits this crime “two or more times in any twelve-month period.” § 18-20-103(1)(d) (citing § 44-30-603(1)(c), C.R.S. 2020, which features the same language proscribed by this instruction). Because the court can constitutionally make this determination rather than the jury, and because the General Assembly has not specifically required a jury determination, the Committee has not drafted a model interrogatory. See *People v. Nunn*, 148 P.3d 222, 228 (Colo. App. 2006) (holding that, under the prior conviction exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), the defendant in habitual criminal proceedings “had no right to have a jury determine whether he was the person convicted in the prior cases”).

5. By its terms, this crime applies to “any person.” § 18-20-103(1). For the purposes of this offense, subsection (2) defines “person” as including “corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to” the Limited Gaming Act of 1991. Because that definition is inclusive rather than exclusive, the Committee has not included an element requiring that the defendant is a “person.” If the parties dispute whether the defendant qualifies as a “person” for the purposes of this crime, the court may give Instruction F:268.5 (defining “person” (limited gaming offenses)).

6. In 2018, the Committee modified the parenthetical citation in Comment 4 pursuant to a legislative amendment. See Ch. 14, sec. 16, § 18-20-103(1)(d), 2018 Colo. Sess. Laws 167, 241.

## 20:04 FALSE PRESENTATION TO COMMISSION

The elements of the crime of false presentation to commission are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. willfully,
4. aided or assisted in, or procured, counseled, or advised,
5. the preparation or presentation under or in connection with any matter arising under any title administered by the Colorado limited gaming control commission or a return, affidavit, claim, or other document,
6. which was fraudulent or was false as to any material fact,
7. whether or not such falsity or fraud was with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of false presentation to commission.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false presentation to commission.

### COMMENT

1. See § 18-20-103(1)(e), C.R.S. 2020.

2. See Instruction F:195 (defining “willfully”).
3. The Committee has included the seventh element because its language appears in the statute. See § 18-20-103(1)(e). The Committee notes, however, that this “whether or not” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he received consent from an authorized person as an affirmative defense.
4. The statute does not define the terms “falsity,” “fraudulent,” or “material fact.”
5. By its terms, this crime applies to “any person.” § 18-20-103(1). For the purposes of this offense, subsection (2) defines “person” as including “corporate officers having control or supervision of, or responsibility for, completing tax returns or making payments pursuant to” the Limited Gaming Act of 1991. Because that definition is inclusive rather than exclusive, the Committee has not included an element requiring that the defendant is a “person.” If the parties dispute whether the defendant qualifies as a “person” for the purposes of this crime, the court may give Instruction F:268.5 (defining “person” (limited gaming offenses)).

## 20:05 FALSE STATEMENT ON GAMING LICENSE APPLICATION

The elements of the crime of false statement on gaming license application are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
- [4. made a false statement in any application for a license issued by the Colorado limited gaming control commission or in any statement attached to the application, or provided any false or misleading information to the Colorado limited gaming control commission or the division of gaming.]
- [4. failed to keep books and records to substantiate the receipts, expenses, or uses resulting from limited gaming conducted under the Limited Gaming Act of 1991, as prescribed in [insert the relevant rule promulgated by the Colorado limited gaming control commission].]
- [4. falsified any books or records which related to any transaction connected with the holding, operating, and conducting of any limited card games or slot machines.]
- [4. violated [insert the relevant provision of the Limited Gaming Act of 1991, the relevant rule adopted by the Colorado limited gaming control commission, or the relevant term of a license granted under the Act].]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find

the defendant guilty of false statement on gaming license application.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of false statement on gaming license application.

#### COMMENT

1. See § 18-20-104, C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:196.9 (defining “limited card games and slot machines” and “limited gaming”).
3. For the first bracketed alternative in the fourth element, the statute does not specify that the license is one issued by the Colorado limited gaming control commission. However, the Committee has concluded from context that this language pertains to a limited gaming license under the Limited Gaming Act of 1991. See § 44-30-501, C.R.S. 2020. Where appropriate, the court should draft an instruction discussing the application process.
4. For the bracketed alternatives that pertain to the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on the relevant point, allowing the jury to apply this law to the facts of the case. See Introductory Comment 1 to this chapter.
5. See *People v. Luke*, 948 P.2d 87, 90 (Colo. App. 1997) (holding that “the trial court erred in imposing a materiality requirement” on the statute); *id.* at 91 (holding that the statute is neither constitutionally overbroad nor constitutionally vague).
6. In 2018, the Committee modified this instruction and the statutory citation in Comment 3 pursuant to a legislative amendment and reorganization. See Ch. 14, secs. 2, 17, §§ 44-30-501, 18-20-104, 2018 Colo. Sess. Laws 167, 184–86, 241.

## 20:06 IMPROPER USE OF SLOT MACHINE (FAILURE TO PROVIDE SHIPPING INVOICE)

The elements of the crime of improper use of slot machine (failure to provide invoice) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a slot machine manufacturer or distributor shipping or importing a slot machine into the state of Colorado, and
4. provided to the Colorado limited gaming control commission at the time of shipment a shipping invoice that failed to include the destination, the serial number of each machine, or a description of each machine.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of slot machine (failure to provide shipping invoice).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of slot machine (failure to provide shipping invoice).

### COMMENT

1. See §§ 18-20-105(1), 44-30-803(1)(a)(I), C.R.S. 2020.
2. See Instruction F:345.6 (defining "slot machine"); Instruction F:345.7 (defining "slot machine distributor"); Instruction F:345.8 (defining "slot

machine manufacturer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. In 2018, the Committee modified the statutory citations in Comment 1 pursuant to a legislative amendment. *See* Ch. 14, sec. 18, § 18-20-105(1), 2018 Colo. Sess. Laws 167, 241-42.

## **20:07 IMPROPER USE OF SLOT MACHINE (FAILURE TO PROVIDE REPORT)**

The elements of the crime of improper use of slot machine (failure to provide report) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. received a slot machine, and
  4. upon receipt of the machine,
  5. failed to provide to the Colorado limited gaming control commission upon a form available from the commission information that included the location of the machine, the machine's serial number, and the machine's description,
  6. regardless of whether the machine was received from a manufacturer or any other person.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of slot machine (failure to provide report).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of slot machine (failure to provide report).

### **COMMENT**

1. See §§ 18-20-105(1), 44-30-803(1)(a)(II), C.R.S. 2020.

2. See Instruction F:345.6 (defining “slot machine”); Instruction F:345.8 (defining “slot machine manufacturer”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The Committee has included the sixth element because its language appears in the statute. *See* § 44-30-803(1)(a)(II). The Committee notes, however, that this “regardless of whether” language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he received the slot machine from a person other than a manufacturer as an affirmative defense.

4. In 2018, the Committee modified the statutory citations in Comments 1 and 3 pursuant to a legislative amendment. *See* Ch. 14, sec. 18, § 18-20-105(1), 2018 Colo. Sess. Laws 167, 241–42.

## 20:08 IMPROPER USE OF SLOT MACHINE (UNREPORTED MOVEMENT)

The elements of the crime of improper use of slot machine (unreported movement) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. moved a slot machine from the specific location for which it was licensed, and
4. failed to report such movement to the Colorado limited gaming control commission in accordance with rules adopted by the commission.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of slot machine (unreported movement).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of slot machine (unreported movement).

### COMMENT

1. See §§ 18-20-105(1), 44-30-803(1)(a)(III), C.R.S. 2020.
2. See Instruction F:345.6 (defining "slot machine"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be

required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether a report complied with rules promulgated by the commission, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

4. In 2018, the Committee modified the statutory citations in Comment 1 pursuant to a legislative amendment. *See* Ch. 14, sec. 18, § 18-20-105(1), 2018 Colo. Sess. Laws 167, 241-42.

## 20:09 CHEATING

The elements of the crime of cheating are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was an owner or employee of, or a player in, an establishment, and
  4. cheated at a limited gaming activity.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of cheating.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of cheating.

### COMMENT

1. *See* § 18-20-106(1), C.R.S. 2020.
2. *See* Instruction F:48.3 (defining “cheating”); Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:196.9 (defining “limited gaming”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:10.SP CHEATING – SPECIAL INSTRUCTION (DEVICE)

Evidence that the defendant possessed more than one of [insert the relevant devices, equipment, products, or materials described in section 18-20-109, C.R.S. 2020] gives rise to a permissible inference that the defendant intended to use them for cheating.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 18-20-109(6), C.R.S. 2020.
2. Although the statute speaks in terms of a presumption, the concept should be explained as a permissible inference. See *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 20:11.INT CHEATING – INTERROGATORY (LICENSED)

If you find the defendant not guilty of cheating, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of cheating, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant licensed? (Answer “Yes” or “No”)

The defendant was licensed only if:

1. the Colorado limited gaming control commission had issued him one of the following licenses: a slot machine manufacturer or distributor license, an operator license, a retail gaming license, a support license, a key employee license, or an associated equipment supplier license.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-20-106(3), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The court should draft a supplemental instruction discussing the relevant licenses. *See* § 44-30-501(1), C.R.S. 2020.

4. In 2018, the Committee modified the statutory citation in Comment 3 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-501(1), 2018 Colo. Sess. Laws 167, 184–86.

## 20:12 GAMING FRAUD (ALTER OUTCOME)

The elements of the crime of gaming fraud (alter outcome) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. altered or misrepresented the outcome of a game or other event on which wagers had been made,
4. after the outcome was made sure but before it was revealed to the players.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (alter outcome).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (alter outcome).

### COMMENT

1. *See* § 18-20-107(1)(a), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:13 GAMING FRAUD (USE OF KNOWLEDGE)

The elements of the crime of gaming fraud (use of knowledge) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. placed, increased, or decreased a bet or determined the course of play,
4. after acquiring knowledge, not available to all players, of the outcome of the game or any event that affected the outcome of the game or which was the subject of the bet.]
- [3. aided anyone in acquiring knowledge, not available to all players, of the outcome of a game or any event that affected the outcome of the game or which was the subject of a bet,
4. for the purpose of placing, increasing, or decreasing a bet or determining the course of play contingent upon that event or outcome.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (use of knowledge).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (use of knowledge).

### COMMENT

1. See § 18-20-107(1)(b), C.R.S. 2020.

2. See Instruction F:31.2 (defining “bet”); Instruction F:195 (defining “knowingly”).

## 20:14 GAMING FRAUD (IMPROPER CLAIM)

The elements of the crime of gaming fraud (improper claim) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. to defraud,
- [5. claimed, collected, or took, or attempted to claim, collect, or take,
6. money or anything of value in or from a limited gaming activity,
7. without having made a wager contingent thereon.]
- [5. claimed, collected, or took,
6. an amount greater than the amount won in or from a limited gaming activity.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (improper claim).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (improper claim).

## COMMENT

1. *See* § 18-20-107(1)(c), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); Instruction F:371 (defining “thing of value”).
3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).
4. The term “defraud” is not defined by statute.

## 20:15 GAMING FRAUD (ENTICE OR INDUCE)

The elements of the crime of gaming fraud (entice or induce) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. enticed or induced another,
5. to go to any place where limited gaming was being conducted or operated in violation of the Limited Gaming Act of 1991,
6. with the intent,
7. that the other person play or participate in that limited gaming activity.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (entice or induce).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (entice or induce).

### COMMENT

1. See § 18-20-107(1)(d), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

3. Regarding whether the gaming at issue violated the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:16 GAMING FRAUD (IMPROPER BET)

The elements of the crime of gaming fraud (improper bet) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. placed or increased a bet, including a past-posting or pressing bet,
4. after acquiring knowledge of the outcome of the game or other event which was the subject of the bet.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (improper bet increase).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (improper bet).

### COMMENT

1. *See* § 18-20-107(1)(e), C.R.S. 2020.
2. *See* Instruction F:31.2 (defining “bet”); Instruction F:195 (defining “knowingly”).
3. The statute does not define the terms “past-posting bet” or “pressing bet.”

## 20:17 GAMING FRAUD (IMPROPER BET REDUCTION)

The elements of the crime of gaming fraud (improper bet reduction) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. reduced the amount wagered or canceled a bet, including a pinching bet,
4. after acquiring knowledge of the outcome of the game or other event which was the subject of the bet.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (improper bet reduction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (improper bet reduction).

### COMMENT

1. *See* § 18-20-107(1)(f), C.R.S. 2020.
2. *See* Instruction F:31.2 (defining “bet”); Instruction F:195 (defining “knowingly”).
3. The statute does not define the term “pinching bet.”

## 20:18 GAMING FRAUD (MANIPULATION)

The elements of the crime of gaming fraud (manipulation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the intent,
4. to cheat,
5. manipulated a component of a gaming device in a manner contrary to the designed and normal operational purpose for the component, including varying the pull of the handle of a slot machine,
6. with knowledge that the manipulation affected the outcome of the game or with knowledge of any event that affected the outcome of the game.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (manipulation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (manipulation).

### COMMENT

1. See § 18-20-107(1)(g), C.R.S. 2020.
2. See Instruction F:48.3 (defining “cheating”); Instruction F:160.8 (defining “gaming device”); Instruction F:185 (defining “with intent”);

Instruction F:195 (defining “knowingly”); Instruction F:345.6 (defining “slot machine”).

## 20:19 GAMING FRAUD (TRICK)

The elements of the crime of gaming fraud (trick) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. by any trick or sleight of hand performance, or by fraud or fraudulent scheme, cards, or device,
  4. for himself [herself] or another,
  5. won or attempted to win money or property or a representative of either or reduced a losing wager or attempted to reduce a losing wager,
  6. in connection with limited gaming.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (trick).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (trick).

### COMMENT

1. *See* § 18-20-107(1)(h), C.R.S. 2020.
2. *See* Instruction F:196.9 (defining "limited gaming"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The Committee has included the fourth element because its language appears in the statute. *See* § 18-20-107(1)(h). The Committee notes, however, that this language is arguably superfluous, as the prosecution will never need to introduce evidence to prove this element. Rather, this language presumably clarifies that a defendant may not claim that he acted on behalf of another as an affirmative defense.

4. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

5. The statute does not define the term “sleight of hand performance.”

## 20:20 GAMING FRAUD (LACK OF LICENSE)

The elements of the crime of gaming fraud (lack of license) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. conducted a limited gaming operation without a valid license.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (lack of license).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (lack of license).

### COMMENT

1. *See* § 18-20-107(1)(i), C.R.S. 2020.
2. *See* Instruction F:196.9 (defining “limited gaming”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:21 GAMING FRAUD (UNLICENSED PREMISES)

The elements of the crime of gaming fraud (unlicensed premises) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. conducted a limited gaming operation on an unlicensed premises.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (unlicensed premises).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (unlicensed premises).

### COMMENT

1. *See* § 18-20-107(1)(j), C.R.S. 2020.
2. *See* Instruction F:196.7 (defining "licensed premises"); Instruction F:196.9 (defining "limited gaming"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

## 20:22 GAMING FRAUD (IMPROPER PERMISSION)

The elements of the crime of gaming fraud (improper permission) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. permitted a limited gaming game or slot machine to be conducted, operated, dealt, or carried on in any limited gaming premises,
4. by a person other than a person licensed for the premises pursuant to the Limited Gaming Act of 1991.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (improper permission).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (improper permission).

### COMMENT

1. See § 18-20-107(1)(k), C.R.S. 2020.
2. See Instruction F:196.7 (defining "licensed premises"); Instruction F:345.6 (defining "slot machine"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the

material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. In 2018, the Committee modified the fourth element pursuant to a legislative amendment. *See* Ch. 14, sec. 20, § 18-20-107(1)(k), 2018 Colo. Sess. Laws 167, 242.

## 20:23 GAMING FRAUD (LACK OF AUTHORITY)

The elements of the crime of gaming fraud (lack of authority) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. placed a limited gaming game or slot machine into play or displayed such a game or slot machine,
  4. without the authorization of the Colorado limited gaming control commission.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (lack of authority).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (lack of authority).

### COMMENT

1. *See* § 18-20-107(1)(l), C.R.S. 2020.
2. *See* Instruction F:345.6 (defining "slot machine"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.").

## 20:24 GAMING FRAUD (IMPROPER EMPLOYMENT)

The elements of the crime of gaming fraud (improper employment) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. employed or continued to employ in a limited gaming operation,
4. any person who was not duly licensed or registered,
5. in a position whose duties required a license or registration pursuant to the Limited Gaming Act of 1991.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (improper employment).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (improper employment).

### COMMENT

1. *See* § 18-20-107(1)(m), C.R.S. 2020.
2. *See* Instruction F:196.9 (defining "limited gaming"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether a position’s duties required a license or registration pursuant to the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:25 GAMING FRAUD (WORK WITHOUT LICENSE)

The elements of the crime of gaming fraud (work without license) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. without first obtaining the requisite license or registration pursuant to the Limited Gaming Act of 1991,
4. was employed, worked, or otherwise acted in a position whose duties required licensing or registration pursuant to said Act.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of gaming fraud (work without license).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of gaming fraud (work without license).

