Where there is evidence of more than one act [or omission] that could support a single count of [name of crime], in order to return a verdict of guilty on that count, the jury must be unanimous as to the specific conduct that has been proven beyond a reasonable doubt.

**USE NOTE**

This instruction implements the rule set forth in Covington v. State, 703 P.2d 436 (Alaska App. 1985), which applies where the state’s charges raise issues of duplicitous or multiplicitous counts. This instruction addresses duplicitous counts.

A count is duplicitous if more than one act or incident could lead to a conviction on that count. For example, in Hicks v. State, Memorandum Opinion No. 10820, (Alaska App. January 16, 2013), the driver drove to a location, then some minutes later was seen by a trooper getting into a parked car in the driveway. Two acts are described, but the jury must be unanimous in deciding which conduct supports the conviction. As another example, suppose that the state indicts a defendant on Sexual Abuse of a Minor in the First Degree, alleging that the abuse occurred during a three month period of time. If the evidence submitted by the state indicates that the abuse may have occurred several times during that three-month period, then that charge could be seen as duplicitous.

Pursuant to Covington, the fact that a count may be duplicitous is not necessarily fatal to the indictment. Rather, any problem of a potentially duplicitous count must be addressed by instructing the jury that it may only convict if it unanimously agrees on the specific conduct underlying the charge in that case.

The instruction uses the terms “act,” “omission,” and “conduct” based on the language of AS 11.81.600(a), which provides: “the minimal requirement for criminal liability is the performance by a person of conduct that includes a voluntary act or the omission to perform an act that the person is capable of performing.”

In some cases, it will be very important to specify the precise “conduct” to which the instruction refers. *See* Khan v. State, 278 P.3d 893 (Alaska 2012).

[An analogous issue may arise and a separate instruction will need to be written if two or more counts are multiplicitous. Two counts are multiplicitous if the same conduct would lead to a conviction on each count. For example, suppose that the state indicts a defendant on two counts of Sexual Abuse of a Minor in the First Degree, where the first count alleges abuse over a one-year period of time and the second count alleges abuse during the summer of that year. These counts could be seen to be multiplicitous, since an incident during the summer could support a conviction as to each count.]