PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CIVIL
PROPOSAL 2020-017

March 3, 2020

The Uniform Jury Instructions - Civil Committee has recommended amendments to UJI 13-801, 13-808, 13-811, 13-812, 13-816, 13-817, 13-819, 13-825, 13-826, 13-827, 13-828, 13-835, 13-839, 13-841, and 13-861 NMRA, amendments to the UJI Chapter 8 Appendices, and the adoption of new UJI 13-834 NMRA for the Supreme Court's consideration.

These proposed changes are intended to address inconsistencies, inaccuracies, and confusing omissions relating to common law contracts actions, and are the second part of a two-part project to amend Chapter 8 of the Uniform Jury Instructions. In the first part of the project, the Supreme Court addressed inconsistencies, inaccuracies, and confusing omissions relating to contracts for the sale of goods under the Uniform Commercial Code (UCC) by eliminating all provisions in Chapter 8 related to UCC sales.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 2, 2020, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

13-801. Contract; definition.

A contract is a legally enforceable promise [set of promises]. In order for a promise [set of promises] to be legally enforceable, there must be an offer, an acceptance, consideration, and mutual assent.

[Any of these four requirements, although not expressly stated, may be found in the surrounding circumstances, including the parties' words or actions, ~~[what they wanted to accomplish, the way they dealt with each other, and how others in the same circumstances~~

~~customarily deal or would deal]~~ the parties' conduct, the parties' course of dealing, the parties' course of performance, or from custom.]

In this case, the parties agree that there [was] [were] _____ (*insert element(s) parties agree were met*). What is in dispute is whether there [was] [were] _____ (*insert element(s) parties do not agree were met*).

USE [~~NOTE~~]NOTES

When the existence of a contract [~~is in dispute, this instruction should be given with instructions for whichever elements of the purported contract are in dispute (UJI 13-805 to 13-816 NMRA)~~] presents a question for a jury, this instruction should be given. [~~Instructions should be given only for those elements in dispute. The bracketed language with respect to implied promises should be given only when a party claims that the promise which forms the basis of the contract arises from an inference and not from an expression, written or oral~~] The element(s) not in dispute and in dispute should be inserted as the parentheticals in the instruction indicate. The bracketed language in the second paragraph should be included in the instruction given to a jury, to the extent the evidence warrants, when a case presents a jury question as to the existence of an implied contract. Additionally, instructions for any element(s) in question should be given. *See* UJI 13-805 to 13-814, UJI 13-816 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~This instruction is applicable only to cases involving true contracts. A true contract is one in which the legal obligation arises from the intentional undertaking of the promisor or the reasonable understanding of the promisee that the promisor has made such an undertaking. *See* Restatement of Contracts § 5, and Restatement (Second) of Contracts § 4 comment b. True contracts are differentiated from quasi-contracts by the presence in true contracts of an intention of the parties to undertake the performances in question. *State ex rel. Gary v. Fireman's Fund Indem. Co.*, 67 N.M. 360, 364, 355 P.2d 291, 294 (1960); Restatement (Second) of Contracts § 4 comment b.~~

~~Where no such intention exists, the law may impose obligations created for reasons of justice. Occasionally, in such cases, the obligations are described as "quasi-contractual" or arising from an "implied in law" contract. Restatement (Second) of Contracts § 4, Reporter's Note, comment b; 1 Corbin, Contracts § 19 (1963). These labels are fictional and liability in such cases has nothing to do with contract.~~

~~A true contract may exist, however, where there is no contractual intent or undertaking on the part of the purported promisor. In these situations, when a true contract is found, the contractual obligation is founded on the reasonable apprehension by the promisee of an undertaking by the purported promisor.~~

~~An implied contract can arise by a course of conduct or through custom and usage. *Toppino v. Herhahn*, 100 N.M. 564, 673 P.2d 1318 (Ct. App. 1983); *Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982); *Gordon v. New Mexico Title Co.*, 77 N.M. 217, 421 P.2d 433 (1966); *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).~~

~~The distinction between express and implied contract lies not in legal effect but in the parties' mode of manifesting assent to the agreement. *State ex rel. Gary v. Fireman's Fund Indem. Co.*, 67 N.M. 360, 364, 355 P.2d 291, 295 (1960); Restatement (Second) of Contracts § 4 comment~~

~~a. Assent may be manifested by words or by implication from other circumstances, including course of dealing, usage of trade, or course of performance. Restatement (Second) of Contracts § 4 comment a.~~

~~Although all four elements of a contract must exist, each element need not be independently expressed. For example, when there has been an explicit offer and acceptance, often there is consideration and mutual assent, even though not separately expressed. *See Clark v. Sideras*, 99 N.M. 209, 656 P.2d 872 (1982).~~]"The existence of a contract between parties is generally a question of law to be decided by the trial court." *Rio Grande Conservancy Dist.*, 1983-NMCA-047, ¶ 22, 99 N.M. 802, 664 P.2d 1000, *overruled on other grounds by Montoya v. Akal Sec. Inc.*, 1992-NMSC-056, 114 N.M. 354. However, "when the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the jury to determine whether the contract did in fact exist." *Segura v. Molycorp, Inc.*, 1981-NMSC-116, ¶ 24, 97 N.M. 13, 636 P.2d 284.

Ordinarily, "a legally enforceable contract requires evidence supporting the existence of an offer, an acceptance, consideration, and mutual assent." *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 6, 137 N.M. 57, 107 P.3d 11 (internal quotation marks & citation omitted); *accord Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶ 9, 121 N.M. 728, 918 P.2d 7; *cf. Hydro Conduit Corp. v. Kimble*, 1990-NMSC-061, ¶ 21, 110 N.M. 173, 793 P.2d 855 (distinguishing quasi-contracts or contracts implied in law); *see also* Restatement of (Second) Contracts § 4, cmt. b, at 15 (1979) ("[Q]uasi-contracts are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law for reasons of justice.").

A contract may be express or implied. *Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 21; *accord Orion Technical Res., LLC*, 2012-NMCA-097, ¶ 9, 287 P.3d 967. "An implied contract may be found in written or oral representations, in the conduct of the parties, or in a combination of representations and conduct." *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 20, 135 N.M. 128, 85 P.3d 252, *aff'd on other grounds*, 2005-NMSC-003, 137 N.M. 192**;** *see also Orion*, 2012-NMCA-097, ¶¶ 8-9, 287 P.3d 967 (explaining that an implied contract also may be found from circumstances, including the parties' course of dealing or course of performance, as well as from custom). The legal effect and the elements of express and implied contracts are the same. 1 R. Lord, *Williston on Contracts* § 1:5, at 33, 37-38 (4th ed. 2007).

[As amended by Supreme Court Order No. _____, effective _____.]

13-808. Acceptance; [terms of the offer]new or different terms; counteroffer.

~~[A reply is not an acceptance if it adds a material qualification or requests a new condition not in the offer. If, however, you determine that _____'s reply departs from the terms of _____'s offer, that reply is still an acceptance if:~~

~~[_____ agreed to the new term;] [or]~~

~~[the new term is so consistent with the offer that _____'s agreement to the term could reasonably be inferred from [his] [her] [its] offer;] [or]~~

~~[_____ makes it clear in the reply that [his] [her] [its] acceptance is not dependent upon _____'s agreement to the new term.]]~~

If _____ (*name of offeree*) responded to an offer by conditioning acceptance on new terms that added, varied or changed any term of the offer, the response was a rejection of the original offer and operated as a new offer that could be accepted or rejected by _____ (*name of offeror*). [If the new terms were reasonably implied by the original offer, however, the response operated as an acceptance of the original offer despite the additional or different terms.]

[If _____'s (*name of offeree*) response to an offer included additional or different terms but did not condition acceptance on agreement to those terms, the response operated as an acceptance of the original offer.]

USE [~~NOTE~~]NOTES

[~~Only those bracketed exceptions to a material qualification which are relevant to the case should be given. This instruction should be given only when the contract does not involve sales of goods governed by the UCC.~~]This instruction should be given only when a purported acceptance includes terms that differ from the offer. Only the bracketed portions relevant to the case should be used.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~When the "acceptance" reply is qualified or adds conditions which materially vary the terms of the offer, the reply is a rejection of the offer and a counteroffer. It is not an acceptance. *See Polhamus v. Roberts*, 1946-NMSC-033, ¶ 18, 50 N.M. 236, 175 P.2d 196; Restatement (Second) of Contracts §§ 39, 59 (1981).~~] An offer must be accepted unconditionally and unqualifiedly by the offeree. *Pickett v. Miller*, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 412 P.2d 400. "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." Restatement (Second) of Contracts, § 59 (1981); *see also Polhamus v. Roberts*, 1946-NMSC-033, ¶ 18, 50 N.M. 236, 175 P.2d 196.