### COMMENT

1. *See* § 18-20-107(1)(n), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether a position's duties required licensing or registration pursuant to the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:26.INT GAMING FRAUD – INTERROGATORY (LICENSED)

If you find the defendant not guilty of gaming fraud, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of gaming fraud, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant licensed? (Answer “Yes” or “No”)

The defendant was licensed only if:

1. the Colorado limited gaming control commission had issued him one of the following licenses: a slot machine manufacturer or distributor license, an operator license, a retail gaming license, a support license, a key employee license, or an associated equipment supplier license.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-20-107(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The court should draft a supplemental instruction discussing the relevant licenses. *See* § 44-30-501(1), C.R.S. 2020.

4. In 2018, the Committee modified the statutory citation in Comment 3 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-501(1), 2018 Colo. Sess. Laws 167, 184–86.

## 20:27 CALCULATING PROBABILITIES (PROJECT OUTCOME)

The elements of the crime of calculating probabilities (project outcome) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person at a licensed gaming establishment, and
4. used, or possessed with the intent to use,
5. a device to assist in projecting the outcome of a game.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of calculating probabilities (project outcome).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of calculating probabilities (project outcome).

### COMMENT

1. *See* § 18-20-108(1)(a), C.R.S. 2020.
2. *See* Instruction F:160.8 (defining "gaming device"); Instruction F:185 (defining "with intent"); Instruction F:196.6 (defining "licensed gaming establishment"); Instruction F:281 (defining "possession"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:28 CALCULATING PROBABILITIES (COUNT CARDS)

The elements of the crime of calculating probabilities (count cards) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person at a licensed gaming establishment, and
4. used, or possessed with the intent to use,
5. a device to assist in keeping track of the cards played.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of calculating probabilities (count cards).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of calculating probabilities (count cards).

### COMMENT

1. *See* § 18-20-108(1)(b), C.R.S. 2020.
2. *See* Instruction F:160.8 (defining “gaming device”); Instruction F:185 (defining “with intent”); Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:29 CALCULATING PROBABILITIES (ANALYZE EVENT)

The elements of the crime of calculating probabilities (analyze event) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a person at a licensed gaming establishment, and
  4. used, or possessed with the intent to use,
  5. a device to assist in analyzing the probability of the occurrence of an event relating to a game.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of calculating probabilities (analyze event).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of calculating probabilities (analyze event).

### COMMENT

1. *See* § 18-20-108(1)(c), C.R.S. 2020.
2. *See* Instruction F:160.8 (defining “gaming device”); Instruction F:185 (defining “with intent”); Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:30 CALCULATING PROBABILITIES (ANALYZE STRATEGY)

The elements of the crime of calculating probabilities (analyze strategy) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person at a licensed gaming establishment, and
4. used, or possessed with the intent to use,
5. a device to assist in analyzing the strategy for playing or betting to be used in a game, and
6. such action was not permitted by the Colorado limited gaming control commission.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of calculating probabilities (analyze strategy).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of calculating probabilities (analyze strategy).

### COMMENT

1. See § 18-20-108(1)(d), C.R.S. 2020.
2. See Instruction F:31.2 (defining "bet"); Instruction F:160.8 (defining "gaming device"); Instruction F:185 (defining "with intent"); Instruction

F:196.6 (defining “licensed gaming establishment”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:31.INT CALCULATING PROBABILITIES – INTERROGATORY (LICENSED)

If you find the defendant not guilty of calculating probabilities, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of calculating probabilities, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant licensed? (Answer “Yes” or “No”)

The defendant was licensed only if:

1. the Colorado limited gaming control commission had issued him one of the following licenses: a slot machine manufacturer or distributor license, an operator license, a retail gaming license, a support license, a key employee license, or an associated equipment supplier license.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-20-108(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The court should draft a supplemental instruction discussing the relevant licenses. *See* § 44-30-501(1), C.R.S. 2020.

4. In 2018, the Committee modified the statutory citation in Comment 3 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-501(1), 2018 Colo. Sess. Laws 167, 184–86.

## 20:32 USE OF COUNTERFEIT CHIPS

The elements of the crime of use of counterfeit chips are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a licensee, employee, or other person, and
4. used counterfeit chips in a limited gaming activity.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of counterfeit chips.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of counterfeit chips.

### COMMENT

1. *See* § 18-20-109(1), C.R.S. 2020.
2. *See* Instruction F:196.8 (defining “licensee”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The Committee has included the third element because its language appears in the statute. *See* § 18-20-109(1). The Committee notes, however, that this element is arguably superfluous, as the prosecution will never need to introduce evidence to prove it. Rather, the phrase “other person”

presumably clarifies that a defendant may not argue that the statute only applies to licensees or employees.

## 20:33 IMPROPER CHIPS OR TOKENS

The elements of the crime of improper chips or tokens are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. played or used a limited gaming activity designed to be played with, to receive, or to be operated by chips or tokens approved by the Colorado limited gaming control commission or by lawful coin of the United States of America, and
- [5. used anything other than chips or tokens approved by the Colorado limited gaming control commission or lawful coin, legal tender of the United States of America.]
- [5. used coin not of the same denomination as the coin intended to be used in that limited gaming activity.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper chips or tokens.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper chips or tokens.

### COMMENT

1. See § 18-20-109(2)(a), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”).

## 20:34 USE OF DEVICE

The elements of the crime of use of device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. played or used a limited gaming activity designed to be played with, to receive, or to be operated by chips or tokens approved by the Colorado limited gaming control commission or by lawful coin of the United States of America, and
4. used a device or a means to violate the Limited Gaming Act of 1991.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of use of device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of use of device.

### COMMENT

1. *See* § 18-20-109(2)(b), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether a device or a means was used to violate the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:35 POSSESSION OF IMPROPER EQUIPMENT

The elements of the crime of possession of improper equipment are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed a device, equipment, or material,
4. which he [she] knew had been manufactured, distributed, sold, tampered with, or serviced in violation of the Limited Gaming Act of 1991.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of possession of improper equipment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of possession of improper equipment.

### COMMENT

1. *See* § 18-20-109(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:281 (defining “possession”).
3. Regarding whether the equipment at issue was manufactured in violation of the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:36 UNAUTHORIZED POSSESSION (DEVICE)

The elements of the crime of unauthorized possession (device) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. had on his [her] person or in his [her] possession,
  4. a device intended to be used to violate the Limited Gaming Act of 1991, and
  5. he [she] was not a duly authorized employee of a licensee acting in furtherance of his [her] employment within an establishment.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession (device).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession (device).

### COMMENT

1. *See* § 18-20-109(4), C.R.S. 2020.
2. *See* Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:196.8 (defining “licensee”); Instruction F:281 (defining “possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of

that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether a device was intended to be used to violate the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:37 UNAUTHORIZED POSSESSION (KEY)

The elements of the crime of unauthorized possession (key) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. had on his [her] person or in his [her] possession while on the premises of a licensed gaming establishment,
  4. a key or device known to have been designed for the purpose of and suitable for opening, entering, or affecting the operation of any limited gaming activity, drop box, or electronic or mechanical device connected thereto, or for removing money or other contents therefrom, and
  5. he [she] was not a duly authorized employee of a licensee acting in furtherance of his [her] employment within an establishment.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized possession (key).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized possession (key).

### COMMENT

1. See § 18-20-109(5), C.R.S. 2020.
2. See Instruction F:196.6 (defining "licensed gaming establishment"); Instruction F:196.8 (defining "licensee"); Instruction F:281 (defining

“possession”); *see also* § 18-1-503(2), C.R.S. 2020 (“ Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## **20:38 UNAUTHORIZED USE OR POSSESSION OF CHEATING OR THIEVING DEVICE**

The elements of the crime of unauthorized use or possession of cheating or thieving device are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. used or possessed while on the premises,
  4. a cheating or thieving device, including tools, drills, wires, coins, or tokens attached to strings or wires or electronic or magnetic devices,
  5. to facilitate the alignment of any winning combination or to facilitate removing from any slot machine any money or contents thereof, and
  6. he [she] was not a duly authorized gaming employee acting in the furtherance of his [her] employment.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized use or possession of cheating or thieving device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized use or possession of cheating or thieving device.

## COMMENT

1. *See* § 18-20-109(7), C.R.S. 2020.
2. *See* Instruction F:160.9 (defining “gaming employee”); Instruction F:281 (defining “possession”); Instruction F:345.6 (defining “slot machine”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. The statute does not define the term “premises.” *Cf.* Instruction F:196.7 (defining “licensed premises”).

## 20:39 OPERATION OF CHEATING OR THIEVING GAME OR DEVICE

The elements of the crime of operation of cheating or thieving game or device are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. knowingly,
  4. was playing a licensed game in licensed gaming premises, and
  5. conducted, carried on, operated, or dealt, or allowed to be conducted, carried on, operated, or dealt,
  6. a cheating or thieving game or device.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation of cheating or thieving game or device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation of cheating or thieving game or device.

### COMMENT

1. See § 18-20-110(1)(a), C.R.S. 2020.
2. See Instruction F:195 (defining "knowingly"); Instruction F:196.7 (defining "licensed premises").

3. The statute does not define “cheating or thieving game or device.” *But see* § 18-20-109(7), C.R.S. 2020 (providing a list of items proscribed by the crime of unauthorized use or possession of cheating or thieving device, *see* Instruction 20:38, including “tools, drills, wires, coins, or tokens attached to strings or wires or electronic or magnetic devices”).

## 20:40 TAMPERING WITH CARD GAME

The elements of the crime of tampering with card game are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. was playing a licensed game in licensed gaming premises, and
5. dealt, conducted, carried on, operated, or exposed for play,
6. a game played with cards or a mechanical device, or any combination of games or devices,
7. which had in any manner been marked or tampered with or placed in a condition or operated in a manner the result of which tended to deceive the public or tended to alter the normal random selection of characteristics or the normal chance of the game which could determine or alter the result of the game.
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with card game.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with card game.

### COMMENT

1. See § 18-20-110(1)(b), C.R.S. 2020.

2. See Instruction F:195 (defining “knowingly”); Instruction F:196.7 (defining “licensed premises”).
3. The statute does not define the term “mechanical device.”

## 20:41 PROHIBITED GAMING BEHAVIOR (DISTRIBUTION)

The elements of the crime of prohibited gaming behavior (distribution) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. manufactured, sold, or distributed any cards, chips, dice, game, or device,
4. that was intended to be used to violate any provision of the Limited Gaming Act of 1991.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited gaming behavior (distribution).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited gaming behavior (distribution).

### COMMENT

1. See § 18-20-111(1), C.R.S. 2020.
2. See also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. Regarding whether the object at issue was intended to be used to violate the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

4. In 2018, the Committee modified the fourth element pursuant to a legislative amendment. *See* Ch. 14, sec. 23, § 18-20-111(1), 2018 Colo. Sess. Laws 167, 244.

## 20:42 PROHIBITED GAMING BEHAVIOR (AFFECT WIN OR LOSS)

The elements of the crime of prohibited gaming behavior (affect win or loss) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. marked, altered, or otherwise modified related equipment or a limited gaming device,
4. in a manner that affected the result of a wager by determining win or loss.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited gaming behavior (affect win or loss).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited gaming behavior (affect win or loss).

### COMMENT

1. *See* § 18-20-111(2)(a), C.R.S. 2020.
2. *See* Instruction F:160.8 (defining “gaming equipment”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect

to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:43 PROHIBITED GAMING BEHAVIOR (ALTER RANDOM SELECTION)

The elements of the crime of prohibited gaming behavior (alter random selection) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. marked, altered, or otherwise modified related equipment or a limited gaming device,
4. in a manner that altered the normal criteria of random selection, which affected the operation of a game or which determined the outcome of a game.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited gaming behavior (alter random selection).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited gaming behavior (alter random selection).

### COMMENT

1. See § 18-20-111(2)(b), C.R.S. 2020.
2. See Instruction F:160.8 (defining "gaming equipment"); see also § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may

nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

## 20:44 PROHIBITED GAMING BEHAVIOR (INSTRUCT IN CHEATING)

The elements of the crime of prohibited gaming behavior (instruct in cheating) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with the knowledge or intent,
4. that the information or use conveyed to another may be employed to violate the Limited Gaming Act of 1991,
5. instructed another in cheating or in the use of any device for that purpose.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of prohibited gaming behavior (instruct in cheating).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of prohibited gaming behavior (instruct in cheating).

### COMMENT

1. See § 18-20-111(3), C.R.S. 2020.
2. See Instruction F:48.3 (defining "cheating"); Instruction F:185 (defining "with intent"); Instruction F:195 (defining "knowingly").

3. Regarding whether the information or use could be employed to violate the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.

## 20:45.INT PROHIBITED GAMING BEHAVIOR – INTERROGATORY (LICENSED)

If you find the defendant not guilty of prohibited gaming behavior, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of prohibited gaming behavior, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question on the verdict form:

Was the defendant licensed? (Answer “Yes” or “No”)

The defendant was licensed only if:

1. the Colorado limited gaming control commission had issued him one of the following licenses: a slot machine manufacturer or distributor license, an operator license, a retail gaming license, a support license, a key employee license, or an associated equipment supplier license.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 18-20-111(4), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The court should draft a supplemental instruction discussing the relevant licenses. *See* § § 44-30-501(1), C.R.S. 2020.

4. In 2018, the Committee modified the statutory citation in Comment 3 pursuant to a legislative reorganization. *See* Ch. 14, sec. 2, § 44-30-501(1), 2018 Colo. Sess. Laws 167, 184–86.

## 20:46 UNLAWFUL ENTRY INTO GAMING ESTABLISHMENT

The elements of the crime of unlawful entry into gaming establishment are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was named on the list promulgated by the Colorado limited gaming control commission of persons to be excluded or ejected from any licensed gaming establishment, and
  4. entered the licensed premises of a limited gaming licensee.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful entry into gaming establishment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful entry into gaming establishment.

### COMMENT

1. *See* § 18-20-112(1), C.R.S. 2020.
2. *See* Instruction F:196.6 (defining "licensed gaming establishment"); Instruction F:196.7 (defining "licensed premises"); Instruction F:196.8 (defining "licensee"); *see also* § 18-1-503(2), C.R.S. 2020 ("Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material

elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. If necessary, the court should draft a supplemental instruction explaining the list of excluded or ejected persons. *See* §§ 44-30-1001(2), 1002(1), C.R.S. 2020.

4. In 2018, the Committee modified the statutory citations in Comment 3 pursuant to a legislative amendment. *See* Ch. 14, sec. 24, § 18-20-112(1), 2018 Colo. Sess. Laws 167, 244.

## 20:47 UNLAWFUL INTEREST IN GAMING ESTABLISHMENT

The elements of the crime of unlawful interest in gaming establishment are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was named on the list promulgated by the Colorado limited gaming control commission of persons to be excluded or ejected from any licensed gaming establishment, and
4. had a personal pecuniary interest, direct or indirect, in a limited gaming licensee, licensed premises, establishment, or business involved in or with limited gaming, or in the shares in a corporation, association, or firm licensed pursuant to the Limited Gaming Act of 1991.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful interest in gaming establishment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful interest in gaming establishment.

### COMMENT

1. See § 18-20-112(2), C.R.S. 2020.

2. See Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:196.7 (defining “licensed premises”); Instruction F:196.8 (defining “licensee”); Instruction F:196.9 (defining “limited gaming”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, the court should draft a supplemental instruction explaining the list of excluded or ejected persons. See §§ 44-30-1001(2), 1002(1), C.R.S. 2020.
4. Regarding whether a corporation was licensed pursuant to the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. See Introductory Comment 1 to this chapter.
5. The statute does not define the term “pecuniary interest.” Cf. Instruction F:265.5 (defining “pecuniary benefit”).
6. The Committee has included the “direct or indirect” language in the fourth element because it appears in the statute. See § 18-20-112(2). The Committee notes, however, that this language is arguably superfluous, as the prosecution will never need to introduce evidence to prove it. Rather, this language presumably clarifies that a defendant may not claim that his pecuniary interest was indirect as an affirmative defense.
7. In 2018, the Committee modified the statutory citations in Comment 3 pursuant to a legislative amendment. See Ch. 14, sec. 24, § 18-20-112(1), 2018 Colo. Sess. Laws 167, 244.

## 20:48 ACTING ON LICENSE FOR PECUNIARY GAIN

The elements of the crime of acting on license for pecuniary gain are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. issued, suspended, revoked, or renewed a license pursuant to the Limited Gaming Act of 1991,
  4. for any personal pecuniary gain or any thing of value.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of acting on license for pecuniary gain.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of acting on license for pecuniary gain.

### COMMENT

1. *See* § 18-20-113(1), C.R.S. 2020.
2. *See* Instruction F:371 (defining “thing of value”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Regarding whether action was taken pursuant to the Limited Gaming Act of 1991, the court should draft a special instruction that explains the

law on this point, allowing the jury to apply this law to the facts of the case. See Introductory Comment 1 to this chapter.

4. The statute does not define the term “personal pecuniary gain.” Cf. Instruction F:265.5 (defining “pecuniary benefit”).

