

## **Report of the Criminal Law Section Council of the Iowa State Bar Association**

To: Criminal Code Reorganization Committee  
Foundational Provisions Subcommittee

From: Theresa Wilson, Council Chair

Date: August 28, 2009

The Criminal Law Section Council of the Iowa State Bar Association is a 13-member board comprised of government attorneys and private attorneys who regularly practice in the area of criminal law. The Council has reviewed the final proposals of the Foundational Provisions Subcommittee regarding: Actus Reus and Mens Rea; Attempt, Solicitation and Conspiracy; Intoxication and Insanity; and Mistake and Liability for the Acts of Others. The Council appreciates this opportunity to provide comments regarding the final reports.

It is the consensus of the Council that the changes recommended in the Foundational Provisions Subcommittee's reports should not be adopted. Rather, current Iowa statutory and case law provisions regarding the concepts addressed in the final reports should be retained.

The foundations of Iowa criminal law – intent, inchoate offenses, defenses, etc – are generally well understood by the criminal bar and have proved to be very workable. The Council sees no reason to exchange the established element of “intent,” for example, with the new element of “purposefully.” The Council has deep concerns that adoption of substantial portions of the Model Penal Code and its different terminology will create significant confusion in the practice of criminal law in Iowa. While we agree that the Iowa Code could be better organized to make relevant information easier to find and that certain offenses may need to be modified, we see no need for a complete overhaul of Iowa's criminal code.

Although the Council strongly encourages the Committee to keep the current foundations of Iowa criminal law, we also wish to suggest changes to the final reports should the Committee choose to go forward with them. The changes recommended by the Council are attached to this report.

For the most part the suggested changes are designed to make the provisions easier to understand. This includes items where the actual wording of the corollary provision of the Model Penal Code is clearer. The most glaring problem noticed by the Council was the definition of “knowing.” The definition is not comprehensible due to typos, repetition, and lack of punctuation. A few grammatical changes will resolve this problem.

There are a few instances, however, where the Council has substantive concerns with the proposals. The provision for “uncommunicated solicitation” is overbroad and unworkable. As written, it would appear to make mere thoughts illegal. The provision regarding the legal accountability for other persons would appear to hold parents legally

accountable for the criminal conduct of their children, regardless of the parent's culpability.

The final proposals create certain affirmative defenses (renunciation, termination) that do not exist under current law. Instead, these are arguments a defendant can make to the trier of fact without having to formally notice them to the State. Current, similar defenses under Iowa law also provide fewer restrictions upon their use than do the proposals.

The proposal on joint criminal conduct should take into account the Iowa Supreme Court's 2007 decision in State v. Smith, which expressed a degree of displeasure with how joint criminal conduct had been instructed and defined.

Finally, the Council strongly encourages the use of plain language whenever possible. A criminal statute should be easy for the public to understand. Some of the terms in the final proposals lack any definition. Terms such as "attendant circumstances," "innocent," and "irresponsible" should be specifically defined. "Irresponsible," for example, has one meaning in criminal law and another meaning entirely to lay persons.

The Council understands the task assigned to the Committee and Subcommittee is a long and laborious one. We appreciate the efforts that have gone into both groups' work. The Council stands prepared to assist the Committee and Subcommittee in their work, if desired, and to answer any questions the Committee or Subcommittee may have for us. Again, thank you for the opportunity to provide input into this process.

## Recommendations of the ISBA Criminal Law Section Council

Notes: Recommended additions are in **bold** and recommended deletions are ~~struck through~~. Explanatory notes and comments are in *italics*.

### MEMORANDUM

TO: Foundational Provision  
Subcommittee Members  
RE: Final Proposals re:  
Actus Reus and Mens Rea

FROM: JimTomkovicz, Chair

DATE: October 25, 2008

The following is a summary of the final proposals of the Foundational Provision Subcommittee regarding Actus Reus and Mens Rea.

#### ACT REQUIREMENT

(1) A person is not guilty of an offense unless his or her liability is based on conduct that includes a voluntary act or an omission to perform an act of which he or she is physically capable.

(2) A voluntary act is a conscious ~~or habitual~~ bodily movement that is the product of the effort or the determination of the person.

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by an act unless (a) the omission is expressly made sufficient by the law defining the offense; or (b) the person has a legal duty to perform the omitted act.

(4) Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his or her control thereof for a sufficient period to have been able to terminate his or her possession.