[~~An acceptance, however, need not be an exact mirror image of the offer. If the offeree accepts the offer unconditionally but requests a change or addition, making it plain that granting the request is not a condition of the acceptance, then, assuming that the time and manner of acceptance was authorized, the offeree's acceptance creates a contract. *Polhamus*, 1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts § 61. In addition, a~~]An acceptance is not inoperative because conditional, if the requirement of the condition could be implied from the offer. [~~*See, e.g., Ross v. Ringsby*, 1980-NMCA-080, ¶ 8, 94 N.M. 614, 614 P.2d 26;~~] *See Pickett v. Miller*, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 109, 412 P.2d 400, 403; Restatement (Second) of Contracts, § 59, Comment b. A conditional acceptance is also operative if the condition was within the manifested intention of the parties. *See Tatsch v. Hamilton-Erickson Mfg. Co.*, 1966-NMSC-193, ¶ 11, 76 N.M. 729, 418 P.2d 187 (where a supplier's offer to provide school desks was conditional upon the project architect's acceptance of the supplier's brand of desk and the supplier made the conditional nature of the offer clear to the contractor, the contractor was empowered to accept supplier's offer on the condition that the project architect would approve the substituted product).

If the offeree accepts the offer unconditionally but requests a change or addition, making it plain that granting the request is not a condition of the acceptance, then, assuming that the time and manner of acceptance was authorized, the offeree's acceptance creates a contract. *Polhamus*,

1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts, § 61 ("An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms."); Restatement (Second) of Contracts, § 59, Comment a. ("[A] definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms.").

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

13-811. Acceptance; when silence is acceptance.

~~[Silence is acceptance only under [one or more of] the following condition[s]:~~

~~[If _____ took the benefits of an offer, knowing of _____'s intent to receive something in return;]~~

~~[or]~~

~~[If an offer gave _____ reason to understand that _____ would consider silence as an acceptance;]~~

~~[or]~~

~~[If the previous dealings of the parties reasonably indicate that an offer can be accepted by silence or inaction].~~]

The silence or inaction of _____ (*name of offeree*) constitutes acceptance only if:

[_____ (*name of offeree)* accepted the benefit[s] of the offer, after a reasonable opportunity to reject the benefit[s], knowing that _____ (*name of offeror*) expected compensation in return];

[or]

[_____ (*name of offeror*) stated or gave _____ (*name of offeree*) reason to understand that the offer could be accepted through silence or inaction and _____ (*name of offeree*) intended to accept the offer through silence or inaction];

[or]

[Where because of past dealings between the parties, it is reasonable that _____ (*name of offeree*) should have notified _____ (*name of offeror*) that [he] [she] [it] did not intend to accept the offer].

USE [~~NOTE~~]NOTES

~~[Where silence is claimed to constitute an acceptance, this instruction should be given with UJI 13-807 and 13-816 NMRA. Use only the condition(s) listed above which may be applicable to the facts.]~~

When a case presents a jury question as to whether a party's silence or inaction constituted acceptance of an offer, this instruction should be given. The bracketed language should be inserted to the extent warranted by the evidence in a case.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~Silence or inaction may become an acceptance only when the circumstances would impose upon the offeree a duty to speak. *Garcia v. Middle Rio Grande*~~

~~*Conservancy District*, 99 N.M. 802, 664 P.2d 1000 (Ct. App. 1983); *Vance v. Forty-Eight Star Mill*, 54 N.M. 144, 215 P.2d 1016 (1949); Restatement (Second) of Contracts § 69.~~

~~The first condition described in this instruction is illustrated by *Acme Cigarette Services, Inc. v. Gallegos*, 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978), in which a party accepted the benefits of an option contract and, after one year, attempted to break the contract and avoid his obligations, claiming that his silence had not constituted an acceptance. The construction of silence in the course of dealing between parties (the third condition above) is illustrated by *McCoy v. Alsup*, 94 N.M. 255, 609 P.2d 337 (Ct. App. 1980) (offerors' silence in response to offeree's letter confirming conditional acceptance constituted an admission and assent to the conditional acceptance).~~

~~The conditions described in this instruction reflect those clearly recognized by the existing reported decisions. The question is one of reasonableness in the circumstances and the listed conditions are not intended to be exclusive. They may be supplemented in a particular case where appropriate.~~]

Ordinarily, silence or inaction does not constitute acceptance of an offer. However, in the circumstances addressed by the instruction, silence or inaction may be found to constitute acceptance. The circumstances are ones which give rise to a duty on the part of the offeree to speak if the offeree does not intend to accept the offer. *See Garcia v. Middle Rio Grande Conservancy Dist.*, 1983-NMCA-047, ¶ 22, 99 N.M. 802, 664 P.2d 1000 ("Silence is acceptance . . . only when there is a duty to speak."); *see generally* Restatement (Second) of Contracts § 69 (1981) (discussing the circumstances and identifying potential limitations on their applicability).
[As amended by Supreme Court Order No. _____, effective _____.]

13-812. Acceptance; performance as acceptance; notification of the offeror; partial performance.

[~~Performance by _____ would be an acceptance of the offer only if: _____ reasonably understood that _____ wanted performance rather than a return promise,~~

~~and if~~

~~[_____ reasonably believed _____ would learn of the performance.]~~

~~[or]~~

~~[_____ took reasonable steps to notify _____ of the performance.]~~

~~In order to be effective as acceptance, performance must be complete.~~]

If _____ (*name of offeror*) invited acceptance of the offer through a return promise or through performance, and _____ (*name of offeree*) began the invited performance, such performance was an acceptance of the offer.

[Unless the offer required _____ (*name of offeree*) to notify _____ (*name of offeror*) about the beginning of performance, no notification was necessary for the performance to be acceptance.]

[If _____ (*name of offeree*) had reason to know that _____ (*name of offeror*) had no adequate means of learning of the performance with reasonable promptness and certainty, _____'s (*name of offeror*) contractual obligation[s] [was] [were] discharged unless:

[_____ (*name of offeree*) exercised reasonable diligence to notify _____ (*name of offeror*) of the acceptance];

[or]

[_____ (*name of offeror*) learned of the acceptance within a reasonable time];

[or]

[the offer indicated notification of acceptance was not required].]

USE [~~NOTE~~]NOTES

[~~This instruction should be given in conjunction with UJI 13-807 and 13-816 NMRA. One or both of the bracketed paragraphs must be given, as the evidence warrants.~~]

In a case which presents a jury question as to whether an offer was accepted through an invited performance, this instruction should be given. The bracketed language should be included to the extent the evidence in the case warrants.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~An offer may be accepted by performance before revocation. *Keeth Gas Co. v. Jackson Creek Cattle Co.*, 1977-NMSC-087, 91 N.M. 87, 570 P.2d 918; Restatement (Second) of Contracts §§ 54, 34(2) (1981); *but see* Restatement (Second) of Contracts § 53 for the qualification that the offer must invite acceptance by performance. Where an offeree who accepts by rendering a performance knows that the offeror has no adequate means of learning of the performance, the offeror's duties are discharged unless one of the following three conditions exists:~~

~~(1) the offeror learns of the performance within a reasonable time;~~

~~(2) the offer indicates that notification is unnecessary; or~~

~~(3) the offeree exercises reasonable diligence to notify the offeror of acceptance. Restatement (Second) of Contracts § 54. Reasonable time is defined in Restatement (Second) of Contracts § 41(2).~~

~~Where the offer calls for performance as consideration for the contract, partial performance which is a part of the consideration creates an option contract in which completion of the performance by the offeree invokes the duties of the offeror. *Marchiondo v. Scheck*, 1967-NMSC-222, 78 N.M. 440, 432 P.2d 405; Restatement (Second) of Contracts §§ 45, 63. What constitutes partial performance will vary from case to case since what can be done toward performance is a question of fact, depending on the circumstances in which the offer is made. *Marchiondo*, 1967-NMSC-222. Use of a subcontractor's bid in a general contractor's bid may constitute an acceptance by the contractor, binding both parties to the terms of the subcontractor's offer. *Stites v. Yelverton*, 1955-NMSC-098, 60 N.M. 190, 289 P.2d 628; Restatement (Second) of Contracts § 87. If a subcontractor's bid contains language specifically limiting the duration of the offer and the contractor does not confirm reliance upon the offer before the time limit, the subcontractor is not bound. *K. L. House Const. v. Watson*, 1973-NMSC-038, 84 N.M. 783, 508 P.2d 592.~~]

"Acceptance of an offer is a manifestation of assent to the terms of the offer in a manner invited or required by the offer." *Orcutt v. S & L Paint Contractors, Ltd.*, 1990-NMCA-036, ¶ 13, 109 N.M. 796, 791 P.2d 71 (citing Restatement (Second) of Contracts § 50 (1981).) The offeror may invite or require acceptance through performance. *See* Restatement (Second) of Contracts § 50; *see also Long v. Allen*, 1995-NMCA-119, ¶ 6, 120 N.M. 763, 906 P.2d 754 (citing

Restatement (Second) of Contracts § 30 (form of acceptance invited), as another source of guidance on the issue). This instruction was drafted to address the first scenario in which the offeror invites acceptance through performance.