## 20:49 CONFLICT OF INTEREST (LICENSE)

The elements of the crime of conflict of interest (license) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a member of the Colorado limited gaming control commission; a spouse of a member; an ancestor or descendant of a member, including a natural child, child by adoption, or stepchild; a brother or sister of the whole or half blood of a member; or an uncle, aunt, nephew, or niece of the whole blood of a member, and
  4. had an interest of any kind in a license issued pursuant to the Limited Gaming Act of 1991 or owned or had any interest in property in any county where limited gaming was permitted.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conflict of interest (license).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conflict of interest (license).

### COMMENT

1. *See* §§ 18-20-113(1), 44-30-401(1)(a), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or

with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute recognizes that “the commission may, by rule, determine that an ownership interest of no more than five percent held by or through an institutional investor fund does not constitute an interest” in violation of this section. § 44-30-401(2). However, the Committee has not drafted a model affirmative defense instruction.

4. In 2018, the Committee modified the statutory citations in Comments 1 and 3 pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 25, §§ 44-30-401, 18-20-113(1), 2018 Colo. Sess. Laws 167, 183–84, 244.

## 20:50 CONFLICT OF INTEREST (PROPERTY)

The elements of the crime of conflict of interest (property) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a member of the Colorado limited gaming control commission or employee of the division of gaming, including the director; or a member of the immediate family of a member or employee of the division, and
- [4. had an interest, direct or indirect, in any licensee, licensed premises, establishment, or business involved in or with limited gaming.]
- [4. owned, in whole or in part, property in the cities of Central, Black Hawk, or Cripple Creek, and
5. was not an employee of the division assigned to work regularly in Gilpin or Teller county who owned private property therein for residential purposes, with commission approval.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conflict of interest (property).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conflict of interest (property).

### COMMENT

1. See §§ 18-20-113(1), 44-30-401(1)(b), C.R.S. 2020.

2. See Instruction F:177.7 (defining “immediate family” (limited gaming)); Instruction F:196.6 (defining “licensed gaming establishment”); Instruction F:196.7 (defining “licensed premises”); Instruction F:196.8 (defining “licensee”); Instruction F:196.9 (defining “limited gaming”); Instruction F:392.8 (defining “within the cities of Central, Black Hawk, or Cripple Creek”); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute provides that certain division employees “may live with their families” in Gilpin County or Teller County. § 44-30-401(1)(b). Because the criminalizing portion of the statute is unconcerned with where an employee lives, and because this language could confuse the jury, the Committee has omitted this language from the fifth bracketed element.

4. The statute recognizes that “the commission may, by rule, determine that an ownership interest of no more than five percent held by or through an institutional investor fund does not constitute an interest” in violation of this section. § 44-30-401(2). However, the Committee has not drafted a model affirmative defense instruction.

5. The Committee has included the “direct or indirect” language in the fourth element because it appears in the statute. *See* § 44-30-401(1)(b). The Committee notes, however, that this language is arguably superfluous, as the prosecution will never need to introduce evidence to prove it. Rather, this language presumably clarifies that a defendant may not claim that his interest was indirect as an affirmative defense.

6. In 2018, the Committee modified the statutory citations in the Comments pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 25, §§ 44-30-401, 18-20-113(1), 2018 Colo. Sess. Laws 167, 183-84, 244.

## 20:51 CONFLICT OF INTEREST (GIFT)

The elements of the crime of conflict of interest (gift) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was a member of the Colorado limited gaming control commission or employee of the division of gaming, including the director; or a member of the immediate family of a member of the commission or employee of the division, and
  4. received a gift, gratuity, employment, or other thing of value,
  5. from any person, corporation, association, or firm that contracted with or that offered services, supplies, materials, or equipment used by the division in the normal course of its operations, or that was licensed by the division or the commission, and
  6. the defendant's acceptance was not on an infrequent basis in the normal course of business of nonpecuniary items of insignificant value that were allowed by the director and that were specified by the commission by rule and regulation.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conflict of interest (gift).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conflict of interest (gift).

## COMMENT

1. See §§ 18-20-113(1), 44-30-401(1)(c), C.R.S. 2020.
2. See Instruction F:177.7 (defining “immediate family” (limited gaming)); Instruction F:371 (defining “thing of value”); see also § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, the court should draft a supplemental instruction detailing nonpecuniary items of insignificant value that were permitted by the director and commission.
4. The statute provides that this offense “shall not apply to an employee of the division acting in his or her official capacity while on duty.” § 44-30-401(3). However, the Committee has not drafted a model affirmative defense instruction.
5. In 2018, the Committee modified the fifth element, the statutory citations in Comments 1 and 4, and the quoted language in Comment 4 pursuant to a legislative amendment and reorganization. See Ch. 14, sec. 25, §§ 44-30-401, 18-20-113(1), 2018 Colo. Sess. Laws 167, 183–84, 244.

## 20:52 CONFLICT OF INTEREST (PARTICIPATION)

The elements of the crime of conflict of interest (participation) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a member of the Colorado limited gaming control commission or employee of the division of gaming, including the director; or a member of the immediate family of a member of the commission or employee of the division, and
4. participated in limited gaming or sports betting.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conflict of interest (participation).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conflict of interest (participation).

### COMMENT

1. *See* §§ 18-20-113(1), 44-30-401(1)(d), C.R.S. 2020.
2. *See* Instruction F:177.7 (defining “immediate family” (limited gaming)); *see also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).

3. The statute provides that this offense “shall not apply to an employee of the division acting in his or her official capacity while on duty.” § 44-30-401(3). However, the Committee has not drafted a model affirmative defense instruction.

4. If necessary, the court should give a supplemental instruction explaining the sports betting at issue. *See* §§ 44-30-1501 to -1515, C.R.S. 2020.

5. In 2018, the Committee modified the statutory citations in Comments 1 and 3, as well as the quoted language in Comment 3, pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 25, §§ 44-30-401, 18-20-113(1), 2018 Colo. Sess. Laws 167, 183–84, 244.

6. In 2019, the Committee added the phrase “or sports betting” to the fourth element pursuant to a legislative amendment; the Committee also added Comment 4. *See* Ch. 347, sec. 9, § 44-30-401(1)(d), 2019 Colo. Sess. Laws 3209, 3215.

## 20:53 CONFLICT OF INTEREST (CONVICTION)

The elements of the crime of conflict of interest (conviction) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. served as a member of the Colorado limited gaming control commission or employee of the division of gaming, including the director,
4. after having been convicted of a felony or any gambling-related offense.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of conflict of interest (conviction).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of conflict of interest (conviction).

### COMMENT

1. *See* §§ 18-20-113(1), 44-30-401(1)(e), C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. If necessary, the court should draft a supplemental instruction discussing the felony or gambling-related offense at issue.

4. In 2018, the Committee modified the statutory citations in Comment 1 pursuant to a legislative amendment and reorganization. *See* Ch. 14, sec. 25, §§ 44-30-401, 18-20-113(1), 2018 Colo. Sess. Laws 167, 183-84, 244.

## 20:54 PROVIDING FALSE OR MISLEADING INFORMATION

The elements of the crime of providing false or misleading information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. provided false or misleading information under the Limited Gaming Act of 1991.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of providing false or misleading information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of providing false or misleading information.

### COMMENT

1. *See* § 18-20-114, C.R.S. 2020.
2. *See also* § 18-1-503(2), C.R.S. 2020 (“Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of that offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such a culpable mental state.”).
3. Regarding whether the information at issue was provided under the Limited Gaming Act of 1991, the court should draft a special instruction that explains the law on this point, allowing the jury to apply this law to the facts of the case. *See* Introductory Comment 1 to this chapter.



## CHAPTER 23

### RECRUITMENT OF JUVENILES FOR A CRIMINAL STREET GANG

[23:01](#) RECRUITMENT OF A JUVENILE FOR A CRIMINAL STREET GANG (PARTICIPATION OR MEMBERSHIP)

[23:02](#) RECRUITMENT OF A JUVENILE FOR A CRIMINAL STREET GANG (PREVENT FROM LEAVING)

### CHAPTER COMMENTS

1. The Committee added this chapter in 2016.

## **23:01 RECRUITMENT OF A JUVENILE FOR A CRIMINAL STREET GANG (PARTICIPATION OR MEMBERSHIP)**

The elements of the crime of recruitment of a juvenile for a criminal street gang (participation or membership) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was eighteen years of age or older, and
4. knowingly,
5. solicited, invited, recruited, encouraged, coerced, or otherwise caused a person younger than eighteen years of age to actively participate in or become a member of a criminal street gang.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of recruitment of a juvenile for a criminal street gang (participation or membership).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of recruitment of a juvenile for a criminal street gang (participation or membership).

### COMMENT

1. See § 18-23-102(1)(a), C.R.S. 2020.
2. See Instruction F:79.5 (defining "criminal street gang"); Instruction F:195 (defining "knowingly").

## **23:02 RECRUITMENT OF A JUVENILE FOR A CRIMINAL STREET GANG (PREVENT FROM LEAVING)**

The elements of the crime of recruitment of a juvenile for a criminal street gang (prevent from leaving) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was eighteen years of age or older, and
4. knowingly,
5. by use of force, threat, or intimidation directed at any person, or by the infliction of bodily injury upon any person,
6. prevented a person younger than eighteen years of age from leaving a criminal street gang.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of recruitment of a juvenile for a criminal street gang (prevent from leaving).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of recruitment of a juvenile for a criminal street gang (prevent from leaving).

### COMMENT

1. See § 18-23-102(1)(b), C.R.S. 2020.

2. See Instruction F:37 (defining “bodily injury”); Instruction F:79.5 (defining “criminal street gang”); Instruction F:195 (defining “knowingly”).

## CHAPTER 42

### VEHICLE AND TRAFFIC OFFENSES

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<a href="#"><u>42:51+</u></a>	TRIP PERMIT VIOLATION

## CHAPTER COMMENTS

1. Determining what culpable mental state, if any, applies to a traffic offense that does not expressly designate a culpable mental state element can be complicated. *See People v. Manzo*, 144 P.3d 551, 559 (Colo. 2006) (“Leaving the Scene of an Accident with Serious Injury [in violation of section 42-4-1601] is a strict liability offense because the plain language of the statute does not require or imply a culpable mental state.”); *People v. Caddy*, 540 P.2d 1089, 1091 (Colo. 1975) (“speeding is an offense of strict liability”). Accordingly, unlike the chapters of elemental instructions that define offenses from Title 18, *see* Chapter A, “[Culpable Mental States](#),” this chapter does not raise the question of whether it may be appropriate to impute a culpable mental state of “knowingly” to an offense that does not expressly designate a culpable mental state. Even when a traffic offense

expressly designates a culpable mental state, instructing the jury on that element may require caution. *See, e.g., People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 (“Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”); *People v. Pena*, 962 P.2d 285, 289 (Colo. App. 1997) (the type of recklessness in 42-4-1401(1) is indistinguishable from the definition of “recklessly” in section 18-1-501(8), C.R.S. 2020).

2. + Chapter F already contains instructions defining many terms used in this chapter. *See, e.g.,* Instruction F:239 (defining “motor vehicle”). The Committee cautions, however, that in most cases, those instructions derive from section 42-1-102, C.R.S. 2020, which only applies to articles 1–4 of Title 42. Therefore, where a crime featuring such a term is located outside of those articles, the Committee has not cross-referenced the definitions appearing in Chapter F; instead, the Committee has cited the specific statutory definition for that article, where applicable. *See, e.g.,* Instruction 42:31, Comment 2 (citing § 42-5-101(5), C.R.S. 2020, which defines “motor vehicle” as used in Part 1 of Article 5).

3. + Previously, Chapter 42 only included instructions for select offenses within Title 42. In 2020, the Committee determined to create model instructions for all offenses within Title 42 that carry a potential penalty of six months or more of incarceration. As a result, in 2020, the Committee deleted the prior Comment 1 to this chapter (which had explained that the chapter only contained instructions for select offenses); the Committee also renumbered the prior Comment 2 to Comment 1, and it added the new Comment 2.

## **+ 42:00 USING SUPPLIES FOR PRIVATE PURPOSES**

The elements of the crime of using supplies for private purposes are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an officer or employee, and
4. used for private or pleasure purposes,
5. any of the equipment or supplies furnished for the discharge of [his] [her] duties.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of using supplies for private purposes.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of using supplies for private purposes.

### COMMENT

1. *See* § 42-1-207, C.R.S. 2020.
2. The statute does not define the terms “officer” or “employee.”
3. + The Committee added this instruction in 2020.

## 42:01 DRIVING WITHOUT A VALID LICENSE

The elements of the crime of driving without a valid license are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a motor vehicle,
  4. upon a highway in this state, and
  5. had not been issued a currently valid driver's license, minor driver's license, or an instruction permit by the Department of Revenue.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving without a valid license.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving without a valid license.

### COMMENT

1. See § 42-2-101(1), C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); Instruction F:239 (defining "motor vehicle").
3. See Instruction H:73 (affirmative defense of "emergency or exemption").

4. The introductory clause of section 42-2-101(1) provides as follows: “Except as otherwise provided in part 4 of this article for commercial drivers.” Accordingly, in a case where the validity of the defendant’s license or conduct as a commercial driver is at issue, refer to Part 4 of Article 2.

5. Subsections two through five of section 42-2-101 define other ways of committing this offense. However, as in COLJI-Crim. (2008), the Committee has not drafted model instructions for these variants.

## **+ 42:01.3 OPERATING VEHICLE AFTER CIRCUMVENTING INTERLOCK DEVICE**

The elements of the crime of operating vehicle after circumventing interlock device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person whose privilege to drive was restricted to the operation of a motor vehicle equipped with an approved ignition interlock device, and
- [4. operated a motor vehicle other than a motor vehicle equipped with an approved ignition interlock device.]
- [4. circumvented or attempted to circumvent the proper use of an approved ignition interlock device.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operating vehicle after circumventing interlock device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operating vehicle after circumventing interlock device.

### COMMENT

1. See § 42-2-132.5(10)(a), C.R.S. 2020.
2. See Instruction F:239 (defining "motor vehicle").

3. In the absence of case law on point, the Committee takes no position on whether the word “attempted” in this instruction implicates the inchoate offense of criminal attempt. *See* Instruction G2:01 (criminal attempt). Accordingly, the Committee expresses no opinion on whether the court should provide the jury with the criminal attempt elemental instruction (Instruction G2:01).

4. + The Committee added this instruction in 2020.

## **+ 42:01.7 TAMPERING WITH AN APPROVED IGNITION INTERLOCK DEVICE (INTERFERING)**

The elements of the crime of tampering with an approved ignition interlock device (interfering) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. intercepted, bypassed, or interfered with,]
- [3. aided any other person in intercepting, bypassing, or interfering with,]
4. an approved ignition interlock device,
5. for the purpose of preventing or hindering the lawful operation or purpose of the approved ignition interlock device.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with an approved ignition interlock device (interfering).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with an approved ignition interlock device (interfering).

### COMMENT

1. *See* § 42-2-132.5(11)(a), (c), C.R.S. 2020.
2. + The Committee added this instruction in 2020.

**+ 42:01.8 TAMPERING WITH AN APPROVED IGNITION INTERLOCK DEVICE (RESTRICTED)**

The elements of the crime of tampering with an approved ignition interlock device (restricted) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person whose privilege to drive was restricted to the operation of a motor vehicle equipped with an approved ignition interlock device, and
4. drove a motor vehicle in which an approved ignition interlock device was installed, and
5. knew that any person had intercepted, bypassed, or interfered with the approved ignition interlock device.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with an approved ignition interlock device (restricted).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with an approved ignition interlock device (restricted).

COMMENT

1. See § 42-2-132.5(11)(b), (c), C.R.S. 2020.
2. See Instruction F:239 (defining "motor vehicle").

3. + The Committee added this instruction in 2020.

## **+ 42:01.9 UNLAWFUL REPRODUCTION OF DRIVER'S LICENSE**

The elements of the crime of unlawful reproduction of driver's license are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. photographed, photostatted, duplicated, or in any way reproduced,
4. any driver's license or facsimile thereof,
5. for the purpose of distribution, resale, reuse, or manipulation of the data or images contained in such driver's license, and
6. was not so authorized by the Department of Revenue or otherwise authorized by law.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful reproduction of driver's license.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful reproduction of driver's license.

### COMMENT

1. *See* § 42-2-136(5.5), (6)(b), C.R.S. 2020.
2. + The Committee added this instruction in 2020.

## 42:02 DRIVING UNDER RESTRAINT (GENERAL)

The elements of the crime of driving under restraint are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a motor vehicle or off-highway vehicle,
4. upon any highway of this state,
5. with knowledge that his [her] license or privilege to drive, either as a resident or a nonresident, was under restraint for any reason.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under restraint.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under restraint.

### COMMENT

1. See § 42-2-138(1)(a), C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); Instruction F:196 (defining "knowledge"); Instruction F:239 (defining "motor vehicle"); Instruction F:249.5 (defining "off-highway vehicle"); Instruction F:320 (defining "restraint" and "restrained").

