

### 14-132. Unlawfulness as an element.<sup>1</sup>

In addition to the other elements of \_\_\_\_\_ (*name of offense*) [as charged in Count \_\_\_\_\_]<sup>2</sup>, the state must prove beyond a reasonable doubt that the act was unlawful.

For the act to have been unlawful it must have been done [without consent and<sup>3</sup>]<sup>4</sup>:

[with the intent to arouse or gratify sexual desire]

[or]

[to intrude upon the bodily integrity or personal safety of \_\_\_\_\_ (*name of victim*)]

[or]

[\_\_\_\_\_ (*other unlawful purpose*)].

\_\_\_\_\_ (*name of offense*) does not include a [touching]<sup>5</sup>

[penetration] [confinement] [\_\_\_\_\_ (*relevant act*)] for purposes of

[reasonable medical treatment]<sup>5</sup> [nonabusive (parental care) (or) (custodial care)]

[lawful arrest, search or confinement] [\_\_\_\_\_ (*other lawful purpose*)].

### USE NOTES

1. This instruction is intended to aid the court and the parties in preparing an instruction when the statutory definition of the offense includes the term "unlawful" and an issue is raised as to the lawfulness of the defendant's act. The examples in the second and third paragraphs address offenses that include the term "unlawful" as part of the definition of the offense. These offenses include certain assault and battery offenses, sex offenses and false imprisonment or kidnapping offenses. The examples suggested in the bracketed language have been taken from controlling cases addressing particular offenses and are not applicable to every case.

If the defendant is a psychotherapist who is accused of unlawfully touching a patient, see Subsection B of Section 30-9-12 NMSA 1978 for lawful touchings by a psychotherapist. See Section 30-9-10 NMSA 1978 for the definitions of patient and psychotherapist.

This instruction is not intended to be all inclusive. Appropriate language should be tailored in specific cases.

If this instruction is given, add to the essential elements instruction of the offense charged, "The defendant's act was unlawful".

This instruction need not be given if the unlawfulness element is included in another instruction such as self-defense or defense of another. See UJI 14-5181 to 14-5184 NMRA if the issue of "lawfulness" involves self-defense or defense of another.

2. Insert count number if more than one count is charged.

3. If the bracketed "without consent and" is given, one of the three alternatives that follows must be given. One or more of the three alternatives may be given without the bracketed "without consent and".

4. Use only applicable bracketed alternative or alternatives. If the evidence raises a particular issue of lawfulness that is not addressed in these alternatives, supply

appropriate descriptive language in the blanks provided.

5. Use only applicable bracketed alternative or alternatives.  
[As amended, effective January 20, 2005.]