Acceptance through performance is invited when the offer invites the offeree to choose between acceptance by promise and acceptance by performance. *Long*, 1995-NMCA-119, ¶ 6 (citing the Restatement (Second) of Contracts § 62); *see also id.* ¶ 4 (citing Restatement (Second) of Contracts § 32 for the proposition that, in case of doubt, the offeree may accept through either a promise to perform or through performance). "[T]he tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance" which "operates as a promise to render complete performance." Restatement (Second) of Contracts § 62.

Acceptance through performance is required when the offer limits the manner of acceptance to performance. *See Marchiondo v. Scheck*, 1967-NMSC-222, 78 N.M. 440, 432 P.2d 405; *see also Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, ¶ 18 n.2, 121 N.M. 622, 916 P.2d 822 (citing *Marchiondo*, 1967-NMSC-222, and the Restatement (Second) of Contracts § 45, as sources of guidance on the issue). In such a case, the tendering or beginning of performance operates as an acceptance for an option contract. *See Marchiondo*, 1967-NMSC-222, Restatement (Second) of Contracts § 45.

For an acceptance through performance to be effective, the offeree need not notify the offeror about the performance unless certain circumstances are present. One of the circumstances is when the offeror requires such notification. *See Long*, 1995-NMCA-119, ¶ 7 (citing Restatement (Second) of Contracts § 54). Additionally, if the offeree has reason to know that the offeror does not have adequate means of learning of the performance with reasonable promptness and certainty, the offeror's contractual duty is discharged unless (1) the offeree exercises reasonable diligence to notify the offeror of the acceptance; (2) the offeror learns of the performance within a reasonable time; or (3) the offer indicates that notification of acceptance is not required. *See id.*

[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

13-816. Mutual assent; definition.

~~[For there to be mutual assent, the parties must have had the same understanding of the material terms of the agreement.~~

~~To determine what each party understood, you should look at the parties' intentions, words, and actions, and at the surrounding circumstances.~~

~~[If the understanding of the parties was not the same, _____ may still be held to have agreed if _____'s understanding was reasonable and _____'s understanding was unreasonable.]]~~

Mutual assent requires a showing of agreement by the parties to the material terms of the contract. Mutual assent may be shown by the parties' written or spoken words, by their acts or failures to act, or some combination thereof. Ordinarily, when one party makes an offer, and the other party accepts the offer, there is mutual assent.

[When the parties attach materially different meanings to the words of an offer, there is no mutual assent if:

1. Neither party knows or has reason to know the meaning attached by the other; or
2. Each party knows or has reason to know the meaning attached by the other.]

USE NOTE

~~This instruction should be given where a question of fact exists as to whether the parties' objective manifestations of assent indicate that the parties believed they had entered into a contract. [If the jury determines that the parties had different understandings, each consistent with their subsequent acts, then the jury must determine whether one party's understanding is so extraordinary as to create estoppel. Paragraph three enables the jury to make this judgment, thereby protecting the reliance interest of the party claiming the sole reasonable interpretation of the words and acts of the exchange. Paragraph three differs from UJI 13-804 NMRA in that the jury is asked to consider not what the parties actually intended, but whether one party's subjective understanding comports with an objective view of the exchange while the other party's does not.~~]

When the existence of mutual assent presents a question for a jury, this instruction should be given. The bracketed language should be included when a case presents a jury question as to whether a misunderstanding resulted in the absence of mutual assent required for the formation of a contract.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____ .]

Committee commentary. — [~~If both parties have reasonable views of an exchange and these views differ, then there is mutual mistake. The law does not make a contract when the parties intend none. If the parties create relations different from what both parties thought they had created, the contract will likewise fail for mutual mistake. *Jacobs v. Phillippi*, 102 N.M. 449, 697 P.2d 132 (1985); Restatement (Second) of Contracts § 20. Where one party meant one thing, and the other party meant another, and the difference goes to the essence of the contract, there is no contract unless one party knew or had reason to know what the other party meant or understood. *Trujillo v. Glen Falls Insurance Co.*, 88 N.M. 279, 540 P.2d 209 (1975); Restatement (Second) of Contracts § 20.~~]

"It is elementary in contract law that mutual assent ordinarily must be expressed by parties to an agreement before a contract is made." *Orcutt v. S&L Paint Contractors, Ltd.*, 1990-NMCA-036, ¶ 11, 109 N.M. 796, 791 P.2d 71 (citing *Trujillo v. Glen Falls, Inc.*, 1975-NMSC-046, 88 N.M. 279, 540 P.2d 209). "Mutual assent is based on objective evidence, not the private, undisclosed thoughts of the parties. In other words, what is operative is the objective manifestations of mutual assent by the parties, not their secret intentions." *Pope v. The Gap, Inc.*, 1998-NMCA-103, ¶ 13, 125 N.M. 376, 961 P.2d 1283 (citations omitted); *accord Trujillo*, 1975-NMSC-046, ¶ 7; *see also Gutierrez v. Sundancer Indian Jewelry, Inc.*, 1993-NMCA-156, ¶ 43, 117 N.M. 41 (Hartz, J., dissenting) ("Often it is written that a contract requires a 'meeting of the minds.' The phrase creates problems because it can readily be interpreted to refer to the unconveyed thoughts of the parties."). Mutual assent may be manifested in whole or in part by the written or spoken language used by the parties or by the parties' acts or failure to act. *Trujillo*, 1975-NMSC-046, ¶ 7; *see also* Restatement (Second) of Contracts §§ 18-19 (1981). "The manifestation of mutual assent to an exchange ordinarily takes the form of an offer by one party followed by an acceptance by another." *Orcutt*, 1990-NMCA-036, ¶ 11.

"The Restatement (Second) of Contracts explains the effect of misunderstandings on contracts." *Pope*, 1998-NMCA-103, ¶ 13. "There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither knows or has reason to know of the meaning attached by the other; or (b) each party knows or has reason to know the meaning attached by the other." Restatement (Second) of Contracts § 20(1), at 58-59 (1981); *see also* 1 R. Lord, *Williston on Contracts*, § 3:4, at 285 (4th ed. 2007); *cf.* Restatement (Second) of Contracts § 20(2) and comments c & d thereto (explaining, in part, when a misunderstanding does not prevent the formation of a contract).

Secondary sources explain when, despite a manifestation of assent by a party, fraud, duress, mistake, or another invalidating cause may render the resulting contract voidable. *See*, *e.g.*, Restatement (Second) of Contracts § 19. Since invalidating causes are in the nature of an affirmative defense, a separate jury instruction should be drafted for any applicable defense.
[As amended by Supreme Court Order No. _____, effective _____ .]

13-817. Modification of contract; definition.

[~~A m~~]Modification of a contract occurs when the parties intend to continue the contractual relationship but wish to change one or more of the terms of the contract. In order for [~~a~~] the modification [~~to the contract~~]to be effective, there must be mutual assent of [~~both~~ _____ ~~and~~ _____]the parties to the modification[, and _____ (*name of party to the contract*) must have:

[done something [he][she][it] was not already obligated to do]; or

[promised to do something [he][she][it] was not already obligated to do]; or

[not done something [he][she][it] otherwise could have done]; or

[promised not to do something [he][she][it] otherwise could have done].]

[Even a contract that requires modifications to be in writing may be modified orally. However, the oral modification must be proven by clear and convincing evidence.]
[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

USE [~~NOTE~~]NOTES

This instruction should be given when the validity of a contract modification is at issue. Use the first set of bracketed language when there is an issue as to whether a party benefitting from the modification gave consideration for it, including whichever of the four bracketed choices are supported by the evidence. Use the second set of bracketed language when an oral modification is alleged to have been made to a written contract with terms requiring that modifications be in writing. In such a case, the jury should also be instructed that an oral modification must be proven by clear and convincing evidence. *See* UJI 13-405 NMRA.
[Adopted by Supreme Court Order No. _____. effective _____.]

Committee commentary. — "[I]n the absence of a prohibiting statute, [a] written contract may be orally modified by the parties who made the original agreement." *Wendell v. Foley*, 1979-NMCA-052, ¶ 11, 92 N.M. 702, 594 P.2d 750. A course of dealing may also modify an agreement. *See Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶ 14, 119 N.M. 136, 889 P.2d 171; *Wal-Go Assoc. v. Leon*, 1981-NMSC-022, 95 N.M. 565, 624 P.2d 507 (lessor's policy always

to redeposit lessee's checks modified contract so that lessee was not in breach when its check was returned marked "insufficient funds"). Because New Mexico still adheres to the pre-existing duty rule, new consideration is necessary whenever a change benefits only one party. *See, e.g., Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 11, 124 N.M. 613, 954 P.2d 45.

