

**2804 CONSPIRACY: INDIRECT PROOF**

There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you, the jury, find facts from the evidence.

A conspiracy may be, and often must be, proved by circumstantial evidence. Inferences arising from surrounding facts and circumstances are sufficient to prove a conspiracy. It is not necessary that the plaintiffs prove that there was an express agreement. Any conformance by a defendant to an agreed or contemplated pattern of joint conduct will warrant an inference of conspiracy.

You may consider the business behavior of the defendants in determining whether one or more of them engaged in a conspiracy, since the existence of a conspiracy may be inferred from such behavior.

Whether an unlawful conspiracy exists is to be proved by what the parties did, not necessarily by what they said. Conspiracy may be found in or inferred from a course of dealings or other circumstances, as well as through an exchange of words.

If you find that any defendant had a unity of purpose or common design and understanding or a meeting of the minds as to an unlawful arrangement with any of the defendants or with other persons, then you may find that a conspiracy has been established.

**COMMENT**

This instruction and comment were approved in 1980. The instruction was revised in 1991. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

The initial portion of this instruction is taken from 2 Devitt and Blackman, Federal Jury Practice and Instructions, 3d § 72.02 at 600. That a conspiracy may be proved from circumstantial evidence is supported by these authorities: 16N Von Kalinowski, Business Organizations-Antitrust Laws and Trade Regulations, § 112.05(4) at 112-17; Pennington v. United Mine Workers of America, 325 F.2d 804, 811 (6th Cir. 1963); Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537,540-41 (1954).

Express agreements need not be proved. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969). Conspiracy may be inferred from conformance to an agreed to contemplated pattern of conduct. United States v. Twentieth Century Fox Film Corp., 137 F. Supp. 78 (S.D. Cal. 1955). Conspiracy may be inferred from business behavior. Norfolk Monument Co., *supra*.

Conspiracy is to be shown by what the parties did, not by what they said, and the jury may conclude that a conspiracy was established if they find the conspirators had a unity of purpose or common design and understanding or meeting of minds in an unlawful arrangement. American Tobacco Co. v. United States, 328 U.S. 781 (1946).