

1 **14-2815. Acts or declarations of co-conspirators; conditional admissibility; limiting**
2 **instruction; withdrawal.**

3 Evidence has been admitted concerning _____. You may consider such
4 [acts] [remarks] against the [other] defendants if you find that the [acts] [remarks] were authorized
5 by them.

6 The [acts] [remarks] were authorized by a defendant if the defendant and the one [doing
7 the acts] [making the remarks] were in a [conspiracy to commit crime] [partnership in crime] and
8 the [acts] [remarks] were during and for the purpose of helping in carrying out the [conspiracy]
9 [partnership].

10 Unless you find by other evidence that the [acts] [remarks] were authorized by a defendant,
11 then you should not consider them against that defendant.

12 [If a (co-conspirator) (partner in crime) withdraws from a (conspiracy) (partnership in
13 crime), then the (acts) (remarks) of the others made after the withdrawal are not authorized by, and
14 should not be considered against, the one who withdraws.

15 In order to withdraw, a person must

16 (in good faith notify the others [~~he~~] the person knows are involved that [~~he~~] the person is
17 no longer involved in the [conspiracy] [partnership] and urge them to give it up.)

18 (make proper efforts to prevent the carrying out of the [conspiracy] [partnership in crime]
19 and end [~~his~~] their participation in such a way as to remove the effect of [~~his~~] their assistance).]

20 USE NOTES

21 No instruction on this subject shall be given.

22 [As amended by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending
23 or filed on or after December 31, 2025.]

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2 **Committee commentary.** — This instruction sets forth the standard of conditional admissibility
3 of evidence which is admitted subject to the condition precedent that a conspiracy be established
4 by evidence aliunde. *See* Rule 11-104 NMRA. If the conspiracy is shown to have existed, then
5 declarations of a co-conspirator during the course of and in furtherance of the conspiracy are not
6 hearsay. Rule 11-801 D(2)(e) NMRA. *See also State v. Armijo*, 90 N.M. 10, 12, 558 P.2d 1149,
7 1151 (Ct. App. 1976), which recognizes that the rule applies to acts as well as declarations, and
8 applies whether conspiracy is charged or not charged.

9 The portion of the instruction on withdrawal sets forth the defense theory that such declarations,
10 made after effective withdrawal, are not admissible against the co-conspirator who has withdrawn.
11 The standards for admissibility of co-conspirator acts or declarations are the same whether
12 conspiracy is charged (in which case the defendant would be referred to as "co-conspirator") or
13 not charged (in which case the defendant would be referred to as a "partner in crime").

14 The committee was of the opinion that no instruction on this subject should be given. The issue of
15 admissibility of evidence is a preliminary question of law to be decided by the judge. *See* Rule 11-
16 104(A) NMRA. Questions of admissibility of evidence are not to be decided beyond a reasonable
17 doubt or by a preponderance of the evidence. Substantial evidence in support of the preliminary
18 fact suffices. *United States v. Herrera*, 407 F. Supp. 766 (N.D. Ill., 1975). When the preliminary
19 question is the existence of a conspiracy, a prima facie case must be made out by substantial,
20 independent evidence of the conspiracy. Whether the standard has been satisfied is a question of
21 the admissibility of evidence to be decided by the trial judge. *United States v. Herrera*, supra. *See*
22 also n. 14 in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

1 The comments to Evidence Rule 104(b), Rules of Evidence for United States Courts and
2 Magistrate Courts, suggest that the judge makes a preliminary determination as to whether the
3 foundation is sufficient to support a finding that the condition has been fulfilled and then submits
4 to the jury the issue of whether the condition has been fulfilled and instructs on conditional
5 admissibility to guide the jury in its deliberations. However, the problem with this approach was
6 pointed out in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84
7 S. Ct. 1625, 12 L. Ed. 2d 498 (1964), rehearing denied, 377 U.S. 1010, 84 S. Ct. 1902, 12 L. Ed.
8 2d 1058 (1964), aff'd, 357 F.2d 800 (9th Cir. 1966). When conspiracy is charged, the admissibility
9 of the evidence depends upon a disputed preliminary question of fact which coincides with the
10 ultimate determination on the merits. *Carbo*, supra, p. 736. In effect, the jury must find a prima
11 facie conspiracy prior to considering the evidence on the question of whether the conspiracy has
12 been proved beyond a reasonable doubt. Such mental compartmentalization has been recognized
13 as a practical impossibility. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd on other
14 grounds, 341 U.S. 494 (1951).

15 Submitting the issue to the jury in cases where conspiracy is not charged does not result in such a
16 circular reasoning process. The jury must only consider the conspiracy question for one purpose.
17 Because admissibility of co-conspirator declarations is not dependent upon a charge of conspiracy
18 in the indictment, *State v. Armijo*, supra, *United States v. Herrera*, supra, the procedure for
19 handling the issue of admissibility should be the same whether conspiracy is charged or not
20 charged.

21 The authorities are split on the requirement of an instruction on conditional admissibility, and the
22 rules of evidence in some jurisdictions expressly require such an instruction. The Rules of
23 Evidence expressly require instructions in certain instances, but Rule 11-104(B) NMRA does not

1 expressly require such an instruction and no New Mexico case requires such an instruction.
2 Therefore, the decision as to admissibility should be left to the judge and no instruction should be
3 given. *See* Morgan, *Basic Problems of Evidence*, p. 48. Such a procedure was tacitly approved
4 in *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed.
5 2d 374 (1966), motion to vacate judgment denied, 386 U.S. 940, 87 S. Ct. 970, 17 L. Ed. 2d 880
6 (1967), rehearing denied, 386 U.S. 951, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1967), motion for new
7 trial denied, 382 F.2d 856 (6th Cir. 1967), where the court in dictum said that a prima facie case
8 linking the appellants with the conspiracy would have justified the court ruling that the evidence
9 was admissible. *Carbo v. United States*, *supra*, expressly states that no instruction is necessary.
10 The supreme court in *United States v. Nixon*, *supra*, indicates that no instruction is necessary, by
11 citing with approval the *Hoffa* and *Carbo* cases.
12 The judge may make the determination of admissibility at the time the evidence is offered or may
13 admit the evidence subject to a further ruling as to whether the necessary foundation has been
14 established. The order of proof is within the discretion of the trial judge. Rule 11-104(B) NMRA.
15 If the judge concludes at the close of the evidence that the necessary foundation has not been
16 established, the evidence should be withdrawn from the consideration of the jury. *See* commentary
17 to UJI 14-5042.