The ability of the parties to modify a contract orally may be circumscribed by their written agreement. *Danzer v. Prof'l Insurers, Inc.*, 1984-NMSC-046, 101 N.M. 178, 679 P.2d 1276 (oral modification of a written contract failed because contract called for modification in writing of the party to be charged). Nevertheless, a contract that requires modifications to be in writing may be modified orally if there is clear and convincing evidence that an oral modification was made. *See Medina*, 1995-NMSC-002, ¶¶ 12-15 (holding the trial court erred in excluding evidence of oral modification of a contract requiring modifications to be in writing); *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 23, 136 N.M. 74, 105 P.3d 294; *Powers v. Miller*, 1999-NMCA-080, ¶ 10, 127 N.M. 496, 984 P.2d 177 (requiring that oral modifications to written contracts that specify that modifications must be in writing must be proven by clear and convincing evidence).
[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

13-819. [~~Assignment; no reversionary interest.~~] Partial assignment of a contractual right; no instruction drafted.

[~~For the assignment to be valid, _____ must have retained no rights in what was assigned.~~]

[~~USE NOTE~~]

[~~This direction should be given in conjunction with UJI 13-818.~~]

Committee commentary. — Section 326(1) of the Restatement (Second) of Contracts (1981) provides that "an assignment of a part of a right, whether the part is specified as a fraction, as an amount, or otherwise, is operative as to that part to the same extent and in the same manner as if the part had been a separate right." The New Mexico Supreme Court has written approvingly of partial assignments, but it has not yet indicated whether New Mexico follows Section 326 or provided specific guidance regarding partial assignments. *Johnson v. Sowell*, 1969-NMSC-133, ¶ 18, 80 N.M. 677, 459 P.2d 839; *Kandelin v. Lee Moor Contracting Co.*, 1933-NMSC-058, ¶ 26, 37 N.M. 479, 24 P.2d 731.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

13-825. Ambiguity in term or terms; general rule of interpretation.

There is a dispute as to the meaning of the following term[s] in the contract: [~~[Fill in term or terms]~~] (*Fill in term or terms*). [~~If you find that the parties, at the time the contract was made, had the same understanding of [this] [these] term[s], then you shall give that meaning to the term[s]. Where, however, the parties at the time the contract was made had different meanings in mind about [this] [these] term[s], then y~~]You shall give the term[s] that meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following:

[the intentions of the parties];

[the words that the parties used];
[the purposes the parties sought to achieve];
[custom in the trade];
[the parties' course of dealing];
[the parties' course of performance];
[whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term[s] differently[.]].

USE [NOTE]NOTES

[This instruction should be given together with UJI 13-804 NMRA, as well as together with any applicable instruction from UJI 13-826, 13-827 or 13-828 NMRA. The term or terms in dispute should be inserted after the colon in the first sentence. Before a court may submit a question of interpretation of a contract term or terms to the jury, however, the court must make the threshold determinations that there is ambiguity as to the meaning of the term or terms at issue and that the resolution of any ambiguity requires extrinsic evidence. These threshold issues are ones of law for the court to determine. If the court determines that ambiguity exists, then extrinsic evidence, which is helpful in resolving the ambiguity, is admissible to demonstrate the parties' intentions and the surrounding circumstances and the question of interpretation may be submitted, where appropriate, to the jury. If the court finds no ambiguity, however, then the unambiguous meaning of the term or terms, as determined by the court, is controlling, and no question of interpretation is submitted to the jury. The bracketed language at the end of the instruction should be used where appropriate from the evidence.]

A court must make a preliminary determination as a matter of law that a contract contains an ambiguity before this instruction is given. If such a determination is made, the term(s) in dispute should be inserted after the colon in the first sentence of the instruction. The bracketed language regarding the circumstances that the jury may consider in resolving the ambiguity should be included as the evidence in the case warrants. The evidence also may warrant the giving of additional instructions, including UJI 13-804 NMRA (Contract; intention of the parties); UJI 13-826 NMRA (Custom in the trade); UJI 13-827 NMRA (Course of dealing); and UJI 13-828 NMRA (Course of performance).

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____ .]

Committee commentary. — [The court's function is to interpret and enforce the contract as made by the parties with reference to the intent of the parties. *CC Housing Corp. v. Ryder Truck Rental*, 106 N.M. 577, 746 P.2d 1109 (1987); *Segura v. Kaiser Steel Corp.*, 102 N.M. 535, 697 P.2d 954 (Ct. App. 1984); *Manuel Lujan Insurance, Inc. v. Jordan*, 100 N.M. 573, 673 P.2d 1306 (1983); *Schaefer v. Hinkle*, 93 N.M. 129, 597 P.2d 314 (1979). A contractual term is ambiguous "only if it is reasonably and fairly susceptible of different constructions." *Levenson v. Mobley*, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). Disagreement between the parties as to what the terms of the contract mean does not in itself establish ambiguity. Id. Once it has been determined that a contract is ambiguous and its construction depends on extrinsic facts and circumstances, terms of a contract become questions of fact for triers of fact. *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 734 P.2d 1258 (1987); *Mobile Investors v. Spratte*, 93 N.M. 752, 605

~~P.2d 1151 (1980); *Schaeffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980); *Young v. Thomas*, 93 N.M. 677, 604 P.2d 370 (1979).~~]

Whether a contract contains an ambiguity presents a preliminary question of law for a court to decide. *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 845 P.2d 1232; *see also C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 17, 112 N.M. 504, 817 P.2d 238. "If the court determines that the contract is reasonably and fairly susceptible of different constructions, an ambiguity exists." *Mark V, Inc.*, 1993-NMSC-001, ¶ 12.

Once a contract is found to be ambiguous, the meaning to be assigned to the unclear term(s) presents a question of fact. *Id.* If evidence is proffered regarding the facts and circumstances surrounding the contract and the evidence is in dispute, turns on witness credibility, or is susceptible to conflicting inferences, the meaning must be resolved by a jury (or the court as the fact finder in the absence of a jury). *Id.* "[T]he [jury] may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent." *Id.* ¶ 13; *see also Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1 (showing that a jury also may consider evidence regarding the purposes the parties sought to achieve, trade custom, course of dealing, and course of performance). The jury must decide whether the proffered evidence "supports one interpretation rather than the other." *McNeill v. Rice Eng'g & Operating, Inc.*, 2003-NMCA-078, ¶ 13, 133 N.M. 804, 70 P.3d 794; *cf. Mark V, Inc.*, 1993-NMSC-001, ¶ 13 (Under the parol evidence rule, "evidence should not be received when its purpose or effect is to contradict or vary the agreement's terms.").

The jury must resolve the ambiguity before deciding breach and damages. *C.R. Anthony Co.*, 1991-NMSC-070, ¶ 11.

[As amended by Supreme Court Order No. _____, effective _____.]

13-826. Custom in the trade.

A custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties.

USE [~~NOTE~~]NOTES

This instruction should be [~~used,~~]given in conjunction with UJI 13-825 NMRA when [~~a question of interpretation exists as to a term or terms in a contract and there is evidence submitted concerning custom in the trade~~]there is a dispute as to the meaning of an ambiguous term or terms in a contract and there has been a sufficient showing of a trade custom to submit the evidence to the jury to consider in resolving the dispute.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____ .]

Committee commentary. — [~~Evidence of trade custom is admissible to determine the meaning of disputed terms in the contract. This instruction should not be considered as having created any duty independent of the contract.~~

~~The existence and scope of the trade custom must be proved as facts, and the issue should not be submitted to the jury unless there is evidence to make a triable issue. While a practice, in order to be considered "custom," must be sufficiently common so as to justify the expectation that~~

~~it will be followed, it is not necessary that the practice be long-standing, universal, or without dissent.~~]

Evidence of a trade custom is admissible for the factfinder to consider in determining the meaning of an ambiguous term in a contract. *See Allsup's v. Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. A trade custom may be proved through witness testimony and other evidence. *Romero v. H.A. Lott, Inc.*, 1962-NMSC-037, ¶ 12, 70 N.M. 40, 369 P.2d 777; *see also Briggs v. Zia Co.*, 1957-NMSC-074, ¶¶ 6-10, 63 N.M. 148, 315 P.2d 217. Guidance regarding the roles of the trial court and the jury when a party seeks to rely on evidence of trade custom may be found in 12 Richard A. Lord, *Williston on Contracts* § 34:19 (4th ed. 2012).

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

13-827. Course of dealing.

A course of dealing is a manner of dealing between the parties in previous transactions which it is reasonable to regard as establishing [~~a~~]the parties' common understanding [~~with respect to~~]of the meaning of the term[s] in dispute.

USE [~~NOTE~~]NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA[~~, when a question of interpretation exists as to a term or terms in a contract and there is evidence submitted concerning course of dealing~~]when there is a dispute as to the meaning of an ambiguous term or terms in a contract and there has been a sufficient evidentiary showing of a prior course of dealing between the parties to submit the evidence to the jury to consider in resolving the dispute.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~Evidence of how the parties have dealt with each other in other similar transactions may be relevant to the proper construction of the contract at issue. This type of evidence is referred to as "course of dealing." The evidence of course of dealing may assist in construing ambiguous terms in a contract or it may also serve to supplement or amplify explicit terms in a contract. J.A. Farnsworth, Contracts § 7.13.~~

~~In order for there to be a "course of dealing," it is necessary that the prior conduct not be an isolated instance but rather reflect a sufficient sequence of events to support the conclusion that it reliably evinces the understanding of the parties. Restatement (Second) of Contracts, §223(2); [*Id.*] J.A. Farnsworth, Contracts § 7.13.~~The concept of "course of dealing" should not be confused with the concept of "course of performance," which deals with the parties' performance of the contract at issue. *See* UJI 13-828 NMRA. Similarly, the concept of "course of dealing" must be distinguished from prior negotiations of the contract at issue.]