*The Model Penal Code specifies that voluntary acts do not include acts resulting from reflexes or acts performed while the person is asleep, unconscious, or under hypnosis. Does the committee wish to include these provisions for clarity? MPC 2.01. We are also recommending the deletion of "habitual" from, section 2. It is not clear that an habitual act would necessarily be a conscious act and may be more akin to a reflex.*

#### CULPABILITY REQUIREMENT

(1) Minimum Requirements of Culpability: Except when the legislature has enacted an offense that does not require proof of culpability for a material element, a person is not guilty of an offense unless he or she acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense."

(2) Kinds of Culpability Defined:

(a) Purposely: A person acts purposely with respect to the nature of his or her conduct or a result of his or her conduct when it is his or her conscious object to engage in conduct of that nature or to cause such a result. ~~and a~~ A person acts purposely with respect to an attendant circumstance when he or she is aware of the existence of that circumstance, unless he or she believes or hopes that it does not exist. ~~A conditional purpose does satisfy the requirement of acting purposely unless the condition negates the culpability ordinarily demonstrated by acting purposely.~~

*The Council recommends staying with the current element of "intent."*

*"Attendant circumstances" requires a definition.*

*While the Model Penal Code does contain a provision on conditional purposes, the language in the MPC and in this proposal is unclear as to what is intended. MPC 2.02(6). Does it refer to justification, where the act is done purposely but we choose to negate the culpability? We recommend the language regarding conditional purposes be either deleted or clarified.*

(b) Knowingly: A person acts knowingly with respect to the nature of his or her conduct ~~if he or she is aware~~ or an attendant circumstance if he or she is aware ~~or aware~~ of a high probability that his or her conduct is of that nature or that the circumstance exists. ~~A~~ ~~and a~~ person acts knowingly with regard to a result of his or her conduct when he or she is aware that it is practically certain that his or her conduct will cause such result.

*As currently written this definition is an incomprehensible run-on sentence with typos and repetitions. The recommended changes are grammatical in nature.*

(c) Recklessly: A person acts recklessly with respect to a material element of an offense when he or she consciously disregards a substantial and **un**justifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him or her, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.<sup>22</sup>

*The risk involved must be unjustifiable. MPC 2.02(2)(c). In addition, the language regarding "gross deviation from the standard" appears to be vague. How do we determine the standard?*

(4) **(d) Negligently:** A person acts negligently with respect to a material element of an offense when he or she should be aware of a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his **or her** conduct and the circumstances known to him or her, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) **Culpability Required Unless Otherwise Required Provided:** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) **Higher Levels of Culpability Than Required:** A person who acts with a higher level of culpability than required for any material element of an offense satisfies the culpability requirement for that element.

*Do we need a definition of "higher?" The Model Penal Code specifies when one level of culpability will suffice for a different level of culpability. MPC 2.02(5). We understand what is meant by this provision, but wonder whether further specification would be helpful.*

(5) **Culpability as to Illegality of Conduct:** Unless otherwise provided **by law**, it is not necessary to prove that a person acted with any culpability as to whether his or her conduct constitutes an offense or as to the existence of an offense, meaning of an offense, or application of an offense to his or her conduct.

## Recommendations of the ISBA Criminal Law Section Council

Notes: Recommended additions are in **bold** and recommended deletions are ~~struck through~~. Explanatory notes and comments are in *italics*.

### MEMORANDUM

TO: Foundational Provision Subcommittee Members

FROM: Jim Tomkovicz, Chair

RE: Final Proposals regarding Attempt, Solicitation, and Conspiracy

DATE: October 25, 2008

#### ATTEMPT

(1) CRIMINAL LIABILITY FOR ATTEMPT: Unless otherwise provided, an attempt to commit a crime is a crime.

(2) MINIMUM CONDUCT REQUIRED FOR ATTEMPT: To be guilty of an attempt, a person must, ~~at a minimum,~~ do or omit to do anything, **where the act or omission** which is a substantial step toward commission of a crime and ~~such act or omission must~~ strongly corroborates the person's criminal purpose.