3. See § 42-2-138(1.5) (providing that driving under restraint is a class A traffic infraction rather than a misdemeanor if the restraint is “for an outstanding judgment”).
4. See *People v. Wambolt*, 2018 COA 88, ¶¶ 49, 63, 431 P.3d 681, 692, 694 (holding that driving under restraint is a lesser included offense of driving after revocation prohibited).
5. In 2017, the Committee added Comment 3 pursuant to new legislation. See Ch. 208, sec. 1, § 42-2-138(1.5), 2017 Colo. Sess. Laws 810, 810.
6. In 2019, the Committee added Comment 4.

## **42:03 DRIVING UNDER RESTRAINT (RESTRAINT BASED ON A CONVICTION OR ADMINISTRATIVE ACTION RELATED TO ALCOHOL OR DRUGS)**

The elements of the crime of driving under restraint (restraint based on a conviction or administrative action related to alcohol or drugs) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a motor vehicle or off-highway vehicle,
4. upon any highway of this state,
5. with knowledge that his [her] license or privilege to drive, either as a resident or a nonresident, was under restraint,
- [6. because of [insert description of restraint(s) from section 42-2-126(3)].]
- [6. solely or partially because of a conviction of driving under the influence, driving with excessive alcohol content, driving while ability impaired, or underage drinking and driving.]
- [6. in another state, solely or partially because of an alcohol-related driving offense.]
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under restraint (restraint based on a conviction or administrative action related to alcohol or drugs).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under restraint

(restraint based on a conviction or administrative action related to alcohol or drugs).

#### COMMENT

1. See § 42-2-138(1)(d)(I), C.R.S. 2020.
2. See Instruction F:171 (defining “highway”); Instruction F:196 (defining “knowledge”); Instruction F:239 (defining “motor vehicle”); Instruction F:249.5 (defining “off-highway vehicle”); Instruction F:320 (defining “restraint” and “restrained”); see also § 42-1-102(109.7), C.R.S. 2020 (“‘UDD’ means underage drinking and driving, and use of the term shall incorporate by reference the offense described in section 42-4-1301(2)(a.5).”).
3. See Instruction H:75 (affirmative defense of “valid license issued subsequent to restraint”).
4. See *Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) (“After our decision in [*Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987)] held the culpable mental state of ‘knowingly’ applicable to the misdemeanor driving under restraint statute, the legislature amended that statute to require a degree of mental culpability less than ‘knowingly.’”).

## 42:04.SP DRIVING UNDER RESTRAINT – SPECIAL INSTRUCTION (NOTICE)

The following circumstances give rise to a permissible inference that the defendant received personal notice that his [her] license or privilege to drive was under restraint:

1. certification that a notice was mailed, postpaid, by first-class mail to the last-known address of the defendant shown by the records of the Department of Revenue; or
2. delivery of such notice to the last-known address of the defendant shown by the records of the Department of Revenue; or
3. personal service of such notice upon the defendant, or upon any attorney appearing on the defendant's behalf; or
4. certification that notice was given in another state in compliance with such state's law.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See §§ 42-2-119(2), 42-2-138(2)(a), C.R.S. 2020.
2. Unlike COLJI-Crim. 42:02 (2008) ("proof of knowledge"), the above model instruction does not authorize the jury to draw a permissible inference that the defendant had *knowledge* of the revocation. Rather, the

instruction now describes how proof of a specified circumstance can give rise to a permissible inference that the defendant had *notice* of the restraint.

It appears that COLJI-Crim. 42:02 (2008) was based on *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987), in which the supreme court relied on the relevant provision for establishing the fact of revocation (then-codified as section 42-2-130(2)) as a basis for holding that: (1) knowledge of the fact of a license revocation was an essential element of the crime of driving while license revoked (then-codified as section 42-2-130(1)); and (2) the giving of notice by registered mail in accordance with section 42-2-130(2) gave rise to a permissible inference that the defendant had knowledge of the revocation. However, *Jolly* was decided under the pre-1994 driving under restraint statute, section 42-2-130(1), which, unlike the current section 42-2-138(1)(a), (d)(I), did not explicitly include knowledge of the restraint as an element of the offense. See *Jolly*, 742 P.2d at 894 (quoting 42-2-130(1)(a)); see also Ch. 337, sec. 1, § 42-2-138(1)(a), (d)(I), 1994 Colo. Sess. Laws 2155 (enacting section 42-2-138 to replace section 42-2-130, as part of a complete recodification of Title 42). Accordingly, the Committee has revised the model instruction so that it is in accord with the definition of “knowledge” in section 42-2-138(4)(a), C.R.S. 2020 (“‘Knowledge’ means actual knowledge of any restraint from whatever source or knowledge of circumstances sufficient to cause a reasonable person to be aware that such person’s license or privilege to drive was under restraint. ‘Knowledge’ does not mean knowledge of a particular restraint or knowledge of the duration of restraint.”), and the supreme court’s explanation of that definition:

The second part of this definition involves in part the use of an objective reasonable person standard. However, this definition requires that the particular defendant possess knowledge of those circumstances that would trigger a reasonable person to believe his license was under restraint. Under this definition, a defendant could not be punished for acting without actual subjective knowledge of these circumstances. Thus, knowledge, as defined, combines both a subjective and an objective component. It requires the defendant to be actually aware of specific circumstances. These specific circumstances are defined by using an objective reasonable person

standard. For example, if, after being convicted of numerous traffic offenses, a defendant sees mail from the Division of Motor Vehicles (DMV) and then refuses to open the letter, he might be found to have been aware of circumstances that would lead a reasonable person to believe his license to drive was under restraint and his claim that he drove without knowledge of the restraint might fail. In contrast, if we were to accept as true that a defendant unwittingly threw out the DMV letter with his junk mail and that he never saw the DMV letter addressed to him, then he might be found not to have possessed the subjective knowledge of the circumstances that would lead a reasonable person to believe his license was under restraint.<sup>FN5</sup> This defendant, although perhaps negligent in sorting his mail, might not have driven with the required “knowledge” of the restraint.

FN5. This example assumes that the hypothetical defendant did not act deliberately to disregard the DMV letter and, further, that awareness of having been convicted of numerous traffic offenses would not alone lead a reasonable person to believe his license was under restraint.

*People v. Ellison*, 14 P.3d 1034, 1037 n.5 (Colo. 2000); see also *Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) (“After our decision in [*Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987)] held the culpable mental state of ‘knowingly’ applicable to the misdemeanor driving under restraint statute, the legislature amended that statute to require a degree of mental culpability less than ‘knowingly.’”).

In summary, under the current statutory scheme: (1) it is permissible for the jury to draw an inference that the defendant had *notice* of a restraint based on evidence satisfying section 42-2-119(2) or section 42-2-138(2)(a); and (2) an inference that the defendant had such notice may, depending on the surrounding circumstances, support a finding that the defendant also had *knowledge*, within the meaning of section 42-2-138(4)(a).

## 42:05 DRIVING AFTER REVOCATION PROHIBITED

The elements of the crime of driving after revocation prohibited are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. having had his [her] license to drive revoked by the Department of Revenue based on a finding that he [she] was an habitual offender,
5. operated a motor vehicle in this state,
6. while the revocation prohibiting such operation was in effect.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving after revocation prohibited.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving after revocation prohibited.

### COMMENT

1. *See* § 42-2-206(1)(a)(I), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); Instruction F:239 (defining “motor vehicle”).

3. See *Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) (“When the General Assembly amended the culpable mental state requirement for driving under restraint but did not amend the culpable mental state for driving after revocation prohibited, we must presume that it did so with awareness of our decisions in [*People v. Lesh*, 668 P.2d 1362, 1365 (Colo. 1983), *Ault v. Department of Revenue*, 697 P.2d 24, 27 (Colo. 1985), and *Jolly v. People*, 742 P.2d 891, 896 (Colo. 1987)], and therefore chose to retain ‘knowingly’ as the culpable mental state for driving after revocation prohibited.”).

4. The term “operate” is not defined in section 42-2-206. See *People v. Stewart*, 55 P.3d 107, 115 (Colo. 2002) (“The term ‘operate’ is somewhat broader [than the term ‘drive’], connoting the action of causing something ‘to occur . . . [or] to cause to function usually by direct personal effort.’ *People v. Gregor*, 26 P.3d 530, 532 (Colo. App. 2000) (quoting *Webster’s Third New International Dictionary* 1580–81 (1986)).”); *People v. Gregor*, 26 P.3d 530, 532 (Colo. App. 2000) (“the trial court did not err in failing to define ‘operate’ as requiring actual movement of the vehicle”).

In *People v. VanMatre*, 190 P.3d 770, 772 (Colo. App. 2008), a division of the Court of Appeals analyzed an instruction that defined the term “operate,” for purposes of the offense of aggravated driving with a revoked license in violation of section 42-2-206(1)(b), as “exercising actual physical control of a vehicle, which was to be determined by considering the totality of the circumstances.”

The instruction further provided a nonexclusive list of factors for the jury to consider in determining the issue of actual physical control. The factors included the vehicle’s operability, the vehicle’s location, defendant’s location in the vehicle, the location of the ignition keys, whether the motor was running, whether defendant had the apparent ability to start the vehicle, whether defendant was conscious, whether the heater or air conditioner was running, whether the windows were up or down, and any other factor which tended to indicate that defendant exercised bodily influence or direction over the vehicle based on the jury’s everyday experience.

*Id.* Although the division held that this instruction was adequate based on the facts of the case, it endorsed the “reasonably capable of being rendered operable” standard:

[W]hen considering whether a defendant exercised actual physical control over a vehicle or caused it to function, that is, drove or operated a vehicle, a jury may consider the totality of the circumstances, including the factors listed in the jury instruction here. Furthermore, when there is evidence indicating that the vehicle may not have been reasonably capable of being rendered operable, the jury must be instructed that it must find the vehicle was either operable, reasonably capable of being rendered operable, in motion (whether by coasting or pushing), or at risk of being put in motion before finding the defendant guilty of driving or operating a vehicle under the DUI and [driving after revocation prohibited] statutes.

*Id.* at 773; see also *People v. Valdez*, 2014 COA 125, ¶ 23, 411 P.3d 94, 100 (“[T]he instruction set forth in *VanMatre* involves an element-negating traverse because, if a defendant establishes that a ‘vehicle may not have been reasonably capable of being operable,’ such evidence would necessarily negate the required elements of ‘driving’ and ‘operating’ a vehicle.”).

5. See *People v. Wambolt*, 2018 COA 88, ¶¶ 49, 63, 431 P.3d 681, 692, 694 (holding that driving under restraint is a lesser included offense of driving after revocation prohibited).

6. In 2017, the Committee added the citation to *People v. Valdez* in Comment 4.

7. In 2019, the Committee added Comment 5.

## **42:06 AGGRAVATED DRIVING AFTER REVOCATION PROHIBITED**

The elements of the crime of driving after revocation prohibited are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. having had his [her] license to drive revoked by the Department of Revenue based on a finding that he [she] was an habitual offender,
5. operated a motor vehicle in this state,
6. while the revocation prohibiting such operation was in effect, and
7. as a part of the same criminal episode, committed [any of] the following crime[s]: [insert the name(s) of the relevant offense(s) enumerated in section 42-2-206(b)(I)(C)-(F)].
- [8. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving after revocation prohibited.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving after revocation prohibited.

## COMMENT

1. See § 42-2-206(1)(b)(I), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); Instruction F:239 (defining “motor vehicle”).
3. If the defendant is not separately charged with a referenced offense, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. Place the elemental instruction for the referenced offense immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for the referenced offense.
4. Aggravated driving with a revoked license is not a sentence enhancement provision for the offense of driving after revocation prohibited; it is a separate crime. See *Griego v. People*, 19 P.3d 1, 6 n.6 (Colo. 2001) (“The 1999 amendment . . . created the new offense of aggravated driving with a revoked license. . . .”); *People v. Wilson*, 114 P.3d 19, 26 (Colo. App. 2004) ([Section] 42-2-206(1)(b) clearly sets forth the elements of the crime of aggravated driving with a revoked license, which include six different offenses committed ‘as part of the same criminal episode.’ Thus, the aggravating offenses listed in § 42-2-206(1)(b) are essential elements of the crime.”).
5. See Instruction 42:05 (driving after revocation prohibited), Comment 3 (discussing the imputed mens rea of “knowingly”), and Comment 4 (discussing cases defining the term “operate”).
6. + See *People v. Sims*, 2020 COA 78, ¶ 40, 474 P.3d 189, 196 (“[T]he offenses listed in the subsections under section 42-2-206(1)(b), including eluding or attempting to elude under subsection (D), are lesser included offenses of aggravated DARP.”).

7. In 2015, the Committee modified the bracketed statutory citation in the seventh element. *See* Ch. 262, sec. 4, § 42-2-206, 2015 Colo. Sess. Laws 990, 996.

8. In 2017, the Committee corrected the statutory citation in Comment 1.

9. + In 2020, the Committee added Comment 6.

## **+ 42:06.1 OPERATION OF COMMERCIAL MOTOR VEHICLE (NO LICENSE)**

The elements of the crime of operation of commercial motor vehicle (no license) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated a commercial motor vehicle upon the highway, and
- [4. [he] [she] had not attained the age of twenty-one years.]
- [4. [he] [she] had not been issued a commercial driver's license.]
- [4. [he] [she] was not in immediate possession of a commercial driver's license.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation of commercial motor vehicle (no license).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation of commercial motor vehicle (no license).

### COMMENT

1. See § 42-2-404(1), (3), C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); see also § 42-2-402(1), C.R.S. 2020 (defining "commercial driver's license"); -402(4) (defining "commercial motor vehicle").

3. Section 42-2-404(4) provides that this crime “does not apply to any person who is at least eighteen years of age but less than twenty-one years of age and who operates a commercial motor vehicle upon the highways of this state solely in intrastate operations.” However, the Committee has not drafted model affirmative defense instructions. Additionally, that subsection cross-references section 42-2-101(4), C.R.S. 2020, which discusses license requirements. *See* Instruction 42:01, Comment 5.

4. + The Committee added this instruction in 2020.

## **+ 42:06.15 OPERATION OF COMMERCIAL MOTOR VEHICLE (MULTIPLE LICENSES)**

The elements of the crime of operation of commercial motor vehicle (multiple licenses) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a commercial motor vehicle, and
  4. had more than one driver's license.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation of commercial motor vehicle (multiple licenses).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation of commercial motor vehicle (multiple licenses).

### COMMENT

1. See § 42-2-404(2), (3), C.R.S. 2020.
2. See also § 42-2-402(1), C.R.S. 2020 (defining "commercial driver's license"); -402(4) (defining "commercial motor vehicle").
3. Section 42-2-404(4) provides that this crime "shall not apply to any person who is at least eighteen years of age but less than twenty-one years of age and who operates a commercial motor vehicle upon the highways of this state solely in intrastate operations." However, the Committee has not

drafted model affirmative defense instructions. Additionally, that subsection cross-references section 42-2-101(4), C.R.S. 2020, which discusses license requirements. *See* Instruction 42:01, Comment 5.

4. + The Committee added this instruction in 2020.

## **+ 42:06.2 OPERATION OF COMMERCIAL MOTOR VEHICLE (OUT-OF-SERVICE ORDER)**

The elements of the crime of operation of commercial motor vehicle (out-of-service order) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. operated a commercial motor vehicle,
  4. in violation of an out-of-service order.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation of commercial motor vehicle (out-of-service order).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation of commercial motor vehicle (out-of-service order).

### COMMENT

1. See § 42-2-405.5(1), C.R.S. 2020.
2. See also § 42-2-402(4), C.R.S. 2020 (defining "commercial motor vehicle"; also defining "out-of-service order" by referring to 49 CFR 383.5).
3. + The Committee added this instruction in 2020.

## **+ 42:06.25 UNLAWFUL COMMERCIAL DRIVER'S LICENSE DRIVING TEST**

The elements of the crime of unlawful commercial driver's license driving test are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not an employee of the Department of Revenue, and
- [4. performed commercial driver's license driving tests, and]
- [4. acted as a commercial driver's license testing unit, and]
- [4. acted as a commercial driver's license driving tester, and]
5. [he] [she] had not been duly licensed by the Department of Revenue.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful commercial driver's license driving test.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful commercial driver's license driving test.

### COMMENT

1. See § 42-2-408, C.R.S. 2020.

2. *See also* § 42-2-402(2), C.R.S. 2020 (defining “commercial driver’s license driving tester”); -402(3) (defining “commercial driver’s license testing unit”).
3. If necessary, the court should provide a supplemental instruction explaining the relevant licensing requirements. *See* § 42-2-407, C.R.S. 2020.
4. + The Committee added this instruction in 2020.

## + 42:06.3 IMPROPER USE OF DEMONSTRATION PLATE

The elements of the crime of improper use of demonstration plate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated special mobile machinery with a demonstration plate, and
4. the machinery was not offered for sale or was not being demonstrated for the purposes of a sale.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of demonstration plate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of demonstration plate.

### COMMENT

1. See § 42-3-116(7)(c), (d), C.R.S. 2020.
2. See also § 42-1-102(93.5), C.R.S. 2020 (defining "special mobile machinery").
3. The statute does not define "demonstration plate."
4. + The Committee added this instruction in 2020.