Evidence of a prior course of dealing between the parties is admissible for the factfinder to consider in determining the meaning of an ambiguous term in a contract. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. For a course of dealing to be shown, the parties must have previously dealt with one another in similar transactions in a manner that supports the conclusion that the dealings evince the parties' understanding of the

contractual term(s) in question. *See* 2 Zachary Wolfe, *Farnsworth on Contracts* § 7.16 (4th ed. 2019). A course of dealing, which involves conduct prior to the contract in question, should not be confused with a course of performance, which involves the parties' performance of the contract at issue. *Id.*

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

13-828. Course of performance.

A course of performance is the way the parties have conducted themselves in the performance of [~~this contract, reflecting a~~]the contract which it is reasonable to regard as establishing the parties' common understanding of the meaning of the term[s] in dispute.

USE [~~NOTE~~]NOTES

This instruction should be given in conjunction with UJI 13-825 NMRA when a question of interpretation exists as to a term or terms in a contract and [~~there is evidence submitted concerning course of performance~~]evidence is submitted concerning the parties' course of performance under the contract.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~How the parties have performed the obligations of the contract at issue may be relevant to the construction of that contract and hence admissible. Such evidence is considered "course of performance" and should be distinguished from "course of dealing" (*see* UJI 13-827 NMRA) and "trade custom" (*see* UJI 13-826 NMRA).~~

~~In order for performance of the contract to constitute a "course" of performance, the evidence must describe more than just an isolated act or instance, but must be sufficiently established to indicate reliably the intents of the parties. See J. A. Farnsworth, Contracts § 7.13. The concept of course of performance is closely associated with the concepts of waiver (*see* UJI 13-842 NMRA) and modification of the contract (*see* UJI 13-817 NMRA).~~]

Evidence of how the parties have performed the obligations of the contract at issue is admissible for the factfinder to consider in determining the meaning of an ambiguous term in the contract. *See Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127 N.M. 1, 976 P.2d 1. The conduct of the parties after the contract is made may indicate the meaning that they attach to the term(s) in question. 2 Zachary Wolfe, *Farnsworth on Contracts* § 7.16 (4th ed. 2019). A course of performance, which involves the parties' performance of the contract at issue, should not be confused with a course of dealing, which involves conduct prior to the contract in question. *Id.*

[Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]
13-834. Misrepresentation.

_____ (*name of defendant*) claims that the contract upon which _____ (*name of plaintiff*) relies is void because of misrepresentation by _____ (*name of plaintiff*).

To establish the defense of misrepresentation, _____ (*name of defendant*) must prove all of the following:

1. That _____ (*name of plaintiff*) made a misrepresentation;
2. That the misrepresentation was [fraudulent] [or] [material];
3. That _____ (*name of defendant*) would not have entered into the contract if [he][she][it] had known that the representation was untrue; and
4. That _____ (*name of defendant*)'s reliance on the misrepresentation was justified.

[A material misrepresentation is any untrue statement upon which the other party did in fact rely in entering into the contract, and without which the other party would not have entered into the agreement.]

[A misrepresentation is fraudulent if one party makes it with the intent to deceive and to cause the other party to act on it. If a fraudulent misrepresentation is at issue, it must be proven by clear and convincing evidence.]

USE NOTES

Use this instruction when the defendant contends that a contract is void because of a misrepresentation by the plaintiff. Include the first bracketed paragraph when a material misrepresentation is alleged. Include the second bracketed paragraph when a fraudulent misrepresentation is alleged. If the defendant contends that the misrepresentation was fraudulent, the jury should also be instructed that a fraudulent misrepresentation must be proven by clear and convincing evidence. *See* UJI 13-405 NMRA.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. – Misrepresentations by one party as to a writing can make a contract voidable by the other party. *See, e.g.*, *Gross Kelly & Co. v. Bibo*, 1914-NMSC-085, ¶¶ 17, 35, 19 N.M. 495, 145 P. 480. "In order for this to occur, the recipient of the misrepresentation must show that (1) there was a misrepresentation that was (2) material or fraudulent and which (3) induced the recipient to enter into the agreement, and that (4) the recipient's reliance on the misrepresentation was justified." *Sisneros v. Citadel Broadcasting Co.*, 2006-NMCA-102, ¶ 10, 140 N.M. 266, 142 P.3d 34.

The contractual defense does not require fraud, or that the misrepresentations be intentional. "The rule in New Mexico is that irrespective of the good faith with which a misrepresentation of material fact is made, if it is justifiably relied on by one seeking rescission of the contract, such rescission should be allowed." *Jones v. Friedman*, 1953-NMSC-051, ¶ 22, 57 N.M. 361, 251 P.2d 1131; *see also Maxey v. Quintana*, 1972-NMCA-069, ¶ 9, 84 N.M. 38, 499 P.2d 356 ("Rescission may be effected without regard to the good faith with which a misrepresentation is made."). However, when the misrepresentation is not material, fraudulent intent must be shown. *See Sisneros*, 2006-NMCA-102, ¶ 10; *cf. McElhannon v. Ford*, 2003-NMCA-091, ¶ 15, 134 N.M. 124, 73 P.3d 827 ("[R]escission may be allowed in certain cases of non-fraudulent, but material, nondisclosure.").

The burden of proof is different depending on whether fraud or misrepresentation is at issue. Where the misrepresentations are fraudulent, the defendant must prove the defense under the higher clear and convincing standard. *See, e.g.*, *McLean v. Paddock*, 1967-NMSC-165, ¶ 16, 78 N.M. 234, 430 P.2d 392 (requiring the defense of fraud to be proven by clear and convincing evidence), *overruled on other grounds by Duke City Lumber Co., Inc. v. Terrel*, 1975-NMSC-041, ¶ 7, 88 N.M. 299, 540 P.2d 229.

[Approved by Supreme Court Order No. _____, effective _____.]

13-835. Illegality; enforceability of contractual obligations.

There was in force in the State of New Mexico at the time this contract was entered into a certain [statute] [ordinance] [regulation] which provided:

(*set out statutory language*)

~~[If you find that _____ violated this statute, then _____ was excused from performing [his] [her] obligations under the contract.]~~

If [making the contract] [performing the contract] [violated] [would violate] the [statute] [ordinance] [regulation], then _____ (*name of defendant*) is excused from [his] [her] [its] obligation[s] under the contract.

USE [~~NOTE~~]NOTES

This instruction is to be used when the defendant has asserted that the making or performance of the contract violated public policy as expressed in a statute, ordinance, or regulation and there is evidence to support a finding that the violation occurred. Before the instruction is given, however, the court must determine as a matter of law that the public policy allegedly violated is of sufficient importance to justify invalidating the contract. Where the evidence warrants, the court should instruct on excuse or justification with respect to violation of the statute or ordinance as provided in UJI 13-1503 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — A contract made or performed in violation of a statute may be unenforceable on public policy grounds. *See DiGesu v. Weingart*, 1978-NMSC-017, ¶ 7, 91 N.M. 441, 575 P.2d 950[~~ (1978) (violation of liquor license regulation)~~]; *Granger v. Caviness*, 1958-NMSC-106, ¶¶ 6, 10, 64 N.M. 424, 329 P.2d 439; *Davis v. Savage*, 1946-NMSC-011, ¶ 42, 50 N.M. 30, 168 P.2d 851; *City of Artesia v. Carter*, 1980-NMCA-006, ¶ 12, 94 N.M. 311, 610 P.2d 198. The statute itself may so provide.

In many instances, however, the effect of the violation, if proved, must be determined by the court. In making this determination, the court should balance the public policy that is alleged to have been violated against the interest in enforcing the contract. *See* Restatement (Second) of Contracts § 178 (1981); 6A Corbin, Contracts § 1375 (1962); *State ex rel. Balderas v. ITT Educ. Servs.*, 2018-NMCA-044, ¶ 13, 421 P.3d 849. Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case. *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 11, 132 N.M. 332, 48 P.3d 70. The court should examine the subject matter, object, and purpose of the statute, the wrong or evil which it is intended to remedy or prevent, and the class of persons sought to be controlled in order to ascertain whether the legislature intended to invalidate contracts in violation of the statute. *Forrest Currell Lumber*

Co. v. Thomas, 1970-NMSC-018, ¶ 15, 81 N.M. 161, 464 P.2d 891 [~~(1970)~~]; *see also Niblack v. Seaberg Hotel Co.*, 1938-NMSC-018, ¶¶ 15-16, 42 N.M. 281, 76 P.2d 1156 [~~(1938)~~]; *Douglass v. Mutual Benefit Health & Accident Ass'n*, 1937-NMSC-097, ¶ 25, 42 N.M. 190, 76 P.2d 453 [~~(1937)~~].