(3) CULPABILITY REQUIRED FOR ATTEMPT: To be guilty of an attempt, **a person must act with the culpability otherwise required for the commission of the crime, and:**

(a) Conduct: With regard to conduct, a person must purposely do or omit to do anything which, **under the circumstances as he or she believes them to be,** is a substantial step toward commission of the crime ~~with the purpose of doing or omitting to do acts sufficient for completion of the crime.~~

(b) Results: With regard to any result element of the completed crime, a person must have the purpose to cause, or the belief he or she will cause, such result element **without any further conduct on her or her part.**

(c) Circumstances: ~~With regard to any circumstance element of the completed crime, a person must have the culpability, if any, that is required for commission of the completed crime.~~

*We recommend adoption of Model Penal Code section 5.01(1) in full if the Committee chooses to go forward with this proposal. It represents a clearer explanation of an attempt.*

(4) IMPOSSIBILITY: Impossibility is not a defense to attempt. If the nonexistence of a fact or circumstance makes it impossible for a person to complete a crime, the person can be held liable for an attempt to commit the crime if he or she believes that the fact or circumstance exists.

(5) RENUNCIATION DEFENSE: When a person's **conduct would otherwise constitute an attempt** ~~has not completed the conduct necessary to commit a crime~~, it is an affirmative defense to a prosecution for attempt that he or she abandoned the effort to ~~complete~~ **commit** the crime. ~~and when~~ **When** a person has completed the conduct necessary to commit a crime, but has an opportunity to prevent completion of the crime, it is a defense that he or she prevented completion of the crime. For such abandonment or prevention to constitute a defense, the circumstances must demonstrate a voluntary and complete renunciation of the person's criminal purpose. The establishment of a renunciation defense does not affect the liability of an accomplice who did not join in the abandonment or prevention of the offense.

A renunciation is not voluntary and complete if it is motivated, in whole or in part, (a) by a **recent** belief that circumstances exist which increase the possibility that the person or another person will be detected or apprehended or which make completion of the crime more difficult or (b) by a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The defendant must raise the defense of renunciation, ~~upon~~ which the state must **then** disprove ~~renunciation~~ beyond a reasonable doubt. [The subcommittee recommends that the renunciation defense be added to the code provision that requires a defendant to provide notice to the prosecution that he or she intends such a defense.]

*Iowa law currently does not recognize renunciation as an affirmative defense. Instead, it is an argument the defense may make to a trier of fact without having to formally raise it ahead of trial. This would create a new affirmative defense. In addition, the proposed language places additional restrictions on the defense (exceptions to voluntary and complete renunciation) that currently do not exist.*

(6) PENALTIES FOR ATTEMPT: [The subcommittee agreed to leave penalties for attempt to the sentencing subcommittee. Options are to punish attempts at the same level as the completed crimes, to punish them at the same level as the completed crimes but lower the highest level to one level lower, or to lower attempts to commit all levels of crimes to one category lower than the completed crimes (except of course attempts to commit the lowest level of crimes).]

SOLICITATION

(1) DEFINITION OF SOLICITATION: A person is guilty of solicitation to commit a crime if the person commands, entreats, or otherwise attempts to persuade another to engage in specific conduct that would constitute a crime or an attempt to commit a crime, or would establish the person's complicity in a crime or an attempt to commit a crime with the purpose that such conduct be done. The circumstances must corroborate the purpose that such conduct be done by clear and convincing evidence.

~~(2) UNCOMMUNICATED SOLICITATION: A person is guilty of solicitation if the person has the purpose of communicating with another person despite a failure to actually communicate with that other person.~~

*This provision is overbroad and impractical. On its face, it appears to criminalize thoughts. It would be difficult for the State to prove illegal thoughts. We assume this provision is meant to address the "attempted enticement" scenario where a person believes they are having internet communications with a minor and are instead communicating with a law enforcement agent. We believe the better course of action is to continue prosecuting such offenses as attempts.*

(3) RENUNCIATION DEFENSE: It is an affirmative **defense** to a prosecution for solicitation that the person, after soliciting another person to engage in conduct sufficient under subsection (1), persuaded the person not to engage in the conduct or otherwise prevented the commission of the crime, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

A renunciation is not voluntary and complete if it is motivated in whole or in part (a) by a belief that circumstances exist which increase the possibility that the person or another person will be detected or apprehended or which make commission of the crime more difficult or (b) by a decision to postpone the crime until another time or to substitute another victim or another but similar objective.

The defendant must raise the defense of renunciation, upon which the state must **then** disprove ~~renunciation~~ beyond a reasonable doubt. [The subcommittee recommends that the renunciation defense be added to the code provision that requires a defendant to provide notice to the prosecution that he or she intends such a defense.]

