

1 **14-2810. Conspiracy; single or multiple objectives; essential elements.**

2 For you to find the defendant guilty of conspiracy to commit _____¹ [or
3 _____ [or _____]]², [as charged in Count _____]³, the state must prove
4 to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

5 1. The defendant and another person by words or acts agreed together to commit
6 _____¹; [or _____ [or _____]]²;

7 [2. That other person was not a state or federal agent acting in the agent's official
8 capacity at the time;]⁴

9 [3. The conspiracy alleged in this Count must be separate, distinct, and not a
10 continuation of Count ____;]⁵

11 4. The defendant and the other person intended to commit _____¹ [or
12 _____ [or _____]]²;

13 5. This happened in New Mexico on or about the _____ day of
14 _____, _____.

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USE NOTES

17 1. For a conspiracy with a single objective, insert the name of the felony. Unless the
18 court has instructed on the essential elements of the named felony, give the essential elements of
19 the named felony, other than venue, immediately after this instruction.

20 2. For a conspiracy to commit multiple felonies, insert the names of the felonies in the
21 alternative. Unless the court has instructed on the essential elements of the named felonies, give
22 the essential elements of the named felonies, other than venue, immediately after this instruction.

23 To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. Where the

1 state charges multiple objectives, the jury must unanimously agree about which of the named
2 felonies, if any, was the object of the conspiracy and the unanimity and special verdict instructions,
3 UJI 14-2810A NMRA and UJI 14-6019B NMRA, must be given.

4 3. Insert the count number if more than one count is charged.

5 4. Insert bracketed language if the co-conspirator’s status as a governmental agent is
6 an issue.

7 5. Insert bracketed language if multiple conspiracy counts are charged and identify all
8 other conspiracy counts. UJI 14-2810B NMRA must also be given.

9 [As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed
10 on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-004, effective
11 for all cases pending or filed on or after December 31, 2020.]

12 **Committee commentary.** — *See* NMSA 1978, § 30-28-2.

13 This instruction sets forth the essential elements of the crime of conspiracy. The offense is
14 complete when the defendant combines with another for felonious purpose. In New Mexico, as at
15 common law, no overt act in furtherance of the conspiracy need be proved. 4 *Wharton’s Criminal*
16 *Law* § 681 (15th ed. 2014); Perkins, *Criminal Law* 616 (2d ed. 1969); *see State v. Gallegos*, 2011-
17 NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (citing *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142
18 N.M. 613, 168 P.3d 743 (no overt act required) and *State v. Villalobos*, 1995-NMCA-105, ¶ 11,
19 120 N.M. 694, 905 P.2d 732 (“conspiracy is complete when the agreement is reached”)).

20 Because Section 30-28-2 links the penalty for conspiracy to the penalty for the felony
21 object(s) of the conspiracy, when the State charges multiple objectives that would result in
22 differing penalties, the general verdict form, UJI 14-6014 NMRA, is not sufficient. Instead, UJI
23 14-2810A NMRA and a special verdict, UJI 14-6019B, should be used to ensure jury unanimity

1 beyond a reasonable doubt regarding *which* felonies, if any, the defendant agreed to commit. *See*
2 *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase
3 statutory maximum possible sentence must be found by the jury beyond a reasonable doubt);
4 *Gallegos*, 2011-NMSC-027, ¶ 53 (conspiracy statute amended in 1979 to provide punishment
5 calibrated at the level of the highest crime to be committed.)

6 New Mexico law appears to accept that a defendant cannot be found guilty of conspiracy
7 where the agreement is solely with an agent of the State, such as an undercover officer, an
8 informant, or a person who is a de facto agent, despite ostensible private status (*e.g.* parcel service
9 deliverer who routinely is rewarded for opening suspicious packages for law enforcement
10 purposes). *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27 (assuming without deciding that New
11 Mexico law follows *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985), which held
12 that a defendant cannot be convicted of conspiring with only government agents or informers and
13 supported defendant’s tendered instruction that he could not be convicted of conspiracy with
14 government agents); *see also State v. Dressel*, 1973-NMCA-113, ¶ 3, 85 N.M. 450, 513 P.2d 187
15 (“It takes at least two persons to effect a conspiracy. The essence of a conspiracy is a common
16 design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means.”
17 (internal citations omitted)). Where there is some evidence to support a defendant’s theory that the
18 only other alleged co-conspirator was a de jure or de facto state agent, the additional phrase in
19 element 2 should be included. *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27; *see also State v. Privett*,
20 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55 (defendant’s requested instruction on
21 intoxication requires “some evidence”; the court does not weigh that evidence but merely
22 determines whether it exists).

1 The agreement need not be verbal but may be shown to exist by acts which demonstrate
2 that the alleged co-conspirator knew of and participated in the scheme. The agreement may be
3 established by circumstantial evidence. *State v. Deaton*, 1964-NMSC-062, ¶ 5, 74 N.M. 87, 390
4 P.2d 966; *State v. Sellers*, 1994-NMCA-053, ¶ 17, 117 N.M. 644, 875 P.2d 400.

5 A defendant may be charged with conspiracy to commit a single felony or multiple
6 felonies. However, a single *agreement* to commit two felonies constitutes only a single conspiracy.
7 *State v. Ross*, 1974-NMCA-028, ¶ 17, 86 N.M. 212, 521 P.2d 1161 (“Whether the object of a
8 single *agreement* is to commit one or many crimes, it is in either case the agreement which
9 constitutes the conspiracy which the statute punishes.” (emphasis added) (quoting *Braverman v.*
10 *United States*, 317 U.S. 49, 54 (1942))); *see also Gallegos*, 2011-NMSC-027, ¶ 38 (accepting
11 *Braverman* that the number of prosecutable conspiracies is based on the number of agreements), ¶
12 49 (cautioning against conflating the existence of multiple objectives in a single conspiracy with
13 multiple conspiracies). If the single conspiracy is alleged to be for the purpose of committing more
14 than one felony, the essential elements of each felony must be given.

15 There is a “rebuttable presumption” that despite the commission of multiple crimes, there
16 is only one, overarching, conspiratorial agreement and thus only one count of conspiracy.
17 *Gallegos*, 2011-NMSC-027, ¶ 55. Nevertheless, distinct from a single conspiracy count alleging
18 multiple objectives, a defendant may be charged with more than one count of conspiracy, with
19 each count alleging a separate agreement to commit one or more felonies. Where the defendant is
20 charged with more than one conspiracy, UJI 14-2810B NMRA must be given.

21 In a multi-defendant trial, evidence may be admitted regarding only one or fewer than all
22 of the defendants. Where certain evidence—such as co-conspirators’ statements—is admitted as

1 to only a particular defendant, an appropriate limiting instruction should be given. *See* UJIs 14-
2 5007, 14-5008 NMRA.

3 Although the gist of the offense is the combination between two or more persons,
4 conviction of all the conspirators is not required. *State v. Verdugo*, 1969-NMSC-008, ¶ 9, 79 N.M.
5 765, 449 P.2d 781.

6 [As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed
7 on or after December 31, 2018.]