Where a contract is made up of several provisions, one of which is illegal, if the illegal provision can be eliminated without destroying the symmetry of the contract as a whole, that provision will be voided, and the remainder of the contract will be enforced. *Forrest Currell*, 1970-NMSC-018, ¶ 16; *Arch, Ltd. v. Yu*, 1988-NMSC-101, ¶ 14, 108 N.M. 67, 766 P.2d 911; *Garcia v. Bd. of Regents*, 2016-NMCA-052, ¶ 20, 373 P.3d 998.

[As amended by Supreme Court Order No. _____, effective _____.]

13-839. Undue influence.

If _____ (*name of party claiming undue influence*) entered into the contract through undue influence, then [he] [she] [it] is excused from performing [his] [her] [its] obligations under the contract. "Undue influence" is the abuse of a [~~close or special relationship~~] position of trust or a dominant position in a relationship by one party which persuades the other party to enter into the contract.

[~~_____ has the burden of proving undue influence by clear and convincing evidence.~~]

USE [~~NOTE~~]NOTES

This instruction is intended for use in contract cases and is not intended for use in its present form in other situations, such as gifts, wills, etc. If the contract in question is a written release of claims, the jury also should be instructed that undue influence must be proven by clear and convincing evidence. *See* UJI 13-304 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Undue influence is not susceptible to a fixed formula. *Brown v. Cobb*, 1949-NMSC-016, 53 N.M. 169, 204 P.2d 264 [~~(1949)~~] (legatees sue to cancel decedent's ranch lease); Restatement (Second) of Contracts § 177 (1981). While influence alone is not prohibited, undue influence will relieve the party of that contract obligation. *Nance v. Dabau*, 1967-NMSC-173, 78 N.M. 250, 430 P.2d 747 [~~(1967)~~] (suit brought by widow's guardian to set aside deeds and contracts). Many cases involve either a confidential or fiduciary relationship. *Shultz v. Ramey*, 1958-NMSC-099, 64 N.M. 366, 328 P.2d 937 [~~(1958)~~] (suit to cancel farm lease with son-in-law); *Salazar v. Manderfield*, 1943-NMSC-005, 47 N.M. 64, 134 P.2d 544 [~~(1943)~~] (suit to cancel deed to fiduciary); *Cardenas v.Ortiz*, 1924-NMSC-039, 29 N.M. 633, 226 P. 418 [~~(1924)~~] (suit to cancel deed to farm[~~.~~]). However, a formal fiduciary or confidential relationship is not required; a person may also occupy a "position of trust" with respect to another "where there exists such trust and confidence between the parties of whatever character that confidence may be as enables the person in whom such confidence is reposed to exert it or so influence the opposite person with the result that some transaction financially beneficial to the person trusted takes place." *Cardenas*, 1924-NMSC-039, ¶ 10; *see also Beals v. Ares*, 1919-NMSC-067, ¶ 88, 25 N.M.459, 185 P. 780 (holding that the "number or character" of relationships giving rise to undue influence "are not defined by law"). Undue influence may also occur where

one party unfairly persuades another party who is under the domination of the person exercising the persuasion. Restatement (Second) of Contracts § 177(1).

Undue influence must be contrasted with the concept of "duress" (see UJI 13-838 NMRA) or "incapacity" (*see* UJI 13-837 NMRA). Duress focuses on threats which induce fear and hence the deprivation of free will. Undue influence focuses on improper influence of a weaker or dependent party by a person who, through a special relationship, abuses his or her favorable position to influence the weaker party into an agreement that he or she normally would not enter. "Undue influence" does not need to rise to the level of "duress," nor is fraud or actual misrepresentation required.

A confidential or fiduciary relationship, coupled with suspicious circumstances, [~~may~~] raises a presumption of undue influence and [~~causing~~]causing the burden of proof to shift. *Nance v. Dabau*, 1967-NMSC-173, 78 N.M. 250, 430 P.2d 747 [~~supra~~]; *Walters v. Walters*, 1920-NMSC-021, 26 N.M. 22, 188 P. 1105 [~~(1920)~~] (ill father transferred all properties to his son who promised to treat brothers and sisters equally); *see* [~~N.M. Evid.~~] Rule 11-301 NMRA. Parent and child relationship or kinship alone is not sufficient to raise a presumption of undue influence. *Giovannini v. Turrietta*, 1966-NMSC-103, 76 N.M. 344, 414 P.2d 855 [~~(1966)~~] (deed by mother to son and daughter did not create confidential relationship); *Trujillo v. Trujillo*, 1966-NMSC-019, 75 N.M. 724, 410 P.2d 947 [~~(1966)~~] (parents conveyed farm to son who worked it for sixteen years before parents sought to recover it).

Where the undue influence arises from a fiduciary relationship, a special instruction may be necessary to define the term. "A confidential or fiduciary relationship exists 'whenever trust and confidence is reposed by one person in the integrity and fidelity of another.'" *In re Ferrill*, 1981-NMCA-074, ¶ 6, 97 N.M. 383, [~~387,~~] 640 P.2d 489[~~, 493 (Ct. App. 1981)~~] (quoting 94 C.J.S. Wills § 230 at 1078 (1956)).

Where the contract in question is a written release of claims, undue influence must be proven by clear and convincing evidence. *P. Mendenhall v. Vandeventer*, 1956-NMSC-064, 61 N.M. 277, 299 P.2d 457 (written release settling all injuries and property damages resulting from a car accident); *Quintana v. Motel 6*, 1984-NMCA-134, 102 N.M. 229, 693 P.2d 597; *Hendren v. Allstate Ins. Co.*, 1983-NMCA-129, 100 N.M. 506, 672 P.2d 1137.

[As amended by Supreme Court Order No. _____, effective _____.]

13-841. [~~Hindrance; p~~]Prevention; excuse for nonperformance.

[~~A party to a contract cannot recover damages if [his] [her] own act or failure to act prevented the other party from performing the contract.~~]

A party to a contract who prevents the other party from performing a contractual obligation cannot take advantage of the non-performance. The party prevented from performing is excused from the obligation to perform.

USE [~~NOTE~~]NOTES

This instruction is to be used where one party prevents either fulfillment of a condition precedent to performance or performance itself. The instruction should be modified if a party contends that it was wrongfully hindered, as opposed to prevented, from performing.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~One cannot take advantage of [his] [her] own act or omission to escape liability thereon. *Bogle v. Potter*, 72 N.M. 99, 380 P.2d 839 (1963); *Gibbs v. Whelan*, 56 N.M. 38, 239 P.2d 727 (1952); Restatement of Contracts § 295.~~]"A party to a contract cannot take advantage of his own act or omission to escape liability thereon." *Gibbs v. Whelan*, 1952-NMSC-005, ¶ 10, 56 N.M. 38, 239 P.2d 727. In keeping with that principle, "[a] party to a contract, who prevents its performance by the adverse party, cannot rely on the adverse party's non-performance to defeat his liability. The party who has been prevented from discharging his part of the obligation is to be treated as though he had performed it." *Estate of Griego v. Reliance Standard Life Ins. Co.*, 2000-NMCA-022, ¶ 27, 128 N.M. 676, 997 P.2d 150 (in part, paraphrasing *Nat'l Old Line Ins. Co. v. Brown*, 1988-NMSC-071, ¶ 21, 107 NM. 482, 760 P.2d 775 (internal quotation marks and citation omitted)). In other words, the party who prevents the other party from performing cannot use the non-performance to avoid the contract or to claim a breach of contract. Instead, the non-performance is excused.

The foregoing principles may apply when a party prevents fulfillment of a condition precedent to performance, s*ee Dechert v. Allsup's Convenience Stores, Inc.*, 1986-NMSC-074, 104 N.M. 748, 726 P.2d 1378 (discussing but finding principle inapplicable) or performance of a contractual obligation, *Gibbs*, 1952-NMSC-005, ¶ 12.

Further guidance regarding the doctrine of prevention, as it relates to a party who wrongfully prevents or hinders the other party from performing under the contract, may be found in the Restatement (Second) of Contracts § 245 (1981) as well as 13 Richard A. Lord, *A Treatise on the Law of Contracts by Samuel Williston* §§ 39:3-12 (4th ed. 2013).

[As amended by Supreme Court Order No. _____, effective _____ .]

13-861. Punitive Damages.

[~~If you find that _____ *(name of party making claim for punitive damages)* should recover compensation for damages, and if you further find that the conduct of _____ *(name of party whose conduct gives rise to a claim for punitive damages)* was [malicious], [reckless], [wanton], [oppressive], or [fraudulent], then you may award punitive damages.~~]

In this case, _____ (*name of party making claim for punitive damages*) seeks to recover punitive damages from _____ (*name of party against whom punitive damages are sought*). You may consider punitive damages only if you find that _____ (*party making claim*) should recover compensatory damages. Not every breach of contract warrants punitive damages.