*Again, this creates an affirmative defense that currently does not exist under Iowa law and places additional restrictions upon a defendant using this defense.*

(4) PENALTIES FOR SOLICITATION: [The subcommittee agreed to leave penalties for solicitation to the sentencing subcommittee. Options are to punish solicitations at the same level as the solicited crimes, to punish them at the same level as the solicited crimes but lower the highest level to one level lower, or to lower solicitations to commit all levels of crimes to one category lower than the solicited crimes (except of course solicitations to commit the lowest level of crimes).]



## CONSPIRACY

(1) DEFINITION OF CONSPIRACY: A person commits conspiracy with another if, with the purpose of promoting or facilitating the commission of a crime, the person does either of the following:

(a) Agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime.

(b) Agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime.

(2) SCOPE OF CONSPIRATORIAL RELATIONSHIP: If a person guilty of conspiracy, as defined by subsection (1), knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) OVERT ACT REQUIREMENT: A person shall not be convicted of conspiracy unless it is alleged and proven that at least one conspirator committed an overt act evidencing a purpose to accomplish the purpose of the conspiracy by criminal means.

*Questions the Committee may wish to address: Does an overt act need to occur after the conspiracy is formed? For example, what about the situation in which one person has the purpose to commit a crime and commits an overt act in furtherance of the crime, then forms an agreement for a second person's participation, yet no further overt act is committed before the persons are arrested? Additionally, what if the second person has determined he or she will participate in the commission, does an overt act in furtherance of the conspiracy, but is arrested before he or she has the opportunity to tell the first person of his or her decision to participate in the conspiracy?*

(4) CONSPIRACY WITH MULTIPLE CRIMINAL OBJECTIVES: If a person conspires to commit more than one crime, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(5) LAW ENFORCEMENT CO-CONSPIRATOR: A person shall not be convicted of conspiracy if the only other person or persons involved in the conspiracy were acting at the behest of or as agents of a law enforcement agency in an investigation of the criminal activity alleged at the time of the formation of the conspiracy.

(6) RENUNCIATION DEFENSE: It is an affirmative defense to a prosecution for conspiracy that the person, after conspiring with another person to commit a crime, thwarted the success of the conspiracy under circumstances manifesting a voluntary and

complete renunciation of his or her criminal purpose.

A renunciation is not voluntary and complete if it is motivated in whole or in part (a) by a belief that circumstances exist which increase the possibility that the person or another person will be detected or apprehended or which make accomplishment of the criminal objectives more difficult or (b) by a decision to postpone efforts to accomplish the criminal objectives until another time or to substitute another victim or another but similar objective.

The defendant must raise the defense of renunciation, upon which the state must disprove renunciation beyond a reasonable doubt. [The subcommittee recommends that the renunciation defense be added to the code provision that requires a defendant to provide notice to the prosecution that he or she intends such a defense.]

*Again, this is creating an affirmative defense not currently recognized under Iowa law and placing additional restrictions on the defense. In addition to the other restrictions previously mention, this proposal also requires "thwarting" the success of the conspiracy. Current Iowa law recognizes that a person may simply withdraw from a conspiracy by alerting either law enforcement or his or her co-conspirators. State v. Ross, 573 N.W.2d 906 (Iowa 1998).*

(7) PENALTIES FOR CONSPIRACY: [The subcommittee agreed to leave penalties for conspiracy to the sentencing subcommittee. Options are to punish conspiracies at the same level as the crimes that are the object(s) of the conspiracies, to punish them at the same level as the object crimes but lower the highest level to one level lower, or to lower conspiracies to commit all levels of crimes to one category lower than the object crimes (except of course conspiracies to commit the lowest level of crimes).]

The subcommittee proposes retention of the following provision of the current Iowa code:

#### LOCUS OF CONSPIRACY

A person commits a conspiracy in any county where the person is physically present when the person makes such agreement or combination, and in any county where the person with whom the person makes such agreement or combination is physically present at such time, whether or not any of the other conspirators are also present in that county or in this state, and in any county in which any criminal act is done by any person pursuant to the conspiracy, whether or not the person is or has ever been present in such county; provided, that a person may not be prosecuted more than once for a conspiracy based on the same agreement or combination.