## + 42:06.35 PASSENGER-MILE TAX (NON-COMPLIANCE)

The elements of the crime of passenger-mile tax (non-compliance) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner or operator of a motor vehicle operated on a public highway of this state and required to pay the passenger-mile tax imposed by law, and
- [4. willfully,
5. failed or refused to file with the Department of Revenue, on or before the twenty-fifth day of each month, on forms prescribed by the department and the public utilities commission,
6. a statement, subject to the penalties for perjury in the second degree, showing the name and address of the owner of the motor vehicle, total miles traveled, and total number of passengers carried in this state during the preceding month and such other information as required by the department and the commission, and
7. the executive director of the department had not authorized the filing of statements and the payment of tax for periods in excess of one month but not to exceed a period of twelve months.]
- [4. made a false or fraudulent return regarding the tax.]
- [4. willfully,
5. failed to pay the tax owed.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of passenger-mile tax (non-compliance).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of passenger-mile tax (non-compliance).

#### COMMENT

1. *See* § 42-3-308(1)(a), (3)(b), C.R.S. 2020.
2. *See* Instruction F:171 (defining “highway”); Instruction F:239 (defining “motor vehicle”); Instruction F:392 (defining “willfully”).
3. The court should draft a supplemental instruction explaining the passenger-mile tax. *See* §§ 42-3-304, 42-3-306, C.R.S. 2020.
4. + The Committee added this instruction in 2020.

## **+ 42:06.4 USING WIRELESS TELEPHONE WHILE OPERATING MOTOR VEHICLE (BODILY INJURY)**

The elements of the crime of using wireless telephone while operating motor vehicle (bodily injury) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. used a wireless telephone,
4. for the purpose of engaging in text messaging or other similar forms of manual data entry or transmission,
5. while operating a motor vehicle, and
6. the defendant's actions were the proximate cause of bodily injury to another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of using wireless telephone while operating motor vehicle (bodily injury).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of using wireless telephone while operating motor vehicle (bodily injury).

### COMMENT

1. See § 42-4-239(3), (5.5)(b), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:239 (defining “motor vehicle”); see also § 42-4-239(1) (defining “operating a motor vehicle,” “use,” and “wireless telephone”); CJI-Civ. 9:18 (2020) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2020) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. The statute creates an exception for persons who use their telephones to contact a public safety entity or during emergencies. See § 42-4-239(4). Additionally, the statute provides that motor vehicle operators shall not be cited “unless a law enforcement officer saw the operator use a wireless telephone for the purpose of engaging in text messaging or other similar forms of manual data entry or transmission, in a manner that caused the operator to drive in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances.” § 42-4-239(6)(b). However, the Committee has not drafted model affirmative defense instructions.

4. + The Committee added this instruction in 2020.

## **+ 42:06.45 USING WIRELESS TELEPHONE WHILE OPERATING MOTOR VEHICLE (DEATH)**

The elements of the crime of using wireless telephone while operating motor vehicle (death) are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. used a wireless telephone,
  4. for the purpose of engaging in text messaging or other similar forms of manual data entry or transmission,
  5. while operating a motor vehicle, and
  6. the defendant's actions were the proximate cause of death to another.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of using wireless telephone while operating motor vehicle (death).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of using wireless telephone while operating motor vehicle (death).

### COMMENT

1. *See* § 42-4-239(3), (5.5)(c), C.R.S. 2020.

2. See Instruction F:239 (defining “motor vehicle”); see also § 42-4-239(1) (defining “operating a motor vehicle,” “use,” and “wireless telephone”); CJI-Civ. 9:18 (2020) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2020) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. The statute creates an exception for persons who use their telephones to contact a public safety entity or during emergencies. See § 42-4-239(4). Additionally, the statute provides that motor vehicle operators shall not be cited “unless a law enforcement officer saw the operator use a wireless telephone for the purpose of engaging in text messaging or other similar forms of manual data entry or transmission, in a manner that caused the operator to drive in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances.” § 42-4-239(6)(b). However, the Committee has not drafted model affirmative defense instructions.

4. + The Committee added this instruction in 2020.

## **+ 42:06.5 UNLAWFUL REMOVAL OF TOW-TRUCK SIGNAGE**

The elements of the crime of unlawful removal of tow-truck signage are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was not a towing carrier or peace officer, and
4. a towing carrier had placed a tow-truck warning sign on the driver-side window of a vehicle to be towed or, if window placement was impracticable, in another location on the driver-side of the vehicle, and
5. the vehicle to be towed was within fifty feet of the towing carrier vehicle, and
6. the defendant removed the tow-truck warning sign from the vehicle before the tow was completed.
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful removal of tow-truck signage.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful removal of tow-truck signage.

### COMMENT

1. See § 42-4-241(1)(a), C.R.S. 2020.

2. See Instruction F:263 (defining “peace officer”); Instruction F:386 (defining “vehicle”); *see also* § 42-4-241(3) (defining “tow-truck warning sign”).
3. + The Committee added this instruction in 2020.

## + 42:06.55 UNLAWFUL USAGE OF TOW-TRUCK SIGNAGE

The elements of the crime of unlawful usage of tow-truck signage are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was not a towing carrier or peace officer, and
  4. placed a tow-truck warning sign on a vehicle,
  5. when the vehicle was not in the process of being towed or when the vehicle was occupied.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful usage of tow-truck signage.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful usage of tow-truck signage.

### COMMENT

1. See § 42-4-241(1)(b), C.R.S. 2020.
2. See Instruction F:263 (defining "peace officer"); Instruction F:386 (defining "vehicle"); see also § 42-4-241(3) (defining "tow-truck warning sign").
3. + The Committee added this instruction in 2020.

## + 42:06.6 NON-COMPLIANCE WITH SUPER-LOAD PERMIT

The elements of the crime of non-compliance with super-load permit are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. was a driver who was issued a super-load permit by the department of transportation, and
4. failed to carry the documentation in the vehicle during the permitted move, or failed to produce, upon request, the documentation for any state agency or law enforcement personnel.]
- [3. was a driver or holder of a super-load permit issued by the department of transportation, and
4. failed to comply with the terms of the permit.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of non-compliance with super-load permit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of non-compliance with super-load permit.

### COMMENT

1. See § 42-4-510(1.7), (12)(d), C.R.S. 2020.

2. *See also* § 42-1-102(27), C.R.S. 2020 (defining “driver”).
3. + The Committee added this instruction in 2020.

## + 42:06.65 CAUSING TRAFFIC LIGHT TO CHANGE

The elements of the crime of causing traffic light to change are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. used an electronic device, without lawful authority,
  4. that caused a traffic light to change, and
  5. thereby proximately caused bodily injury to another person.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of causing traffic light to change.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of causing traffic light to change.

### COMMENT

1. See § 42-4-607(2), C.R.S. 2020.
2. See Instruction F:36 (defining "bodily injury"); see also CJI-Civ. 9:18 (2020) (defining "cause"); CJI-Civ. Ch. 9, § B (Causation) (2020) ("The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. + The Committee added this instruction in 2020.

## **+ 42:06.7 CARELESS DRIVING (APPROACHING OR PASSING – STATIONARY VEHICLE)**

The elements of the crime of careless driving (approaching or passing – stationary vehicle) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a driver in a vehicle, and
4. failed to exhibit due care and caution when approaching or passing,
  - [5. a stationary authorized emergency vehicle that was giving a visual signal by means of flashing, rotating, or oscillating red, blue, or white lights.]
  - [5. a stationary towing carrier vehicle that was giving a visual signal by means of flashing, rotating, or oscillating yellow lights.]
  - [5. a stationary public utility service vehicle that was giving a visual signal by means of flashing, rotating, or oscillating amber lights.]
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving (approaching or passing – stationary vehicle).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving (approaching or passing – stationary vehicle).

## COMMENT

1. See § 42-4-705(2)(a), (3)(b)(I), C.R.S. 2020.
2. See Instruction F:386 (defining “vehicle”); see also § 42-1-102(6), (27) (defining “authorized emergency vehicle” and “driver”).
3. See Instruction 42:06.85.SP (due care and caution – special instruction).
4. See *People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 (“Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).
5. In cases where the defendant’s careless driving allegedly caused bodily injury or death, the interrogatories found in Instruction 42:16 or 42:17 should be given. See § 42-4-705(3)(b)(II), (III).
6. + The Committee added this instruction in 2020.

## **+ 42:06.75 CARELESS DRIVING (APPROACHING OR PASSING – SLOW-MOVING VEHICLE)**

The elements of the crime of careless driving (approaching or passing – slow-moving vehicle) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a driver in a vehicle, and
4. failed to exhibit due care and caution when approaching or passing,
5. a maintenance, repair, or construction vehicle that was moving at less than twenty miles per hour.
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving (approaching or passing – slow-moving vehicle).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving (approaching or passing – slow-moving vehicle).

### COMMENT

1. See § 42-4-705(2.5)(a), (3)(b)(I), C.R.S. 2020.
2. See Instruction F:386 (defining “vehicle”); see also § 42-1-102(27), C.R.S. 2020 (defining “driver”).

3. See Instruction 42:06.85.SP (due care and caution – special instruction).
4. See *People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 (“Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).
5. + The Committee added this instruction in 2020.

## **+ 42:06.8 CARELESS DRIVING (APPROACHING OR PASSING – TIRES WITH CHAINS)**

The elements of the crime of careless driving (approaching or passing – tires with chains) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a driver in a vehicle, and
4. failed to exhibit due care and caution when approaching or passing,
5. a motor vehicle where the tires were being equipped with chains on the side of the highway.
- [6. and that the defendant’s conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving (approaching or passing – tires with chains).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving (approaching or passing – tires with chains).

### COMMENT

1. See § 42-4-705(2.6)(a), (3)(b)(I), C.R.S. 2020.
2. See Instruction F:171 (defining “highway”); Instruction F:239 (defining “motor vehicle”); Instruction F:386 (defining “vehicle”); see also § 42-1-102(27), C.R.S. 2020 (defining “driver”).

3. See Instruction 42:06.85.SP (due care and caution – special instruction).
4. See *People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 (“Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).
5. + The Committee added this instruction in 2020.

## **+ 42:06.85.SP CARELESS DRIVING – SPECIAL INSTRUCTION (DUE CARE AND CAUTION)**

On a highway with at least two adjacent lanes proceeding in the same direction on the same side of the highway where [a stationary authorized emergency vehicle, stationary towing carrier vehicle, or stationary public utility service vehicle is located] [a stationary or slow-moving maintenance, repair, or construction vehicle is located] [chains are being applied to the tires of a motor vehicle], the driver of an approaching or passing vehicle shall proceed with due care and caution and yield the right-of-way by moving into a lane at least one moving lane apart from [the stationary authorized emergency vehicle, stationary towing carrier vehicle, or stationary public utility service vehicle] [the vehicle], unless directed otherwise by a peace officer or other authorized emergency personnel. If movement to an adjacent moving lane is not possible due to weather, road conditions, or the immediate presence of vehicular or pedestrian traffic, the driver of the approaching vehicle shall proceed in the manner described below.

On a highway that does not have at least two adjacent lanes proceeding in the same direction on the same side of the highway where [a stationary authorized emergency vehicle, stationary towing carrier vehicle, or stationary public utility service vehicle is located] [a stationary or slow-moving maintenance, repair, or construction vehicle is located] [chains are being applied to the tires of a motor vehicle], or if movement by the driver of the approaching vehicle into an adjacent moving lane, as described above, is not possible, the driver of an approaching vehicle shall reduce and maintain a safe speed with regard to the location of [the stationary authorized emergency vehicle, stationary towing carrier vehicle, or stationary public utility service vehicle] [the stationary or slow-moving maintenance, repair, or construction vehicle] [the motor vehicle where chains are being applied to the tires], weather conditions, road conditions, and vehicular or pedestrian traffic, and shall proceed with due care and caution, or as directed by a peace officer or other authorized emergency personnel.

[The following speeds are presumed to be safe unless the speeds are

unsafe for the conditions:

- a. if the speed limit is less than forty-five miles per hour, twenty-five miles per hour or less.
- b. if the speed limit is forty-five miles per hour or more, twenty miles per hour less than the speed limit.]

#### COMMENT

1. See § 42-4-705(2)(b-c), (2.5)(b-c), (2.6)(b-c), C.R.S. 2020.
2. See Instruction F:171 (defining “highway”).
3. The three bracketed alternatives that appear throughout the instruction correspond to the three alternative methods of committing careless driving by passing, depending on the type of vehicle being passed. See Instruction 42:06.7 (stationary vehicle); Instruction 42:06.75 (slow-moving vehicle); Instruction 42:06.8 (tires with chains). Also, the final bracketed paragraph regarding presumptively safe speeds only applies to the crime of approaching or passing a stationary vehicle. See § 42-4-705(2)(c)(II).

Additionally, the first paragraph applies to a highway with at least two adjacent lanes proceeding in the same direction, while the second paragraph applies to a highway that does *not* have at least two adjacent lanes proceeding in the same direction. If the type of highway at issue is undisputed, then the court should only include one of the two paragraphs in its instruction.

4. + The Committee added this instruction in 2020.

## + 42:06.9 CARELESS DRIVING (CROWDING BICYCLIST)

The elements of the crime of careless driving (crowding bicyclist) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a driver of a motor vehicle, and
4. in a careless and imprudent manner,
5. drove the vehicle unnecessarily close to, toward, or near a bicyclist.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving (crowding bicyclist).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving (crowding bicyclist).

### COMMENT

1. See § 42-4-1008.5, C.R.S. 2020.
2. See Instruction F:32 (defining "bicycle"); Instruction F:239 (defining "motor vehicle"); see also § 42-1-102(27), C.R.S. 2020 (defining "driver").
3. See *People v. Zwegardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 ("Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without due regard. A person who grossly deviates from the standard of care that

a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).

4. + The Committee added this instruction in 2020.

## 42:07 SPEEDING

The elements of the crime of speeding are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a motor vehicle,
  4. on a highway,
  5. at a speed greater than was reasonable and prudent under the conditions then existing.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of speeding.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of speeding.

### COMMENT

1. See § 42-4-1101(1), C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); Instruction F:239 (defining "motor vehicle").
3. See *People v. Caddy*, 540 P.2d 1089, 1091 (Colo. 1975) ("speeding is an offense of strict liability"); Instruction G1:02 (strict liability crimes).
4. See Instruction H:74 (affirmative defense of "emergency").

## 42:08.SP SPEEDING – SPECIAL INSTRUCTION (SPEED IN EXCESS OF DESIGNATED SPEED LIMIT)

Evidence that the defendant was driving at any speed in excess of [insert the lawful designated speed pursuant to section 42-4-1101(2)] gives rise to a presumption that such speed was not reasonable or prudent under the conditions then existing.

A presumption requires you to find a fact as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt.

### COMMENT

1. See § 42-4-1101(4), C.R.S. 2020.
2. Unlike most criminal statutes, section 42-4-1101(4) creates a mandatory rebuttable presumption rather than a permissible inference. See *People v. Hoskin*, 2016 CO 63, ¶¶ 11, 17, 380 P.3d 130, 134, 136 (“[T]he plain language of the speeding statute creates a mandatory rebuttable presumption. . . . [C]ivil traffic infraction defendants are not entitled to the same due process protections afforded to defendants in criminal proceedings. Rather, due process rights afforded to defendants in criminal proceedings, specifically, as they relate to the burden of proof, are not implicated here.”).
3. In 2016, the Committee modified this instruction and Comment 2 in light of *People v. Hoskin*, *supra*.

## + 42:08.5 SPEED CONTEST

The elements of the crime of speed contest are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. engaged in a speed contest on a highway.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of speed contest.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of speed contest.

### COMMENT

1. See § 42-4-1105(1), C.R.S. 2020.
2. See Instruction F:171 (defining "highway"); Instruction F:195 (defining "knowingly"); see also § 42-4-1105(1)(b) (defining "speed contest" as "the operation of one or more motor vehicles to conduct a race or a time trial, including but not limited to rapid acceleration, exceeding reasonable and prudent speeds for highways and existing traffic conditions, vying for position, or performing one or more lane changes in an attempt to gain advantage over one or more of the other race participants").
3. Section 42-4-1105(4) provides that this section "shall not apply to the operation of a motor vehicle in an organized competition according to accepted rules on a designated and duly authorized race track, race course,

or drag strip.” However, the Committee has not drafted model affirmative defense instructions.

4. + The Committee added this instruction in 2020.

## 42:09 DRIVING UNDER THE INFLUENCE

The elements of the crime of driving under the influence are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a motor vehicle or vehicle,
  4. while under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, and
- + [5. the defendant had three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide; vehicular assault; or any combination thereof.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving under the influence.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving under the influence.