Only if you find that _____ (*name of party against whom punitive damages are sought*) breached the contract and that [his] [her] [its] conduct in committing the breach was [malicious], [reckless], [wanton], [oppressive], [or] [fraudulent] [rather than being legitimate or justified in the circumstances], then you may award punitive damages against [him] [her] [it].

[Malicious conduct is the intentional doing of a wrongful act with knowledge that the act was wrongful.]

[Reckless conduct is the intentional doing of an act with utter indifference to the consequences.]

[Wanton conduct is the doing of an act with utter indifference to or conscious disregard for a person's rights.]

[Fraudulent conduct consists of a misrepresentation of fact that the maker knows to be untrue [or that is made recklessly], by which the maker intends to deceive another for the purpose of causing the other to act in reliance on the misrepresentation, and on which the other does rely.]

[~~Such additional~~]Punitive damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature and enormity of the wrong and such aggravating and mitigating circumstances as may be shown. The property or wealth of the defendant is a legitimate factor for your consideration.The amount awarded, if any, must be reasonably related to the injury and to the damages given as compensation and not disproportionate to the circumstances.

USE [~~NOTE~~] NOTES

Appropriate bracketed language should be selected depending on the type of conduct [~~offered~~] alleged to [~~justify~~] support punitive damages and, as to the bracketed phrase regarding a "legitimate or justified" breach in the second paragraph, on whether there is evidence that any breach that occurred was committed for a legitimate or justifiable reason. For punitive damages in insurance bad faith cases, *see* UJI 13-1718 NMRA.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — [~~In *Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992 (1989), the New Mexico Supreme Court thoroughly reviewed punitive damages in breach of contract cases. The Court noted that in New Mexico, the award of punitive damages for breach of contract is "conceptualized . . . in terms of the quality of the conduct constituting the breach itself," rather than in terms of an independent tort or breach of the implied covenant of good faith, as in some other jurisdictions. *Id.* at 257, 784 P.2d at 1000. "Overreaching, malicious, or wanton conduct" justifying punitive damages "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships." *Id.* at 258, 784 P.2d at 1001.~~

~~The Court observed that "[o]ur previous cases clearly establish that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." 109 N.M. at 255, 784 P.2d at 998. "Each of the terms listed, standing alone, will support an award of punitive damages." *Id.* "[I]n the sense that malice and wantonness ... suggest an absence either of a good faith reason or of an innocent mistake, they describe the conduct targeted by our punitive damages rule." Id. "[T]hese words broadly distinguish 'wrongful' breaches of contract from those committed intentionally for legitimate business reasons or those that are the result of inadvertence." *Id.* at 256, 784 P.2d at 999. "Nonetheless, we remain convinced that the nuances distinguishing the terms 'malice,' 'fraud,' and 'oppression' make it useful to retain these words as distinct standards to guide the jury's exercise of discretion in particular cases." *Id.*~~

~~With regard to the definitional language included in the bracketed parts of the instruction, *see* UJI 13-834 and 13-1827 nmra. In Romero the Supreme Court stated that oppressive conduct would exist when a party "has breached a contract believing that the wronged party cannot afford to contest the matter in court." 109 N.M. at 258 n.6, 784 P.2d at 1001 n.6.~~

~~Because oppressive conduct has not been sufficiently well defined in New Mexico case law, no definition is provided. Such conduct is a foundation for punitive damages, and in the appropriate case the Court should provide a definition drawing upon Romero and other sources. The Committee suggests the following definition as appropriate in some contexts: "Oppressive conduct is marked by an unjust use of power or advantage."~~

~~No definition is provided of fraudulent conduct because the elements of fraud are separately stated in UJI~~ 13-834 ~~NMRA, and the jury will already have been instructed on conduct that constitutes fraud.~~]

Unlike some other jurisdictions, New Mexico determines the availability of punitive damages in contract cases, as in tort cases, based on "the quality of the conduct constituting the breach itself." *See Romero v. Mervyn's*, 1989-NMSC-081, ¶¶ 31-33, 109 N.M. 249, 784 P.2d 992. New Mexico case law "clearly establish[es] that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights." *Id.* ¶ 23.

Contract law is to be distinguished from tort law with respect to punitive damages, however, in that a breach of contract may not be a basis for punitive damages even if the breach is intentional and "even if the other party will clearly be injured by the breach." *Bogle v. Summit Inv. Co.*, 2005-NMCA-024, ¶ 28, 137 N.M. 80, 107 P.3d 520. New Mexico law acknowledges this fact by distinguishing " 'wrongful' breaches . . . from those committed intentionally for legitimate business reasons." *Romero*, 1989-NMSC-081, ¶ 26; *see also McGinniss v. Honeywell, Inc.*, 1990-NMSC-043, ¶ 31, 110 N.M. 1, 791 P.2d 452 (noting that "even if deliberate, the breach may be justified in some sense if the promisee can be fully compensated for the loss and the benefit to the promisor from the breach may provide society with a net gain -- i.e., the breach may be 'efficient'"); *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs., L.P.*, 1998-NMCA-005, ¶ 42, 124 N.M. 440, 952 P.2d 435 (Hartz, J., concurring in part and dissenting in part).

Generally, the case law indicates that the kind of conduct targeted by punitive damages is "[o]verreaching, malicious, or wanton conduct" that "is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to contractual relationships." *Romero*, 1989-NMSC-081, ¶ 34; *see also Constr. Contracting & Mgmt., Inc. v. McConnell*, 1991-NMSC-066, ¶ 16, 112 N.M. 371, 815 P.2d 1161 (stating that a breach that is fully compensated and results in a net social gain will not support punitive damages "unless there is an intention to inflict harm on the nonbreaching party or conduct which violates community standards of decency"). This instruction thus differs from the instruction regarding punitive damages in tort, UJI 13-1827 NMRA, by allowing for the possibility that the breaching party may offer evidence to show that the breach was committed for a legitimate or justifiable reason.

New Mexico precedent indicates that "a party's inability to perform a contract without incurring a substantial financial loss would constitute a legitimate business reason" for nonperformance. *Constr. Contracting*, 1991-NMSC-066, ¶ 16. Other grounds that would expose a breaching party to compensatory but not punitive damages have yet to be defined. *See Cafeteria Operators*, 1998-NMCA-005, ¶ 49 (Hartz, J., concurring in part and dissenting in part). In some cases, the court may be called upon to determine whether a reason offered by a breaching party to

justify nonperformance of a contract is supported by sufficient evidence to be presented to the jury and whether the reason offered would, if established, provide a legally sufficient basis to avoid punitive damages for the breach.

In addition to breaches that are malicious in that they are intended to cause harm, *see Constr. Contracting*, 1991-NMSC-066, ¶ 16, New Mexico precedent indicates that punitive damages are justified where a party breaches a contract after making the contract with knowledge it would not be performed or with a conscious disregard for whether it would be performed, *Romero*, 1989-NMSC-081, ¶¶ 36-37, or attempts to avoid any obligation by breaching while "believing that the wronged party cannot afford to contest the matter in court," *id.* ¶ 33 & n.6, or adopts a construction of an ambiguous contract that is "unreasonable and . . . in wanton disregard of [the other party's] rights," *Pub. Serv. Co. v. Diamond D Constr. Co.*, 2001-NMCA-082, ¶ 43, 131 N.M. 100, 33 P.3d 651.

The language defining malicious, reckless, and wanton conduct in the bracketed parts of the instruction is taken from UJI 13-1827. The language defining fraudulent conduct is taken from *Prudential Insurance Co. v. Anaya*, 1967-NMSC-132, ¶ 9, 78 N.M. 101, 428 P.2d 640. Oppressive conduct is not defined in New Mexico case law. A definition will have to be added by the court where conduct alleged to be oppressive is at issue. The Committee suggests the following definition may be appropriate in some contexts: "Oppressive conduct is marked by an unjust use of power or advantage."

[As amended by Supreme Court Order No. _____, effective _____.]

APPENDICES

Note: The sample instructions set forth in these appendices include definitional instructions where possible in the statement of issues, *see Gallegos v. Citizens Ins. Agency, Inc.*, 108 N.M. 722, 779 P.2d 99 (1989), and only those instructions, or portions thereof, that are pertinent to the particular matters in dispute, *see* Introduction to Chapter 8 of the Uniform Jury Instructions - Civil. "Stock" instructions are omitted and damage instructions are only provided where especially helpful to the practitioner. Also, some instructions require a threshold determination by the court, *see, e.g.*, UJI 13-825 NMRA.

[~~APPENDIX~~] Appendix 1. Sample Contracts Instructions.

[~~The following is an example of a simple contracts case where both parties are claiming money damages.~~]

Statement of facts

John Garcia owns his own business in which he sells his services as a computer programmer and a consultant in computer software design. He entered into a contract with Albuquerque Construction Company to design a computer software system for use by the Albuquerque Construction Company in their accounting and bookkeeping functions, general ledger functions, account receivables and accounts payable functions, inventorying and capital asset control. The contract called for Mr. Garcia to be paid in installments according to certain "milestones." The last "milestone" required payment of $7,500 upon satisfactory installation of the software in Albuquerque Construction Company's computer. The contract included the following terms:

Article III

Seller shall design, prepare and install the software in buyer's computer within a reasonable time after buyer has provided seller with the "detailed statement of criteria" called for and described in Article II [~~above~~]of this contract.