The subcommittee proposes addition of the following provision to the Iowa code:

#### INCAPACITY, IRRESPONSIBILITY, OR IMMUNITY OF PARTY TO SOLICITATION

## OR CONSPIRACY

(1) Except as provided in Subsection (2) of this Provision, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) the person or the person solicited or conspired with does not occupy a particular position or have a particular characteristic that is an element of such crime, if the person believes that one of them does occupy that position or have that characteristic; or

(b) the person solicited or conspired with is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that ~~if the criminal objective were achieved~~ the person would not be guilty ~~of a crime~~ under the law that defining the offense ~~crime~~ or would not be guilty as an accomplice to the crime because: (a) the person is legally incapable of committing the offense and liability as accomplice would be inconsistent with the purpose of the provision that establishes such incapacity or (b) the person is a victim of the offense.

*It is necessary to define "irresponsible." The Model Code definition appears in section 4.01. Subsection 1(a) is unclear. What is meant by this subsection?*

The subcommittee proposes the following revision and expansion of the current Iowa code provision regarding multiple conviction for conspiracy and a completed crime:

## PROSECUTION AND CONVICTION FOR MULTIPLE CRIMES

(1) A person may be prosecuted for more than one crime based on the same conduct, including an attempt, solicitation, or conspiracy to commit a crime and the completed crime.

(2) A person may not be convicted for both an attempt to commit a crime and that crime.

(3) A person may not be convicted for both solicitation to commit a crime and that crime.

(4) A person may not be convicted for both a conspiracy to commit a particular crime and that crime.

(5) A person may not be convicted for more than one inchoate crime—attempt, solicitation, or conspiracy—based on conduct designed to ~~commit or~~ culminate in the commission of the same crime.

## Recommendations of the ISBA Criminal Law Section Council

Notes: Recommended additions are in **bold** and recommended deletions are ~~struck through~~. Explanatory notes and comments are in *italics*.

### MEMORANDUM

TO: Foundational Provision Subcommittee Members

FROM: Jim Tomkovicz, Chair

RE: FINAL PROPOSALS ON INTOXICATION AND INSANITY

DATE: July 21, 2009

#### INTOXICATION

(1) A person is not guilty of an offense if, due to voluntary intoxication, the person did not have the purpose or knowledge required for commission of a crime. A person is not guilty of an offense if, due to involuntary or pathological intoxication, the person did not have any culpability required for commission of a crime.

(2) When an offense requires a culpability other than purpose or knowledge, it is immaterial that a person did not have that culpability as a result of voluntary intoxication.

(3) Intoxication does not, in itself, constitute a mental disease or defect within the meaning of the insanity defense.

(4) Involuntary or pathological intoxication is an affirmative defense if, by reason of such intoxication, the person lacks substantial capacity to know the nature and quality of the person's act or lacks substantial capacity to know the difference between right and wrong in relation to the act.

(5) Definitions:

(a) "intoxication" means a disturbance of the mental or physical capacities resulting from the introduction of substances into the person's body;

(b) "voluntary intoxication" means intoxication caused by substances that the person knowingly introduces into the person's body, the tendency of which to cause intoxication the person knows or ought to know, unless they are introduced pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

*Clarification would be necessary on the last portion of this definition. When would substances be voluntarily introduced in a way that would be a defense to a charge of crime?*

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the person does not know that ~~the person~~ **he or she** is susceptible.

## INSANITY

A person shall not be convicted of a crime if at the time of the conduct that is the basis of the charge the person, as a result of a mental disease ~~of~~ **or** defect, lacks substantial capacity to know the nature and quality of the act the person is committing or lacks substantial capacity to know that the act being committed is wrong. Insanity need not exist for any specific length of time before or after the commission of the alleged criminal act.

The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

## Recommendations of the ISBA Criminal Law Section Council

Notes: Recommended additions are in **bold** and recommended deletions are ~~struck through~~. Explanatory notes and comments are in *italics*.

### MEMORANDUM

TO: Foundational Provision Subcommittee Members

FROM: Jim Tomkovicz, Chair

RE: Final Proposals regarding Mistake and Liability for the Acts of Others

DATE: October 25, 2008

The following is a summary of the final proposals of the Foundational Provision Subcommittee regarding Mistake and Liability for the Acts of Others.

