

1 **14-2817. Criminal solicitation; essential elements.**

2 For you to find the defendant guilty of criminal solicitation [as charged in Count  
3 \_\_\_\_\_]<sup>1</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the  
4 following elements of the crime:

5 1. The defendant intended that another person commit \_\_\_\_\_ (*name*  
6 *of felony*)<sup>2</sup>;

7 2. The defendant [solicited]<sup>3</sup> [commanded] [requested] [induced] [employed] the  
8 other person to commit the crime;

9 3. This happened in New Mexico on or about the \_\_\_\_\_ day of  
10 \_\_\_\_\_, \_\_\_\_\_.

11

12

USE NOTES

13 1. Insert the count number if more than one count is charged.

14 2. Give the essential elements of the felony, if not covered by other instructions. [~~See~~  
15 ~~UJI 14-140 for example of how essential elements instructions are to be modified when not given~~  
16 ~~as separate offense.~~] To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must  
17 be used.

18 3. Use applicable alternative.

19 [As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed  
20 on or after December 31, 2020.]

21 **Committee commentary.** — Section 30-28-3 NMSA 1978 sets out not only the essential  
22 elements of the crime of criminal solicitation, but also what is and is not a defense. To be guilty of  
23 solicitation the crime intended to be committed must be a felony. New Mexico law makes no

1 provision for soliciting someone to commit a lesser offense than a felony. The same is true for the  
2 crimes of attempt and conspiracy. The underlying crime must be punishable as a felony.

3         There is much confusion over the distinctions between solicitation, attempt and conspiracy.  
4 Under the Model Penal Code a solicitation may be “a substantial step in a course of conduct  
5 planned to culminate in [the] commission of the crime” for the purpose of proving an attempt.  
6 Model Penal Code § 5.01(1)(c) and (2)(g) (1962). There is some disagreement with this view,  
7 however. The Memorandum to Virginia Model Jury Instructions - Criminal, Attempts and  
8 Solicitations No. 6, states, “[s]olicitation *does not* amount to a direct act towards the commission  
9 of the crime. . . . Where the inciting to crime does proceed to the point of some overt act in the  
10 commission of the offense, it becomes an attempt. . . .” (Citing *Wiseman v. Commonwealth*, 143  
11 Va. 631, 130 S.E. 249 (1925).) (Emphasis added.) It is unclear which view prevails in New Mexico  
12 due to the lack of case law on solicitation, but the committee was of the opinion that mere  
13 solicitation is not enough of an overt act to constitute an attempt. As stated by Perkins, “[t]he usual  
14 statement is to the effect that, although a few cases have held otherwise, a solicitation is not an  
15 attempt. . . .” R. Perkins, *Perkins on Criminal Law*, p. 585 (2d ed. 1969). A more definite distinction  
16 can be drawn when the solicitor does not merely solicit another to commit the crime, but plans to  
17 actually assist in the commission of the crime. In these instances there is a specific intent to commit  
18 the crime, which may rise to the level of attempt. To prove solicitation, one must only show the  
19 solicitor intended someone else to commit the crime.

20         The solicitation of another to commit a crime is an attempt to commit that crime if, but  
21 only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, -  
22 not at some future time or distant place, but here and now, and the crime is such that it cannot be  
23 committed by one without the cooperation or submission of another, such as bribery or buggery.

1 Where such cooperation or submission is an essential feature of the crime itself, the request for it  
2 now is a step in the direction of the offense.

3 Id. at 586-7.

4 To be guilty of solicitation, the crime need not be committed. It must only be proven that  
5 the defendant intended that the other person commit the crime.