

- 1 3.
- 2 2. Use only the applicable bracketed elements established by the evidence.
- 3 3. If the defendant is charged with tampering with evidence involving multiple
4 crimes, list all crimes. If the defendant is charged with tampering with evidence of crimes
5 that fit into more than one category as defined in NMSA 1978, Section 30-22-5(B), the
6 special verdict in UJI 14-6019 NMRA must be repeated for each category of offense [~~as~~
7 ~~defined in Section 30-22-5(B) NMSA 1978~~]. For example, if the defendant is charged with
8 tampering with evidence involving three crimes, two of which fit in category one and the
9 third that fits in category two, the jury should receive a special verdict instruction for the
10 category one crimes and a separate instruction for the category two crime.
- 11 4. If a violation for probation or parole is at issue, the instruction must identify
12 the underlying offense for which the defendant was serving probation or parole. [~~*See State*~~
13 ~~*v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with~~
14 ~~evidence conviction for tampering with urine specimen required under terms of defendant's~~
15 ~~probation):~~]
16 [As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed
17 in the district court on or after November 18, 2011; as amended by Supreme Court Order No.
18 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as
19 amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
20 on or after December 31, 2019.]
21 **Committee commentary.** — *See* NMSA 1978, §[Section] 30-22-5 [~~NMSA 1978~~].

1 A verdict in a criminal case must be unanimous. N.M. Const. [~~Art.~~] art. II, § 12. Because
2 the permissible punishment range under Section 30-22-5 [~~NMSA 1978~~] depends on the
3 highest crime for which tampering with evidence is committed, the jury must be given the
4 special verdict in UJI 14-6019 NMRA for each crime for which tampering with evidence is
5 alleged to have been committed. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding
6 that any fact that increases the permissible penalty range for a crime must be submitted to
7 a jury and proved beyond reasonable doubt).

8 To comport with *Apprendi*, New Mexico cases previously provided that, where no
9 special verdict clarified the associated crime, the “indeterminate crime” provision from
10 Section 30-22-5(B)(4) applied, rendering the tampering penalty a fourth-degree felony. *See*
11 *State v. Alvarado*, 2012-NMCA-089, P.3d , *overruled by State v. Radosevich*, 2018-
12 NMSC-028, ¶ 34, 419 P.3d 176. However, in *Radosevich*, this approach was repudiated
13 because the associated crime in that case could well have been a misdemeanor offense and
14 no special verdict form was submitted to the jury. *See* 2018-NMSC-028, ¶¶ 2-6, 20
15 (discussing the tension between constitutional principles and prior precedent).

16 Under Section 30-22-5(B)(3), tampering with evidence of a misdemeanor is
17 punishable only as a petty misdemeanor. As a result, the Supreme Court found that
18 application of the “indeterminate crime” provision to impose felony liability would violate
19 *Apprendi* and due process. *Radosevich*, 2018-NMSC-028, ¶ 24. In cases where the
20 associated crime is indeed “indeterminate,” *Radosevich* limited tampering punishment to a
21 petty misdemeanor. *Id.* ¶ 30 (overruling *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452,

1 237 P.3d 754).

2 Thus, under *Radosevich*, felony liability for tampering may only be accomplished
3 through proper use of UJI 14-6019 to ensure express jury findings supporting the felony
4 tampering provisions. See UJI 14-2241, Use Note 3. For tampering with evidence of a
5 probation violation, *Radosevich* held that the penalty tracks the highest “offense of
6 conviction for which the defendant is on probation.” *Id.* ¶ 31. Accord UJI 14-2241, Use Note
7 4.

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