#### IGNORANCE OR MISTAKE OF FACT OR LAW

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) because of ~~the~~ ignorance or mistake, the defendant did not have the purpose, knowledge, belief, recklessness or negligence that is a required element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

*Subsection (b) may be unclear when it refers to "the state of mind" established by ignorance or mistake. Would it suffice simply to say "the law provides that ignorance or mistake as to an element of the offense constitutes a defense."?*

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged ~~under subsection (1)~~, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall ~~alter~~ **reduce** the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

*The Model Penal Code specifies reduction of the offense. As written, the provision could theoretically increase the charge.*

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he or she acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in: (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

#### CRIMINAL LIABILITY FOR THE ACTS OF OTHERS

(1) A person is guilty of an offense if it is committed by his or her own conduct or by the conduct of another person for which he or she is legally accountable, or both. Any person who is guilty of an offense committed by his or her own conduct or by the conduct of another person for which he or she is legally accountable shall be charged, tried, and punished as a principal.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he or she causes an innocent or irresponsible person to engage in such conduct; or

*Again, definitions of "innocent" and "irresponsible" would appear necessary.*

(b) he or she is made accountable for the conduct of such other person by the Iowa Code; or

*This may be overbroad. It would appear to mean that a parent can be held legally accountable for the conduct of his or her child, regardless of the parent's culpability.*

(c) he or she is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the knowledge that he or she is promoting or facilitating ~~or will promote or facilitate~~ the commission of the offense, he or she

(i) commands, encourages, or requests such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) the law otherwise expressly declares that his or her conduct establishes his or ~~her conduct~~ complicity.

(4) ~~When an offense requires proof of causation of a particular result~~ causing a particular result is an element of the offense, a person who knowingly promotes or facilitates the conduct that causes that result is an accomplice in the commission of the offense if he or she acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) When an offense requires proof of a particular circumstance, a person who knowingly promotes or facilitates the conduct of the person who commits the offense is an accomplice in the commission of the offense if he or she acts with the kind of culpability, if any, with respect to that circumstance that is sufficient for the commission of the offense.

*Iowa currently allows for conviction as an aider and abetter if the defendant had the specific intent required for the offense or knew that the person he or she was aiding and abetting had such specific intent. This proposal would appear to make the defendant's intent the sole question.*

(6) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(7) Unless otherwise provided by the Iowa Code, a person is not an accomplice in an offense committed by another person if:

(a) he or she is a victim of that offense; or

(b) he or she terminates his or her complicity prior to the commission of the offense and



(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense;

(iii) the defendant shall have the burden of proving the defense provided in subsection (b) by a preponderance of the evidence.

*As with the renunciation defense in the Attempt, Solicitation and Conspiracy proposal, this provision appears to create an affirmative defense not currently recognized by Iowa law. It also creates a new burden upon the defendant, who currently can benefit from evidence he or she "opted out" of the offense without the further requirements of section 7(b).*

(8) An accomplice may be convicted on proof of the commission of the offense and of his or her complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

(9) The guilt of an accomplice in the commission of an offense must be determined upon the facts which show the part that he or she had in the commission of the offense, and does not depend upon the degree of another person's guilt.

(10) When two or more persons, acting in concert, knowingly participate in an offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

*This explanation of joint criminal conduct was disfavored by the Iowa Supreme Court in State v. Smith, 739 N.W.2d 289 (Iowa 2007). According to the Court in Smith: "Under our present law in order for a person to be found guilty by reason of joint criminal conduct the State must prove the following elements:*

- 1. Defendant must be acting in concert with another.*
- 2. Defendant must knowingly be participating in a public offense.*
- 3. A "different crime" must be committed by another participant in furtherance of the defendant's offense.*
- 4. The commission of the different crime must be reasonably foreseen."*

*The Court also recommended the State specify the "different crime" relied upon. To the extent possible, we would recommend rewording the statute to comport with Smith.*

The subcommittee recommends retention of the following provision, which is currently Section 703.3 of the Iowa Code, as a separate section of the Iowa Code:

#### ACCESSORY AFTER THE FACT

Any person having knowledge that a public offense has been committed and that a certain person committed it, and who does not stand in the relation of husband or wife to the person who committed the offense, who harbors, aids or conceals the person who committed the offense, with the purpose of preventing the apprehension of the person who committed the offense, commits an aggravated misdemeanor if the public offense committed was a felony, or commits a simple misdemeanor if the public offense was a misdemeanor.