### COMMENT

1. See § 42-4-1301(1)(a), C.R.S. 2020.
2. See Instruction F:110 (defining "driving under the influence"); Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

3. In *People v. Swain*, 959 P.2d 426, 431 (Colo. 1998), the supreme court held that, for purposes of section 42-4-1301, the term “drive” means “actual physical control of a vehicle.” In so holding, the court extended the definition it had developed in the license revocation context, *see Brewer v. Motor Vehicle Division, Department of Revenue*, 720 P.2d 564 (Colo. 1986), without endorsing the trial court’s instruction that enumerated five factors for the jury to “consider in deciding whether or not a person was in actual physical control of a motor vehicle.” *People v. Swain*, 959 P.2d at 428; *see also People v. VanMatre*, 190 P.3d 770, 773 (Colo. App. 2008) (“a vehicle must be reasonably capable of being rendered operable before a person can be convicted of ‘driving’ . . . the vehicle while intoxicated”); *People v. Valdez*, 2014 COA 125, ¶ 23, 411 P.3d 94, 100 (“[T]he instruction set forth in *VanMatre* involves an element-negating traverse because, if a defendant establishes that a ‘vehicle may not have been reasonably capable of being operable,’ such evidence would necessarily negate the required elements of ‘driving’ and ‘operating’ a vehicle.”).

4. *See Reyna-Abarca v. People*, 2017 CO 15, ¶ 69, 390 P.3d 816, 827 (concluding that DUI is a lesser-included offense of vehicular assault-DUI and vehicular homicide-DUI).

5. + In *Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735, the court held that “the statutory provisions that define and provide penalties for felony DUI treat the fact of prior convictions as an element of the crime, which must be proved to the jury beyond a reasonable doubt.” Therefore, in 2020, the Committee added the bracketed fifth element; the court should only include this element if the prosecution is seeking a felony conviction. Additionally, the court may need to issue supplemental instructions defining the relevant crimes (e.g., DUI, DUI per se, or DWAI; vehicular homicide; or vehicular assault).

The Committee notes that, after *Linnebur*, it remains unclear whether the prosecution may introduce evidence of the defendant’s prior convictions during the same trial where it’s seeking a new conviction, or whether the court may conduct a bifurcated trial and allow the jury to hear evidence of prior convictions only after it has returned a guilty verdict in the current case. *See id.* at ¶ 54 (Márquez, J., dissenting) (“To the extent defendants

anticipate that these prior convictions can be somehow bifurcated from the remaining elements of the felony offense, that may be wishful thinking.”). The Committee expresses no opinion on whether bifurcation is permissible or required.

6. In 2017, the Committee added the citation to *People v. Valdez* in Comment 3, and it also added Comment 4.

7. In 2018, the Committee added Comment 5 and renumbered the subsequent comment.

8. + In 2020, the Committee added the fifth bracketed element in light of *Linnebur*; it also modified Comment 5.

## 42:10 DRIVING WHILE ABILITY IMPAIRED

The elements of the crime driving while ability impaired are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a motor vehicle or vehicle,
  4. while impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, and
- + [5. the defendant had three or more prior convictions, arising out of separate and distinct criminal episodes, for DUI, DUI per se, or DWAI; vehicular homicide; vehicular assault; or any combination thereof.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving while ability impaired.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving while ability impaired.

### COMMENT

1. See § 42-4-1301(1)(b), C.R.S. 2020.
2. See Instruction F:111 (defining "driving while ability impaired"); Instruction F:239 (defining "motor vehicle"); Instruction F:252 (defining "one or more drugs"); Instruction F:386 (defining "vehicle").

3. See Instruction 42:09, Comment 3 (discussing the meaning of the term “drive”).

4. + In *Linnebur v. People*, 2020 CO 79M, ¶ 2, 476 P.3d 734, 735, the court held that “the statutory provisions that define and provide penalties for felony DUI treat the fact of prior convictions as an element of the crime, which must be proved to the jury beyond a reasonable doubt.” The felony DWAI statute is identical in this regard. See *id.* at ¶ 5 n.1. Therefore, in 2020, the Committee added the bracketed fifth element; the court should only include this element if the prosecution is seeking a felony conviction. Additionally, the court may need to issue supplemental instructions defining the relevant crimes (e.g., DUI, DUI per se, or DWAI; vehicular homicide; or vehicular assault).

The Committee notes that, after *Linnebur*, it remains unclear whether the prosecution may introduce evidence of the defendant’s prior convictions during the same trial where it’s seeking a new conviction, or whether the court may conduct a bifurcated trial and allow the jury to hear evidence of prior convictions only after it has returned a guilty verdict in the current case. See *id.* at ¶ 54 (Márquez, J., dissenting) (“To the extent defendants anticipate that these prior convictions can be somehow bifurcated from the remaining elements of the felony offense, that may be wishful thinking.”). The Committee expresses no opinion on whether bifurcation is permissible or required.

5. + In 2020, the Committee added the fifth bracketed element in light of *Linnebur*; it also added Comment 4.

**42:11.SP DRIVING UNDER THE INFLUENCE OR WHILE ABILITY IMPAIRED – SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)**

As to the charge of [driving under the influence] [driving while ability impaired], the amount of alcohol in the defendant's blood or breath at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant's blood or breath, gives rise to the following:

(a) Presumption:

It shall be presumed that the defendant was not under the influence of alcohol if there was at such time 0.05 or less grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.05 or less grams of alcohol per two hundred ten liters of breath.

A presumption requires you to find a fact, as if it had been established by evidence, unless the presumption is rebutted by evidence to the contrary.

(b) Permissible inferences:

A permissible inference that the defendant's ability to operate a motor vehicle or vehicle was impaired by the consumption of alcohol may be drawn if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per one hundred milliliters of blood, or if there was at such time in excess of 0.05 but less than 0.08 grams of alcohol per two hundred ten liters of breath, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

A permissible inference that the defendant was under the influence of alcohol may be drawn if there was at such time 0.08 or more grams of alcohol per one hundred milliliters of blood, or if there was at such time 0.08 or more grams of alcohol per two hundred ten liters of breath.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

#### COMMENT

1. *See* § 42-4-1301(6)(a)(I)-(III), C.R.S. 2020.
2. The similar provisions relating to vehicular homicide and vehicular assault do not establish a permissible inference for a B.A.C. in excess of .05, but less than .08. This is because those offenses require proof that the defendant was “under the influence,” and not merely “impaired.” *See* § 18-3-106(2)(b), C.R.S. 2020 (stating that the B.A.C. “may be considered with other competent evidence”); § 18-3-205(2)(b), C.R.S. 2020 (same). Accordingly, where a charge of DUI is submitted as a lesser-included offense of one of these felonies, it may be necessary to use separate special instructions to guide the jury’s consideration of the B.A.C. evidence.

**42:12.SP DRIVING UNDER THE INFLUENCE OR WHILE ABILITY IMPAIRED – SPECIAL INSTRUCTION (DELTA 9-TETRAHYDROCANNABINOL LEVEL)**

As to the charge of [driving under the influence] [driving while ability impaired], a permissible inference that the defendant was under the influence of one or more drugs may be drawn if the amount of delta 9-tetrahydrocannabinol in the defendant’s blood at the time of the alleged offense, or within a reasonable time thereafter, as shown by analysis of the defendant’s blood, was five nanograms or more per milliliter in whole blood.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. See § 42-4-1301(6)(a)(IV), C.R.S. 2020.

## 42:13 DRIVING WITH EXCESSIVE ALCOHOL CONTENT

The elements of the crime of driving with excessive alcohol content are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a motor vehicle or vehicle, and
4. at the time of driving, or within two hours after driving,
5. he [she] had a blood alcohol content of 0.08 or more grams of alcohol per one hundred milliliters of blood, or a breath alcohol content of 0.08 or more grams of alcohol per two hundred ten liters of breath.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving with excessive alcohol content.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving with excessive alcohol content.

### COMMENT

1. See § 42-4-1301(2)(a), C.R.S. 2020.
2. See Instruction F:239 (defining "motor vehicle"); Instruction F:386 (defining "vehicle"); *see also* Instruction 42:09, Comment 3 (discussing the meaning of the term "drive").

3. *See* Instruction H:76 (affirmative defense of “subsequent consumption of alcohol”).

## 42:14 RECKLESS DRIVING

The elements of the crime of reckless driving are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [electric scooter] [low-power scooter],
4. in such a manner as to indicate either a wanton or a willful disregard for the safety of persons or property.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of reckless driving.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of reckless driving.

### COMMENT

1. See § 42-4-1401(1), C.R.S. 2020.
2. See Instruction F:32 (defining "bicycle"); Instruction F:114.9 (defining "electric scooter"); Instruction F:115 (defining "electrical assisted bicycle"); Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").
3. See *People v. Pena*, 962 P.2d 285, 289 (Colo. App. 1997) (the type of recklessness in 42-4-1401(1) is indistinguishable from the definition of "recklessly" in section 18-1-501(8), C.R.S. 2020).

4. See *People v. Dominguez*, 2019 COA 78, ¶ 64, 454 P.3d 364, 374 (holding that reckless driving is a lesser included offense of vehicular eluding).

5. In 2019, pursuant to new legislation, the Committee added “electric scooter” to the third element and added the cross-reference to Instruction F:114.9 in Comment 2. See Ch. 271, sec. 11, § 42-4-1401(1), 2019 Colo. Sess. Laws 2557, 2561. The Committee also added Comment 4.

## 42:15 CARELESS DRIVING

The elements of the crime of careless driving are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a [motor vehicle] [bicycle] [electrical assisted bicycle] [electric scooter] [low-power scooter],
4. in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of careless driving.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of careless driving.

### COMMENT

1. See § 42-4-1402(1), C.R.S. 2020.
2. See Instruction F:32 (defining "bicycle"); Instruction F:114.9 (defining "electric scooter"); Instruction F:115 (defining "electrical assisted bicycle"); Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").
3. See *People v. Zweygardt*, 2012 COA 119, ¶ 34, 298 P.3d 1018, 1025 ("Criminal negligence requires a gross deviation from the standard of care. § 18-1-501(3). Careless driving requires that the defendant drive without

due regard. A person who grossly deviates from the standard of care that a reasonable person would exercise and fails to perceive a substantial and unjustified risk that a result will occur or that a circumstance exists, has necessarily acted without due regard for safety.”).

4. In 2019, pursuant to new legislation, the Committee added “electric scooter” to the third element, and it added the cross-reference to Instruction F:114.9 in Comment 2. *See* Ch. 271, sec. 12, § 42-4-1402(1), 2019 Colo. Sess. Laws 2557, 2561-62.

## 42:16.INT CARELESS DRIVING – INTERROGATORY (BODILY INJURY)

If you find the defendant not guilty of careless driving, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of careless driving, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the careless driving result in bodily injury? (Answer “Yes” or “No”)

The careless driving resulted in bodily injury only if:

1. the defendant’s actions were the proximate cause of bodily injury to another.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* + §§ 42-4-705(3)(b)(II), 42-4-1402(2)(b), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form); *see also* CJI-Civ. 9:18 (2014) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2014) (“The [Colorado Supreme Court

Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. + In 2020, the Committee updated the statutory citation in Comment 1 to account for the new instruction on careless driving – approaching or passing (stationary vehicle), *see* Instruction 42:06.7.

## 42:17.INT CARELESS DRIVING – INTERROGATORY (DEATH)

If you find the defendant not guilty of careless driving, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of careless driving, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the careless driving result in death? (Answer “Yes” or “No”)

The careless driving resulted in death only if:

1. the defendant’s actions were the proximate cause of death to another.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See §§ 42-4-705(3)(b)(III), 42-4-1402(2)(c), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form); see also CJI-Civ. 9:18 (2014) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation)(2014) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use of the word ‘proximate’ when instructing

the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word ‘proximate’ tends to be confusing to the jury.”); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of “cause” and “proximate cause” that appeared in COLJI-Crim. (1983)).

3. + In 2020, the Committee updated the statutory citation in Comment 1 to account for the new instruction on careless driving – approaching or passing (stationary vehicle), *see* Instruction 42:06.7.

## + 42:17.3 INJURING VULNERABLE ROAD USER

The elements of the crime of injuring vulnerable road user are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. inflicted serious bodily injury to a vulnerable road user.
- [4. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of injuring vulnerable road user.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of injuring vulnerable road user.

### COMMENT

1. *See* § 42-4-1402.5(3)(a), C.R.S. 2020.
2. *See* Instruction F:332 (defining “serious bodily injury”); *see also* § 42-4-1402.5(1) (defining “vulnerable road user”).
3. + The Committee added this instruction in 2020.

## **+ 42:17.7 THROWING CIGARETTE ONTO HIGHWAY**

The elements of the crime of throwing cigarette onto highway are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. threw, dropped, or otherwise expelled,
4. a lighted cigarette, cigar, match, or other burning material,
5. from a motor vehicle upon any highway.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of throwing cigarette onto highway.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of throwing cigarette onto highway.

### COMMENT

1. *See* § 42-4-1406(1)(b), (5)(b)(I), C.R.S. 2020.
2. *See* Instruction F:171 (defining “highway”); Instruction F:239 (defining “motor vehicle”).
3. + The Committee added this instruction in 2020.

## 42:18 OPERATION WITHOUT INSURANCE

The elements of the crime of operation without insurance are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. operated a [motor vehicle] [low-power scooter],
  4. on a public highway of this state,
  5. without a complying policy or certificate of self-insurance in full force and effect as required by law.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of operation without insurance.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of operation without insurance.

### COMMENT

1. See § 42-4-1409(2), C.R.S. 2020.
2. See Instruction F:202 (defining "low-power scooter"); Instruction F:239 (defining "motor vehicle").
3. See Instruction 42:05 (driving after revocation prohibited), Comment 4 (discussing the meaning of the term "operate").

## **42:19.SP OPERATION WITHOUT INSURANCE – SPECIAL INSTRUCTION (FAILURE TO PRESENT)**

As to the charge of operation without insurance, testimony that an operator of a [motor vehicle] [low-power scooter] failed to immediately present evidence of a complying policy or certificate of self-insurance in full force and effect as required by law, when requested to do so by a peace officer, gives rise to a permissible inference that the defendant did not have such a policy or certificate.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

### COMMENT

1. See § 42-4-1409(5), C.R.S. 2020.
2. Although the statute speaks in terms of “prima facie evidence,” the concept should be explained to the jury as a permissible inference. See *People in re R.M.D.*, 829 P.2d 852 (Colo. 1992) (construing the “prima facie” proof provision of section 18-4-406 as establishing a permissible inference); see generally *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987) (unlike a mandatory presumption, the use of a permissible inference in a criminal case does not violate due process).

## 42:20 ELUDING OR ATTEMPTING TO ELUDE A POLICE OFFICER

The elements of the crime of eluding or attempting to elude a police officer are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. operated a motor vehicle, and
4. received from a police officer a visual or audible signal directing him [her] to bring the vehicle to a stop (such as a red light or a siren from a police officer driving a marked vehicle showing the same to be an official police, sheriff, or Colorado State Patrol car),
5. when the officer had reasonable grounds to believe that defendant had violated a state law or municipal ordinance, and
6. after receiving such signal, defendant
7. willfully,
8. increased his [her] speed or extinguished his [her] lights in an attempt to elude the police officer, or attempted in any other manner to elude the police officer, or did in fact elude the police officer.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of eluding or attempting to elude a police officer.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt,

you should find the defendant not guilty of eluding or attempting to elude a police officer.

#### COMMENT

1. See § 42-4-1413, C.R.S. 2020.
2. See Instruction F:195 (defining “willfully”); Instruction F:239 (defining “motor vehicle”).
3. See Instruction 42:05 (driving after revocation prohibited), Comment 4 (discussing the meaning of the term “operate”).
4. An unnumbered comment to COLJI-Crim. 42:20 (2008) stated as follows: “The ‘probable cause’ [sic] issue in this statute is a question for the court on a motion for judgment of acquittal. It is not a jury question.” However, the Committee is now of the view that the question of whether the officer had “reasonable grounds” to make a stop is, at least in part, subject to jury determination. Therefore, the court should identify any factual questions relevant to the “reasonable grounds” inquiry and draft a special instruction advising the jury that it can find that the officer had reasonable grounds to make the stop only if it first finds that the prosecution has proven, beyond a reasonable doubt, certain threshold facts (as identified by the court).
5. + See *People v. Sims*, 2020 COA 78, ¶ 40, 474 P.3d 189, 196 (“[T]he offenses listed in the subsections under section 42-2-206(1)(b), including eluding or attempting to elude under subsection (D), are lesser included offenses of aggravated DARP.”).
6. + In 2020, the Committee added Comment 5.

## **42:21 FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH**

The elements of the crime of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. drove a vehicle that was directly involved in an accident,
  4. resulting in injury to, serious bodily injury to, or the death of any person, and
  5. failed to do the following, without obstructing traffic more than was necessary: immediately stop his [her] vehicle at the scene of the accident, or as close to the accident scene as possible, and immediately return to the scene of the accident and remain at the scene of the accident until he [she] had fulfilled the legal requirements of giving notice, information, and aid.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death.

## COMMENT

1. See § 42-4-1601(1), C.R.S. 2020.
2. See Instruction F:182 (defining “injury”); Instruction F:332 (defining “serious bodily injury”); Instruction F:386 (defining “vehicle”).
3. See *People v. Manzo*, 144 P.3d 551, 559 (Colo. 2006) (“Leaving the Scene of an Accident with Serious Injury [in violation of section 42-4-1601] is a strict liability offense because the plain language of the statute does not require or imply a culpable mental state.”); Instruction G1:02 (strict liability crimes).

