

1 **13-842. Waiver.**

2 Waiver is the voluntary giving up of a known right. A waiver may be express or implied
3 from a person[']s statements or conduct. If _____ (*name of individual who waived*
4 *right*) waived ~~[[his] [her]]~~their right to _____ (*identify contractual*
5 *right*), then _____ (*name of individual who waived right*) is excused from ~~[[his]~~
6 ~~her]]~~their obligation to comply with that condition of ~~[[his] [her]]~~their performance.

7 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. S-1-RCR-2025-
8 00126, effective for all cases pending or filed on or after December 31, 2025.]

9 **Committee commentary.** — The elements of waiver are an existing right, knowledge of such
10 right, and an intention to relinquish or surrender that right. *Talley v. [Security Service] Sec. Serv.*
11 *Corp.*, 1983-NMSC-046, ¶ 18, 99 N.M. 702, 663 P.2d 361[~~(1983)~~]. *But see* Restatement (Second)
12 of Contracts § 84 comment b (promisor need not always know ~~[[his/her]]~~their legal rights nor intend
13 the legal effect of ~~[[his/her]]~~their promise).

14 Waiver usually arises in the context of conditions (such as timeliness) attached to the contract
15 obligor[']s performance rather than in the context of the performance itself. *See, e.g., Green v.*
16 *[General]Gen. Accident [Insurance]Ins. Co.*, 1987-NMSC-111, 106 N.M. 523, 746 P.2d 152[
17 ~~(1987)~~]. It is not clear, however, that absent a [']“novation,[']” [']“accord and satisfaction[']” or
18 the like, a party may [']“waive[']” the other party[']s contract performance.

19 Waiver covered by this instruction is waiver which occurs by a voluntary act whose effect is
20 intended. The instruction addresses both waiver which may be found in the express declaration
21 and implied from a party[']s representations that fall short of such declaration or from conduct.
22 Waiver may also be presumed or implied contrary to the intention of a party from a course of
23 conduct showing waiver by estoppel. To prove waiver by estoppel a party must show that ~~he/she~~

1 ~~was~~ they were misled to ~~[his/her]~~ their prejudice by the conduct of the other party into the honest
2 and reasonable belief that such waiver was intended. *Hale Contracting Co., Inc. v. United N.M.*
3 *Bank*, 1990-NMSC-089, ¶ 12, 110 N.M. 712, 799 P.2d 581[~~(1990)~~]. UJI 13-842 does not cover
4 waiver by estoppel; counsel and the trial court must draft an appropriate instruction where this
5 doctrine is available on the evidence.

6 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]