

1 **14-331. Stalking; essential elements.**

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

5 [~~1. The defendant maliciously pursued a pattern of conduct that would cause a  
6 reasonable person to feel frightened, intimidated or threatened on more than one occasion  
7 by:<sup>2</sup>~~

8 ~~\_\_\_\_\_ [(a) following \_\_\_\_\_ (name of victim) in a place other  
9 than the residence of the defendant;]~~

10 ~~\_\_\_\_\_ [(b) placing \_\_\_\_\_ (name of victim) under surveillance  
11 by being present outside \_\_\_\_\_'s (name of victim)  
12 [school][residence][workplace][vehicle] or [\_\_\_\_\_, a place frequented by  
13 \_\_\_\_\_ (name of victim)][other than the defendant's residence]<sup>3</sup>; [or]~~

14 ~~\_\_\_\_\_ [(c) harassing \_\_\_\_\_ (name of victim);]<sup>4</sup>~~

15 ~~2. The defendant intended~~

16 ~~\_\_\_\_\_ [to place \_\_\_\_\_ (name of victim) in reasonable  
17 apprehension of [death] [bodily harm] [sexual assault] [confinement or restraint]<sup>3</sup>;~~

18 ~~\_\_\_\_\_ [or]~~

19 ~~\_\_\_\_\_ [to cause a reasonable person to fear for the person's safety or the safety of  
20 a household member<sup>5</sup>;~~

1           3. ~~This happened in New Mexico on or about the \_\_\_\_\_ day of~~  
2 ~~\_\_\_\_\_, \_\_\_\_\_.~~

3           1. The defendant knowingly pursued a pattern of conduct by, on more than one  
4 occasion, [directly or indirectly] [or] [using a third party<sup>2</sup>]<sup>3</sup> engaging in any of the  
5 following acts:

6                   (a) following \_\_\_\_\_ (*name of person*)

7                   (b) monitoring \_\_\_\_\_ (*name of person*)

8                   (c) placing \_\_\_\_\_ (*name of person*) under surveillance]

9                   (d) threatening \_\_\_\_\_ (*name of person*)

10                  (e) communicating [to] [or] [about] \_\_\_\_\_ (*name of person*)<sup>3</sup>;

11           2. In pursuing the pattern of conduct the defendant was not acting within the  
12 scope of [lawful employment] [or] [constitutionally protected activity,]<sup>3</sup><sup>5</sup>

13           3. [Although some of the acts constituting the pattern of conduct were directed  
14 at other people, the] [The]<sup>3</sup> overall pattern of conduct was directed at \_\_\_\_\_  
15 (*name of victim*):

16           4. The defendant intended  
17 to place \_\_\_\_\_ (*name of victim*) in reasonable  
18 apprehension of [death] [bodily harm] [sexual assault] [confinement or restraint]]

19                   [or]

20                   [to cause \_\_\_\_\_ (*name of victim*) to reasonably fear the

1 [death] [bodily harm] [sexual assault] [confinement or restraint] of \_\_\_\_\_

2 (name(s) of other individual(s))<sup>3</sup>.<sup>6</sup>

3 5. This happened in New Mexico [between] [on or about] the \_\_\_\_\_

4 day of \_\_\_\_\_, \_\_\_\_\_ [and the \_\_\_\_\_ day of

5 \_\_\_\_\_, \_\_\_\_\_].<sup>3, 7</sup>

6

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USE NOTES

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

9 2. Use when the evidence establishes that one or more third parties committed  
10 the acts constituting the pattern of conduct.

11 ~~2.~~ 3. Use only the applicable bracketed alternatives.

12 ~~4. — If this alternative is used, instruction UJI 14-330 NMRA must also be given.~~

13 ~~5. — If this alternative is given, UJI 14-332 NMRA must be given immediately~~  
14 ~~after this instruction.]~~

15 5. Insert when there is any evidence the defendant acted with lawful authority,

16 as defined in Section 30-3A-3(B)(1) NMSA 1978.

17 6. The victim may be afraid for the victim, other individuals, or both.

18 7. The pattern of conduct must involve more than one occasion, but may or  
19 may not occur on more than one date.

20 [Adopted, effective February 1, 1995; as amended, effective July 1, 1998; as

1 amended by Supreme Court Order No. 21-8300-010, effective for all cases pending or filed  
2 on or after December 31, 2021.]

3 **Committee commentary.** See NMSA 1978, § 30-3A-3 (2009) (changing essential  
4 elements of stalking and defining “lawful authority”); NMSA 1978, § 30-3A-4 (1997)  
5 (providing specific exemptions to the provisions of the Harassment and Stalking Act for  
6 picketing and public demonstrations arising out of labor disputes and for peace officers in  
7 performance of their duties). These exemptions were not repealed or changed when the  
8 2009 amendments added the more general definitions of lawful authority.

9 \_\_\_\_\_ The Committee believes that UJI 14-132 NMRA (Unlawfulness as an element) is  
10 a general instruction not directly applicable to the stalking statute, which has a specific  
11 definition of “lawful authority” as “within the scope of lawful employment or  
12 constitutionally protected activity.” Section 30-3A-3(B) (1). The original 1997 exceptions  
13 to the stalking statute are specific, affirmative, categorical exceptions to what otherwise is  
14 unlawful conduct.

15 By inserting “without lawful authority” into the 2009 revision of Section 30-3A-3,  
16 the Legislature appears to have both expanded the range of conduct and, when there is  
17 evidence on the issue, made proof of acting without lawful authority an element of the  
18 offense—not an affirmative defense to be raised by the defendant. An unlawfulness  
19 instruction is not required “when there is *no evidence* of lawful behavior, and hence the  
20 element omitted from the instructions was not factually in issue[.]” *State v. Peterson*, 1998-

1 NMCA-049, ¶ 10, 125 N.M. 55, 956 P.2d 854 (internal quotation marks and citation  
2 omitted) (emphasis added). Similarly, where there is no evidence regarding the scope of  
3 the defendant’s employment or constitutionally protected activity, there is no requirement  
4 to give the bracketed second element.

5 The individual, enumerated acts constituting the pattern of conduct need not be  
6 directed at the victim; it is the overall pattern of conduct which must reasonably affect the  
7 victim. See, e.g., *Best v. Marino*, 2017-NMCA-073, ¶¶ 2, 3 n.2, 404 P.3d 450 (affirming  
8 district court’s determination that the respondent had committed stalking by, in relevant  
9 part, “posting of statements and photographs related to Petitioner on (1) Respondent’s own  
10 website; (2) Respondent’s own Facebook and other social media pages; and (3) third-party  
11 controlled Facebook and other social media pages”). For example, a defendant stalking his  
12 former partner might use a third party to place the victim’s children under surveillance and  
13 follow them and later indirectly communicate to the victim by having a different third party  
14 send her the following text: “Those are cute twins you have going to Sunshine Elementary.  
15 It would be a shame if a car ran over them as they were walking home along Elm Street.”

16 Because the essential element of a “pattern of conduct” requires two or more of the  
17 enumerated acts on more than one occasion, the acts which must be proven may occur on  
18 more than one date. The Committee believes that due process and double jeopardy require  
19 that the dates encompassing all of the acts constituting the alleged pattern should be  
20 presented to the jury.

- 1 [Adopted by Supreme Court Order No. 21-8300-010, effective for all cases pending or
- 2 filed on or after December 31, 2021.]