**42:22.SP FAILURE TO FULFILL DUTIES AFTER  
INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY,  
SERIOUS BODILY INJURY, OR DEATH – SPECIAL  
INSTRUCTION (LEGAL REQUIREMENTS OF GIVING  
NOTICE, INFORMATION, AND AID)**

The driver of any vehicle involved in an accident resulting in injury to, serious bodily injury to, or death of any person or damage to any vehicle which was driven or attended by any person shall give the driver's name, the driver's address, and the registration number of the vehicle he [she] was driving and shall upon request exhibit his [her] driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and where practical shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if the carrying is requested by the injured person.

A driver does not commit the crime of failure to fulfill duties after involvement in an accident involving injury or death if, after fulfilling the requirements set forth above, he [she] leaves the scene of the accident for the purpose of reporting the accident to a duly authorized police authority.

In the event that none of the persons specified above are in condition to receive the information to which they otherwise would be entitled and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements, insofar as possible on the driver's part to be performed, shall immediately report the accident to the nearest office of a duly authorized police authority and give that authority notice of the location of the accident, as well as all information specified above.

## COMMENT

1. See § 42-4-1601(1.5), C.R.S. 2020; § 42-4-1603(1), (2), C.R.S. 2020 (incorporating section 42-4-1606(1), C.R.S. 2020).
2. See *People v. Hernandez*, 250 P.3d 568, 575 (Colo. 2011) (“We hold that sections 42-4-1601(1) and -1603(1) require a driver of a vehicle involved in an accident to affirmatively identify himself as the driver before leaving the scene of the accident if that fact is not otherwise reasonably apparent from the circumstances.”).

**42:23.INT FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH – INTERROGATORY**

If you find the defendant not guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death, you should disregard this instruction and fill out the verdict form reflecting your not guilty verdict.

If, however, you find the defendant guilty of failure to fulfill duties after involvement in an accident involving injury, serious bodily injury, or death, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the accident result in [injury] [serious bodily injury] [death]?  
(Answer “Yes” or “No”)

The accident resulted in [injury] [serious bodily injury] [death] only if:

1. The accident resulted in [[injury] [serious bodily injury] to] [the death of] any person.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

COMMENT

1. See § 42-4-1601(2)(a)–(c), C.R.S. 2020.

2. See Instruction F:36 (defining “bodily injury”); Instruction F:332 (defining “serious bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form).
3. Use a separate copy of this interrogatory for each bracketed sentence enhancement factor that is at issue.

## **42:24 FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT RESULTING IN DAMAGE TO A DRIVEN OR ATTENDED VEHICLE**

The elements of the crime of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a vehicle, and
4. was directly involved in an accident resulting only in damage to a vehicle which was driven or attended by any person, and
5. failed to do the following, without obstructing traffic more than was necessary: immediately stop his [her] vehicle at the scene of the accident, or as close to the accident scene as possible, and immediately return to the scene of the accident and remain at the scene of the accident until he [she] had fulfilled the legal requirements of giving notice, information, and aid.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after involvement in an accident resulting in damage to a driven or attended vehicle.

## COMMENT

1. *See* § 42-4-1602(1), C.R.S. 2020.
2. *See* Instruction F:386 (defining “vehicle”).

**42:25.SP FAILURE TO FULFILL DUTIES AFTER  
INVOLVEMENT IN AN ACCIDENT RESULTING IN  
DAMAGE TO A DRIVEN OR ATTENDED VEHICLE –  
SPECIAL INSTRUCTION (LEGAL REQUIREMENTS OF  
GIVING NOTICE, INFORMATION, AND AID)**

When an accident occurs on the traveled portion, median, or ramp of a divided highway and each vehicle involved can be safely driven, each driver shall move such driver's vehicle as soon as practicable off the traveled portion, median, or ramp to a frontage road, the nearest suitable cross street, or other suitable location to fulfill the following requirements.

The driver of any vehicle involved in an accident resulting in damage to any vehicle which was driven or attended by any person shall give the driver's name, the driver's address, and the registration number of the vehicle he [she] was driving and shall upon request exhibit his [her] driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with and where practical shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if the carrying is requested by the injured person.

A driver does not commit the crime of failure to fulfill duties after involvement in an accident resulting in damage to any vehicle which was driven or attended by any person if, after fulfilling the requirements set forth above, he [she] leaves the scene of the accident for the purpose of reporting the accident to a duly authorized police authority.

In the event that none of the persons specified above are in condition to receive the information to which they otherwise would be entitled and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements, insofar as possible on the driver's part to be performed, shall immediately report the accident to the nearest office of a duly authorized police authority and give that authority notice of the location of the accident, as well as all information specified

above.

#### COMMENT

1. *See* § 42-4-1602, C.R.S. 2020 (referencing section 42-4-1603, which incorporates section 42-4-1606(1)).

## **42:26 FAILURE TO FULFILL DUTIES AFTER STRIKING AN UNATTENDED VEHICLE OR OTHER PROPERTY**

The elements of the crime of failure to fulfill duties after striking an unattended vehicle or other property are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a vehicle, and
4. collided with or was involved in an accident with any vehicle or other property which was unattended (other than a highway fixture or a traffic control device),
5. resulting in any damage to such vehicle or other property, and
6. [failed to do the following, without obstructing traffic more than was necessary: immediately stop, and immediately either locate and notify the operator or owner of such vehicle or other property of the accident or collision, the defendant's name and address, and the registration number of the vehicle he [she] was driving, or attach securely in a conspicuous place in or on such vehicle or other property a written notice giving the driver's name and address and the registration number of the vehicle he [she] was driving]  
  
[; or] [failed [also] to give immediate notice of the location of such accident to the nearest office of the duly authorized police authority, and provide such police authority with his [her] name, address, and the registration number of the vehicle he [she] was driving].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after striking an unattended vehicle or other property.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after striking an unattended vehicle or other property.

#### COMMENT

1. *See* § 42-4-1604, C.R.S. 2020 (incorporating section 42-4-1606, which references the informational requirements of section 42-4-1603(2), which, in turn, references the informational requirements of section 42-4-1603(1)).
2. *See* Instruction F:386 (defining “vehicle”).

## **42:27 FAILURE TO FULFILL DUTIES AFTER STRIKING A HIGHWAY FIXTURE OR TRAFFIC CONTROL DEVICE**

The elements of the crime of failure to fulfill duties after striking a highway fixture or traffic control device are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. drove a vehicle, and
4. was involved in an accident resulting only in damage to fixtures or traffic control devices upon or adjacent to a highway, and
5. failed to notify the road authority in charge of such property of the accident, and of his [her] name and address and of the registration number of the vehicle he [she] was driving; or failed to give immediate notice of the location of such accident to the nearest office of the duly authorized police authority, and provide such police authority with his [her] name, address, and the registration number of the vehicle he [she] was driving.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to fulfill duties after striking a highway fixture or traffic control device.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to fulfill duties after striking a highway fixture or traffic control device.

## COMMENT

1. *See* § 42-4-1605, C.R.S. 2020 (incorporating section 42-4-1606, which references the informational requirements of section 42-4-1603(2), which, in turn, references the informational requirements of section 42-4-1603(1)).
2. *See* Instruction F:386 (defining “vehicle”).
3. The terms “fixture” and “traffic control device” are not defined in section 42-1-102, C.R.S. 2020.

## **+ 42:28 FAILING TO REPORT VEHICLE IDENTIFIED AS STOLEN**

The elements of the crime of failing to report vehicle identified as stolen are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. submitted an inquiry to the motor vehicle verification system,  
and
4. the system identified a motor vehicle as stolen, and
5. the defendant failed to report the incident to the nearest law enforcement agency with jurisdiction within one business day.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failing to report vehicle identified as stolen.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failing to report vehicle identified as stolen.

### COMMENT

1. See § 42-4-2204, C.R.S. 2020.
2. See Instruction F:239 (defining "motor vehicle"); see also § 42-4-2203(1), C.R.S. 2020 (describing the motor vehicle verification system).

3. Section 42-4-2204(2) provides that “[a] person who, acting in good faith, recycles a motor vehicle or reports an incident to a law enforcement agency shall be immune from . . . criminal prosecution for such acts if made in reliance on the system.” However, the Committee has not drafted model affirmative defense instructions.

4. Section 42-4-2204(3) provides that (1) a first offense is a class 3 misdemeanor, (2) a second offense within five years is a class 2 misdemeanor, and (3) a third or subsequent offense within five years is a class 1 misdemeanor.

5. + The Committee added this instruction in 2020.

## **+ 42:29 IMPROPER USE OF EVENT DATA (RETRIEVE)**

The elements of the crime of improper use of event data (retrieve) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. retrieved event data that had been recorded on a motor vehicle's event data recorder, and
4. was not the owner of the motor vehicle, and
- [5. the owner of the motor vehicle or the owner's agent had not consented to the retrieval of the data within the last thirty days.]
- [5. the defendant was not a motor vehicle dealer or an automotive technician retrieving the data to diagnose, service, or repair the motor vehicle at the request of the owner or the owner's agent.]
- [5. the data was not subject to discovery pursuant to the rules of civil procedure in a claim arising out of a motor vehicle accident.]
- [5. a court or administrative agency with jurisdiction had not ordered the data to be retrieved.]
- [5. the event data recorder was not installed after the manufacturer or motor vehicle dealer sold the motor vehicle.]
- [5. the defendant was not a peace officer who retrieved the data pursuant to a court order as part of an investigation of a suspected violation of a law that had caused, or contributed to the cause of, an accident resulting in damage of property or injury to a person.]
- [6. and that the defendant's conduct was not legally authorized by

the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of event data (retrieve).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of event data (retrieve).

#### COMMENT

1. See § 42-4-2402(2), (5), C.R.S. 2020.
2. See Instruction F:239 (defining “motor vehicle”); see also § 42-4-2401(1), C.R.S. 2020 (defining “event data”); -2401(2) (defining “event data recorder”); -2401(3) (defining “owner”); -2401(4) (defining “owner’s agent”).
3. The bracketed alternatives in the fifth element derive from paragraphs (a) through (f) of subsection (2), which provide exceptions to liability. The court should only include exceptions if they arguably appear in evidence; if no exception is relevant, the court should omit the fifth element altogether.
4. Section 42-4-2402(4) provides that this crime shall not apply to data recorders which are used as part of a subscription service. However, the Committee has not drafted model affirmative defense instructions.
5. + The Committee added this instruction in 2020.

## **+ 42:30 IMPROPER USE OF EVENT DATA (RELEASE)**

The elements of the crime of improper use of event data (release) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. released event data from an event data recorder, and
- [4. the owner of the motor vehicle or the owner's agent had not consented to the release of the data within the last thirty days.]
- [4. the data was not subject to discovery pursuant to the rules of civil procedure in a claim arising out of a motor vehicle accident.]
- [4. the data was not released pursuant to a court order as part of an investigation of a suspected violation of a law that had caused, or contributed to the cause of, an accident resulting in appreciable damage of property or injury to a person.]
- [4. the data was not released to a motor vehicle safety and medical research entity in order to advance motor vehicle safety, security, or traffic management.]
- [4. the data was not released to a data processor solely for the purposes permitted by law.]
- [4. the identity of the owner or driver was disclosed.]
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper use of event data (release).

After considering all the evidence, if you decide the prosecution has

failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper use of event data (release).

#### COMMENT

1. See § 42-4-2402(3), (5), C.R.S. 2020.
2. See Instruction F:239 (defining “motor vehicle”); *see also* § 42-4-2401(1), C.R.S. 2020 (defining “event data”); -2401(2) (defining “event data recorder”); -2401(3) (defining “owner”); -2401(4) (defining “owner’s agent”).
3. The bracketed alternatives in the fourth element derive from subparagraphs (I) through (V) of subsection (3)(b), which provide exceptions to liability. The court should only include exceptions if they arguably appear in evidence; if no exception is relevant, the court should omit the fourth element altogether.
4. Section 42-4-2402(4) provides that this crime shall not apply to data recorders which are used as part of a subscription service. However, the Committee has not drafted model affirmative defense instructions.
5. + The Committee added this instruction in 2020.

## **+ 42:31 TAMPERING WITH A MOTOR VEHICLE**

The elements of the crime of tampering with a motor vehicle are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent, and
4. without the knowledge and consent of the owner of a motor vehicle,
- [5. tightened or loosened any bolt, bracket, wire, screw, or other fastening contained in, contained on, or forming a part of such motor vehicle.]
- [5. shifted or changed the gears or brakes of such motor vehicle.]
- [5. scratched, marred, marked, or otherwise damaged such motor vehicle or any part thereof.]
- [5. added any substance or liquid to the gas tank, carburetor, oil, radiator, or any other part of such motor vehicle.]
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a motor vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a motor vehicle.

## COMMENT

1. See § 42-5-103(1)(a)-(d), C.R.S. 2020.
2. See Instruction F:185 (defining “with intent”); see also § 42-5-101(5), C.R.S. 2020 (defining “motor vehicle”); -101(7) (defining “owner”).
3. The statute applies to any person who performs any of the specified acts “to a motor vehicle or to any part, equipment, attachment, accessory, or appurtenance contained in or forming a part thereof.” § 42-5-103(1). But subsections (1)(a), (1)(c), and (1)(d) – translated here into the fifth element’s first, third, and fourth bracketed alternatives – already make clear that they apply to any part of a motor vehicle, while subsection (1)(b) – the second bracketed alternative – is specific to gears or brakes. Therefore, the Committee has not included this language in its instruction.
4. + The Committee added this instruction in 2020.

## **+ 42:32 TAMPERING WITH A MOTOR VEHICLE (ASSISTING)**

The elements of the crime of tampering with a motor vehicle (assisting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent, and
4. without the knowledge and consent of the owner of a motor vehicle,
5. aided, abetted, or assisted in the commission or attempted commission of tampering with a motor vehicle.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of tampering with a motor vehicle (assisting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of tampering with a motor vehicle (assisting).

### COMMENT

1. See § 42-5-103(1)(e), C.R.S. 2020.
2. See Instruction F:185 (defining "with intent"); Instruction G2:01 (criminal attempt); see also § 42-5-101(5), C.R.S. 2020 (defining "motor vehicle").

3. If the defendant is not separately charged with tampering with a motor vehicle, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 42:31. Place that elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the jury with instructions defining the relevant terms and theories of criminal liability for tampering with a motor vehicle.
4. + The Committee added this instruction in 2020.

## **+ 42:33.INT TAMPERING WITH A MOTOR VEHICLE – INTERROGATORY (VALUE)**

If you find the defendant not guilty of tampering with a motor vehicle, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of tampering with a motor vehicle, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict questions on the verdict form. Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other questions.

1. Was the damage one thousand dollars or more but less than twenty thousand dollars? (Answer “Yes” or “No”)
2. Was the damage twenty thousand dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the value of the damage beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 42-5-103(2), C.R.S. 2020.
2. *See, e.g.*, Instruction E:28 (special verdict form).

3. The court should use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one question. *See* Instruction 4-4:06.INT, Comment 4.
4. + The Committee added this instruction in 2020.

## **+ 42:34.INT TAMPERING WITH A MOTOR VEHICLE – INTERROGATORY (BODILY INJURY)**

If you find the defendant not guilty of tampering with a motor vehicle, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of tampering with a motor vehicle, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict question:

Did the tampering with a motor vehicle result in injury? (Answer “Yes” or “No”)

The tampering with a motor vehicle resulted in injury only if:

1. the tampering caused bodily injury to a person.

The prosecution has the burden to prove the numbered condition beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. *See* § 42-5-103(2)(c), C.R.S. 2020.
2. *See* Instruction F:36 (defining “bodily injury”); *see, e.g.*, Instruction E:28 (special verdict form); *see also* CJI-Civ. 9:18 (2020) (defining “cause”); CJI-Civ. Ch. 9, § B (Causation) (2020) (“The [Colorado Supreme Court Committee on Civil Jury Instructions] has intentionally eliminated the use

of the word 'proximate' when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word 'proximate' tends to be confusing to the jury."); *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002) (discussing the significance of the different definitions of "cause" and "proximate cause" that appeared in COLJI-Crim. (1983)).

3. + The Committee added this instruction in 2020.

## **+ 42:35 THEFT OF MOTOR VEHICLE PARTS**

The elements of the crime of theft of motor vehicle parts are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. removed, detached, or took from a motor vehicle which was the property of another,
5. any part, equipment, attachment, accessory, or appurtenance contained therein, contained thereon, or forming a part thereof.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of motor vehicle parts.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of motor vehicle parts.

### COMMENT

1. *See* § 42-5-104(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”); *see also* § 42-5-101(5), C.R.S. 2020 (defining “motor vehicle”).
3. + The Committee added this instruction in 2020.

## **+ 42:36 THEFT OF MOTOR VEHICLE PARTS (ASSISTING)**

The elements of the crime of theft of motor vehicle parts (assisting) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. with intent,
4. aided, abetted, or assisted in the commission of theft of motor vehicle parts.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of theft of motor vehicle parts (assisting).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of theft of motor vehicle parts (assisting).

### COMMENT

1. *See* § 42-5-104(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining “with intent”).
3. If the defendant is not separately charged with theft of motor vehicle parts, give the jury the elemental instruction for the offense without the two concluding paragraphs that explain the burden of proof. *See* Instruction 42:35. Place that elemental instruction immediately after the above instruction (or as close to it as practicable). In addition, provide the

jury with instructions defining the relevant terms and theories of criminal liability for theft of motor vehicle parts.

4. + The Committee added this instruction in 2020.

## **+ 42:37.INT THEFT OF MOTOR VEHICLE PARTS – INTERROGATORY (VALUE)**

If you find the defendant not guilty of theft of motor vehicle parts, you should disregard this instruction and sign the verdict form to indicate your not guilty verdict.

If, however, you find the defendant guilty of theft of motor vehicle parts, you should sign the verdict form to indicate your finding of guilt, and answer the following verdict questions on the verdict form. Although you may answer “No” to more than one question, you may not answer “Yes” to more than one question. Further, if you answer “Yes” to any question, you should not answer the other questions.

1. Was the value of the thing involved one thousand dollars or more but less than twenty thousand dollars? (Answer “Yes” or “No”)
2. Was the value of the thing involved twenty thousand dollars or more? (Answer “Yes” or “No”)

The prosecution has the burden to prove the value of the thing involved beyond a reasonable doubt.

After considering all the evidence, if you decide the prosecution has met this burden, you should mark “Yes” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you should mark “No” in the appropriate place, and have the foreperson sign the designated line of the verdict form.

### COMMENT

1. See § 42-5-104(2), C.R.S. 2020.
2. See, e.g., Instruction E:28 (special verdict form).

3. The court should use a special verdict form with a corresponding format that repeats the admonition that the jury cannot answer “Yes” to more than one question. *See* Instruction 4-4:06.INT, Comment 4.
4. Section 42-5-104(3) provides: “When a person commits theft of motor vehicle parts two times or more within a period of six months without having been placed in jeopardy for the prior offense or offenses and the aggregate value of the things involved is one thousand dollars or more but less than twenty thousand dollars, it is a class 5 felony; however, if the aggregate value of the things involved is twenty thousand dollars or more, it is a class 4 felony.” The Committee has not drafted model interrogatories for this subsection.
5. Section 42-5-104(4) provides that “[a]ny person who steals a license plate shall be in violation of paragraph (a) of subsection (2) of this section.” In turn, subsection (2)(a) creates the lowest possible penalty classification for this crime (class 1 misdemeanor). Therefore, if the defendant has been charged with stealing a license plate, the court should not give this interrogatory.
6. + The Committee added this instruction in 2020.

## + 42:38 CERTIFICATE OF TITLE VIOLATION

The elements of the crime of certificate of title violation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. upon the sale or transfer of a motor or off-highway vehicle for which a certificate of title had been issued or filed,
- [4. was the person in whose name the certificate of title was registered, and
5. was not a dealer, and
6. did not execute a formal transfer of the vehicle described in the certificate.]
- [4. was the person in whose name the certificate of title was registered, and
5. the defendant, or the defendant's agent or attorney, did not affirm the sale or transfer, or the affirmation was not accompanied by a written declaration that the statement was made under the penalties of perjury in the second degree.]
- [4. was the purchaser or transferee, and
5. did not present the certificate, together with an application for a new certificate of title, to the director of the Department of Revenue or one of the authorized agents within sixty days, accompanied by the fee required by law to be paid for the filing of a new certificate of title.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has

proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of certificate of title violation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of certificate of title violation.

#### COMMENT

1. *See* § 42-6-110(1), (2), C.R.S. 2020.
2. *See also* § 42-6-102(1.5), C.R.S. 2020 (defining “authorized agent”); -102(2) (defining “dealer”); -102(10) (defining “motor vehicle”); -102(11.5) (defining “off-highway vehicle”); -102(13) (defining “person”).
3. + The Committee added this instruction in 2020.

## **+ 42:39 SALVAGE TITLE (REMOVE OR ALTER)**

The elements of the crime of salvage title (remove or alter) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. removed or altered a salvage brand.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of salvage title (remove or alter).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of salvage title (remove or alter).

### COMMENT

1. *See* § 42-6-136.5(2)(c)(I)(A), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”); *see also* § 42-6-102(1.7), C.R.S. 2020 (defining “brand”); -102(17) (defining “salvage vehicle”).
3. The statute exempts from liability those who “remove or alter a salvage brand if necessary to legitimately repair a motor vehicle. To qualify for this exception, the person must provide evidence of the repair to the investigating law enforcement authority. The evidence must include pre-repair and post-repair photographs of the affected motor vehicle part and the salvage brand and a signed affidavit describing the repairs. Upon repair, or subsequent repair, the person or owner must restamp the

vehicle.” § 42-6-136.5(2)(c)(II). However, the Committee has not drafted model affirmative defense instructions.

4. + The Committee added this instruction in 2020.

## **+ 42:40 SALVAGE TITLE (NOT RETITLING)**

The elements of the crime of salvage title (not retitling) are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. possessed a motor vehicle without retitling the vehicle with a salvage brand,
4. for forty-five days,
5. after learning that the motor vehicle's salvage brand may have been removed or altered.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of salvage title (not retitling).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of salvage title (not retitling).

### COMMENT

1. *See* § 42-6-136.5(2)(c)(I)(B), C.R.S. 2020.
2. *See also* § 42-6-102(1.7), C.R.S. 2020 (defining "brand"); -102(10) (defining "motor vehicle"); -102(17) (defining "salvage vehicle").
3. The statute exempts from liability those who "remove or alter a salvage brand if necessary to legitimately repair a motor vehicle. To qualify for this exception, the person must provide evidence of the repair to the investigating law enforcement authority. The evidence must include

pre-repair and post-repair photographs of the affected motor vehicle part and the salvage brand and a signed affidavit describing the repairs. Upon repair, or subsequent repair, the person or owner must restamp the vehicle.” § 42-6-136.5(2)(c)(II). However, the Committee has not drafted model affirmative defense instructions.

4. + The Committee added this instruction in 2020.

## **+ 42:41 UNLAWFUL SALE, TRANSFER, OR DISPOSAL OF VEHICLE**

The elements of the crime of unlawful sale, transfer, or disposal of vehicle are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. sold, transferred, or in any manner disposed of a motor or off-highway vehicle,
4. without complying with [insert relevant statute from Part 1 of Title 42, Article 6, C.R.S.].
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of salvage title (not retitling).

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of salvage title (not retitling).

### COMMENT

1. See § 42-6-142(1), C.R.S. 2020.
2. See also § 42-6-102(10), C.R.S. 2020 (defining "motor vehicle"); - 102(11.5) (defining "off-highway vehicle").
3. Regarding the fourth element, the statute provides that a person "shall not sell, transfer, or in any manner dispose of a motor or off-highway vehicle in this state without complying with this part 1." Therefore, in

addition to inserting the relevant statute from Part 1, the court should provide an instruction explaining that statute.

4. + The Committee added this instruction in 2020.

## + 42:42 ALTERING OR USING ALTERED CERTIFICATE

The elements of the crime of altering or using altered certificate are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
- [3. caused to be altered or forged,
- [4. a certificate of title issued by the executive director of the Department of Revenue.]
- [4. a written transfer of a title.]
- [4. a notation placed on a title by the executive director of the Department of Revenue, or under the director's authority, concerning a mortgage or lien.]]
- [3. used or attempted to use,
- [4. a certificate of title issued by the executive director of the Department of Revenue,]
- [4. a written transfer of a title,]
- [4. a notation placed on a title by the executive director of the Department of Revenue, or under the director's authority, concerning a mortgage or lien,]
5. to transfer a vehicle,
6. knowing that the [certificate] [written transfer] [notation] was altered or forged.]
- [\_. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find

the defendant guilty of altering or using altered certificate.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of altering or using altered certificate.

#### COMMENT

1. *See* § 42-6-143, C.R.S. 2020.
2. *See also* § 42-6-102(7), C.R.S. 2020 (defining “lien”); -102(9) (defining “mortgage”); -102(23) (defining “vehicle”).
3. + The Committee added this instruction in 2020.

## **+ 42:43 UNLAWFUL REPOSSESSION OF VEHICLE**

The elements of the crime of unlawful repossession of vehicle are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a mortgagee, lienholder, or the mortgagee's or lienholder's assignee or the agent of either, and
4. repossessed a motor or off-highway vehicle because of default in the terms of a secured debt, and
5. did not notify, either orally or in writing,
  - [6. the police department, town marshal, or other local law enforcement agency of the city or town where the repossession took place,]
  - [6. the sheriff of the county where the repossession took place,]
7. of the repossession, the name of the owner, the name of the reposessor, and the name of the mortgagee, lienholder, or assignee,
8. within one hour after the repossession occurred.
- [9. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unlawful repossession of vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unlawful repossession of vehicle.

## COMMENT

1. *See* § 42-6-146(1), (2), C.R.S. 2020.
2. *See also* § 42-6-102(1.5), C.R.S. 2020 (defining “authorized agent”); -102(10) (defining “motor vehicle”); -102(11.5) (defining “off-highway vehicle”); § 42-6-146(4) (defining “repossessor” as “the party who physically takes possession of the motor or off-highway vehicle and drives, tows, or transports the vehicle for delivery to the mortgagee, lienholder, or assignee or the agent of the mortgagee, lienholder, or assignee”).
3. For the sixth element, the court should use the first bracketed alternative if the repossession took place in an incorporated city or town; it should use the second alternative if the repossession took place in the unincorporated area of a county. *See* § 42-6-146(1).
4. + The Committee added this instruction in 2020.

## **+ 42:44 DRIVING DURING SUSPENSION**

The elements of the crime of driving during suspension are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was a person whose license or other privilege to operate a motor vehicle had been suspended, cancelled, or revoked, and
4. restoration thereof or issuance of a new license was contingent upon the furnishing of proof of financial responsibility for the future, and
5. during such suspension or revocation, or in the absence of proper authorization from the executive director of the Department of Revenue,
6. the defendant drove any motor vehicle upon any highway in Colorado[, and was not permitted to do so by law].
- [7. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of driving during suspension.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of driving during suspension.

### COMMENT

1. See § 42-7-422, C.R.S. 2020.

2. See also § 42-7-103(7), C.R.S. 2020 (defining “license”); -103(8) (defining “motor vehicle”); -102(13) (defining “person”); -102(14) (defining “proof of financial responsibility for the future”).
3. Regarding the bracketed language in the sixth element (“and was not permitted to do so by law”), the statute applies to any person who meets the other elements and who “drives any motor vehicle upon any highway in Colorado *except as permitted under this article.*” § 42-7-422 (emphasis added). Therefore, if there is any evidence suggesting that the defendant was driving based on permission granted in Title 42, Article 7, the court should craft a supplemental instruction explaining the relevant law. Conversely, if there is no suggestion that the defendant’s driving was permitted under Article 7, the court should omit the bracketed language.
4. The statute provides for a mandatory jail sentence, “except in a case where the defendant has established that the defendant had to drive the motor vehicle in violation of this section because of an emergency.” § 42-7-422. The Committee has not drafted model instructions.
5. + The Committee added this instruction in 2020.

## + 42:45 UNAUTHORIZED DISCLOSURE OF INSURANCE INFORMATION

The elements of the crime of unauthorized disclosure of insurance information are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. disclosed information from the motorist insurance identification database,
5. for a purpose or to a person other than those authorized by law.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of unauthorized disclosure of insurance information.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of unauthorized disclosure of insurance information.

### COMMENT

1. See § 42-7-606(1), (2), C.R.S. 2020.
2. See Instruction F:195 (defining “knowingly”); see also § 42-7-604(5), C.R.S. 2020 (describing the motorist insurance identification database).
3. Regarding the “authorized by law” language in the fifth element, section 42-7-606(2) provides that insurance information may not be

disclosed “for a purpose or to a person other than those authorized in this section.” In turn, subsection (1) provides that such information may not be disclosed “except as follows”: (a) where a government agency requests the information in certain circumstances; or (b) where particular individuals request to learn “whether a motor vehicle has the required insurance coverage.” Therefore, to assist the jury in finding whether the alleged disclosure was “authorized by law,” the court may need to craft a supplemental instruction detailing any relevant excepting language that appears in subsection (1).

4. + The Committee added this instruction in 2020.

## **+ 42:46 INSTALLING OBJECT IN LIEU OF AIR BAG**

The elements of the crime of installing object in lieu of air bag are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an employee of a motor vehicle repair facility, and
4. installed or reinstalled, as part of a vehicle inflatable restraint system,
5. any object in lieu of an air bag that was designed in accordance with federal safety regulations for the make, model, and year of the vehicle.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of installing object in lieu of air bag.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of installing object in lieu of air bag.

### COMMENT

1. See §§ 42-9-111(1)(j), 42-9-112(4), C.R.S. 2020.
2. See also § 42-9-102(1.6), C.R.S. 2020 (defining "inflatable restraint system"); -102(2) (defining "motor vehicle"); -102(3) (defining "motor vehicle repair facility").

3. If necessary, the court should give a supplemental instruction explaining the relevant federal safety regulations.
4. + The Committee added this instruction in 2020.

## **+ 42:47 IMPROPER RELEASE OF IMPOUNDED VEHICLE**

The elements of the crime of improper release of impounded vehicle are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. was an owner, operator, or employee of a garage or service station, or an appointed custodian, and
4. released a vehicle impounded or ordered held by an officer of the Colorado state patrol,
5. without a release from an officer of the Colorado state patrol or a bona fide court order.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of improper release of impounded vehicle.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of improper release of impounded vehicle.

### COMMENT

1. See § 42-13-105, C.R.S. 2020.
2. + The Committee added this instruction in 2020.

## **+ 42:48 FAILURE TO GIVE NOTICE OF SPILL**

The elements of the crime of failure to give notice of spill are:

1. That the defendant,
  2. in the State of Colorado, at or about the date and place charged,
  3. was the driver of a motor vehicle transporting hazardous materials as cargo, and
  4. the vehicle was involved in a hazardous materials spill, whether intentional or unintentional, and
  5. the defendant failed to give immediate notice of the location of such spill and such other information as necessary to the nearest law enforcement agency.
- [6. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of failure to give notice of spill.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of failure to give notice of spill.

### COMMENT

1. *See* § 42-20-113(3), (4), C.R.S. 2020.
2. *See also* § 42-20-103(3), C.R.S. 2020 (defining “hazardous materials”); - 103(4) (defining “motor vehicle”).
3. The Committee has included the “whether intentional or unintentional” language in the fourth element because it appears in the

statute. *See* § 42-20-113(3). The Committee notes, however, that this language is arguably superfluous, as the prosecution will never need to introduce evidence to prove it. Rather, this language presumably clarifies that a defendant may not claim that a spill was unintentional as an affirmative defense.

4. + The Committee added this instruction in 2020.

## + 42:49 TRANSPORTING HAZARDOUS MATERIALS WITHOUT PERMIT

The elements of the crime of transporting hazardous materials without permit are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. intentionally,
4. transported hazardous materials without a permit in violation of law.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of transporting hazardous materials without permit.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of transporting hazardous materials without permit.

### COMMENT

1. *See* § 42-20-204(1), C.R.S. 2020.
2. *See* Instruction F:185 (defining “intentionally”); *see also* § 42-20-103(3), C.R.S. 2020 (defining “hazardous materials”).
3. *See* Instruction 42:50.SP (prior violation – special instruction).

4. This crime applies to anyone who transported materials without a permit “in violation of any of the provisions of section 42-20-201,” C.R.S. 2020. In turn, that statute provides in relevant part as follows:

Except as otherwise provided in this part 2, no transportation of hazardous materials by motor vehicle which requires placarding under 49 CFR part 172 or 173 shall take place in, to, from, or through this state until the department of transportation issues a permit, in accordance with the provisions of this part 2, authorizing the applicant to operate or move upon the public roads of this state a motor vehicle or a combination of motor vehicles which carries hazardous materials.

§ 42-20-201. Therefore, the court should craft a supplemental instruction explaining the permit requirement at issue.

5. + The Committee added this instruction in 2020.

**+ 42:50.SP TRANSPORTING HAZARDOUS MATERIALS  
WITHOUT PERMIT – SPECIAL INSTRUCTION (PRIOR  
VIOLATION)**

If the defendant previously acknowledged guilt or was convicted of transporting hazardous materials without a permit, and the defendant subsequently transported hazardous materials without a permit, a permissible inference is created that such subsequent transportation without a permit was intentional.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COMMENT

1. *See* § 42-20-204(1), C.R.S. 2020.
2. + The Committee added this instruction in 2020.

## + 42:51 TRIP PERMIT VIOLATION

The elements of the crime of trip permit violation are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly,
4. violated any of the terms and conditions of an annual or single trip hazardous materials transportation permit.
- [5. and that the defendant's conduct was not legally authorized by the affirmative defense[s] in Instruction[s] \_\_\_\_.]

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of trip permit violation.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of trip permit violation.

### COMMENT

1. *See* § 42-20-204(3), C.R.S. 2020.
2. *See* Instruction F:195 (defining “knowingly”); *see also* § 42-20-202, C.R.S. 2020 (discussing annual and single trip permits).
3. + The Committee added this instruction in 2020.