Article IV

Seller agrees to provide to buyer, at no additional cost, adequate instruction manuals on the software, training of buyer's personnel upon installation of the software and backup and consultation services for one year after installation of the software.

Albuquerque Construction Company provided Garcia with the "detailed statement of criteria" on February 15, 1988. Garcia did not deliver and install the software until October 30, 1988. Albuquerque Construction claims that this delay was unreasonable and in breach of contract. Garcia installed the software in Albuquerque Construction's computer, held a one-day training session for Albuquerque Construction's staff, and provided Albuquerque Construction with a training manual. Because of the delay in the installation, however, Albuquerque Construction refused to pay Garcia the last $7,500 installment on the purchase price of the software. In addition, Albuquerque Construction claims that because of the delay in the installation, it was required to expend $11,000 in additional outside accounting services that would not have been expended if the software had been installed by July 1, 1988, the commencement of Albuquerque Construction's fiscal year. Finally, in December 1988, a power surge wiped out a considerable part of the data base on Albuquerque Construction's computer. Albuquerque Construction believed that it had its database "backed up" in a backup file but was having difficulty finding the backup file on the computer's "hard disk." Albuquerque Construction called Garcia for "backup" assistance and consultation in finding the backup files on the hard disk. Garcia refused, claiming that the request was not for "backup" services and because Albuquerque Construction did not pay the last $7,500 milestone. As a consequence, Albuquerque Construction Company hired someone for $3,500 to retrieve the backup files.

Albuquerque Construction brought suit against Garcia for damages, claiming breach of contract in the late delivery and in the failure to provide backup. Garcia defended in counterclaim for the $7,500 payment at the final milestone.

[~~Instruction No. 1: Theory of the Case; Statement of the Issues; Claim; Burden of Proof~~] [13-302A] **Statement of Theory for Recovery;** [13-302B] **Statement of factual contentions of plaintiff, causation and burden of proof;** [13-302C] **Statement of denial and affirmative defense;** [13-302D] **Statement of factual contentions of defendant, causation and burden of proof**

In this civil action Albuquerque Construction Company seeks compensation from Mr. John Garcia for damages which Albuquerque Construction Company claims were proximately caused by the breach by Mr. Garcia of the contract entered into between Mr. Garcia and Albuquerque Construction Company.

To establish its claim of breach of contract on the part of Mr. Garcia, Albuquerque Construction Company has the burden of proving one or more of the following contentions:

1. That Mr. Garcia failed to deliver and install the computer software within a "reasonable time" as required by the contract; or

2. That Mr. Garcia failed to provide "backup" or "consultation" services as required by the contract.

In addition, Albuquerque Construction Company contends and has the burden of proving that any breach of contract caused Albuquerque Construction Company to incur damages as a consequence of Mr. Garcia's breach of contract.

Mr. Garcia denies that he breached any of his contract obligations to Albuquerque Construction Company. Specifically, Mr. Garcia:

1. Denies that he did not deliver and install the computer software within a "reasonable time;" and

2. Contends that any requests made by Albuquerque Construction Company were not for "backup" services and, therefore, he did not fail to provide backup services as called for under the contract.

In addition, as to the claim of breach of contract for failure to provide backup services, Mr. Garcia contends and has the burden of proving that he was excused from performing any backup services because Albuquerque Construction Company itself breached the contract by failing to make the final payment[~~s~~] to Mr. Garcia.

In addition, Mr. Garcia counterclaims against Albuquerque Construction Company under the contract, claiming that Albuquerque Construction Company breached its contract obligations to Mr. Garcia by failing to pay the called for final payment of $7,500. To establish his claim for breach of contract on the part of Albuquerque Construction Company, Mr. Garcia has the burden of proving that Albuquerque Construction Company failed to pay $7,500 as called for under the contract. Albuquerque Construction Company denies that it breached any contract obligation to Mr. Garcia and contends and has the burden of proving that it is excused from paying Mr. Garcia $7,500 because Mr. Garcia failed to perform his obligations under the contract.

[13-822] **Breach of contract; definition**

For you to find Mr. Garcia liable to Albuquerque Construction Company, you must find that Mr. Garcia breached his contract with Albuquerque Construction Company. A person may breach a contract by failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused).

[13-823] **Breach of contract; failure to perform**

Albuquerque Construction Company contends that there has been a material breach of the contract. A material breach occurs when a party fails to do something that is so important to the contract that the failure to perform that obligation defeats an essential purpose of the parties in making the agreement.

Albuquerque Construction Company has the burden of proving that Mr. Garcia committed a material breach.

Material breach by one party excuses the other from performing its obligations under the contract.

[13-825] **Ambiguity in term or terms; general rule of interpretation**

There is a dispute as to the meaning of the following term in the contract: backup services. You shall give the term that meaning which you find to be most reasonable, taking into consideration all the circumstances, including the following:

the intentions of the parties,

the words that the parties used,

the purposes the parties sought to achieve,

custom in the trade, and

whether a party, at the time the contract was entered into, knew or should have known that the other party interpreted the term differently.

[13-826] **Custom in the trade**

A custom in the trade is any manner of dealing that is commonly followed in a place or trade so as to create a reasonable expectation that it will be followed with respect to the transaction between the parties.

[13-831] **Reasonable time**

Mr. Garcia was obligated to perform the contract within a reasonable time. What is a reasonable time should be determined by you from the surrounding circumstances.

[13-822] **Breach of contract; definition**

For you to find Albuquerque Construction Company liable to Mr. Garcia, you must find that Albuquerque Construction Company breached its contract with Mr. Garcia. A person may breach a contract by failing to perform a contractual obligation when that performance is called for (unless that performance is otherwise excused).

[13-823] **Breach of contract; failure to perform**

Mr. Garcia contends that there has been a material breach of the contract. A material breach occurs when a party fails to do something that is so important to the contract that the failure to perform that obligation defeats an essential purpose of the parties in making the agreement.

Mr. Garcia has the burden of proving that Albuquerque Construction Company committed a material breach.

Material breach by one party excuses the other from performing its obligations under the contract.

[13-843] **Contracts; measure of damages; general instruction**

If you should decide in favor of Albuquerque Construction Company on either of its claims for breach of contract, then you must fix the amount of money which will reasonably and fairly compensate Albuquerque Construction Company for damages that resulted from Mr. Garcia's breach.

1. On its claim that Mr. Garcia failed to deliver and install the computer software within a "reasonable time" as required by the contract, Albuquerque Construction Company seeks direct damages for the following:

$11,000 it paid for additional outside accounting services.

2. On its claim that Mr. Garcia failed to provide "backup" or "consultation" services as required by the contract, Albuquerque Construction Company seeks direct damages for the following:

$3,500 it paid to retrieve the backup files.

Direct damages are damages that arise naturally and necessarily as the result of the breach. The direct damages that you award for breach of contract must be the amount of money that will place Albuquerque Construction Company in the position it would have been in if the contract had been performed.

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof, and not upon speculation, guess, or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

[13-843] **Contracts; measure of damages; general instruction**

If you should decide in favor of Mr. Garcia for his claim for breach of contract, then you must fix the amount of money which will reasonably and fairly compensate Mr. Garcia for damages that resulted from Albuquerque Construction Company's breach.

1. Mr. Garcia seeks direct damages for the following: Albuquerque Construction Company's failure to pay the last $7,500 milestone.

Direct damages are damages that arise naturally and necessarily as the result of the breach. The direct damages that you award for breach of contract must be the amount of money that will place Mr. Garcia in the position he would have been in if the contract had been performed.

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based upon proof, and not upon speculation, guess, or conjecture.

Further, sympathy for a person, or prejudice against any party, should not affect your verdict and is not a proper basis for determining damages.

[Adopted, effective November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Appendix 2. Sample [~~**formation of contract instructions**~~]**Contracts Instructions.**

Statement of facts

Smith, an avid hunter, owns a prize hunting dog named Zeke that is much admired by his friend Jones. Smith is in the National Guard. An international conflict erupts in the Middle East, and Smith's unit is activated. Anticipating a long absence from the country, Smith writes to his friend: "I feel bad about having to put Zeke in a kennel. I would sell him to a good home if I could get $500 for him." Jones writes back immediately: "Five hundred is a fair price for Zeke, but things are pretty tight here and I wish you would take $400 and my old shotgun instead."

The Middle East conflict is unexpectedly brief, and several days later Smith writes to Jones: "I am back to civilian life already. Thank goodness I won't be selling Zeke." Jones claims never to have received this letter. The next month, Jones comes to visit Smith and brings $400 cash and his shotgun. Smith refuses to part with Zeke. Jones pulls out some more cash and offers Smith $500, still to no avail. Zeke is worth $1000. Jones sues Smith for damages for breach of contract.

[~~Sample instructions~~

~~*Note*: These sample instructions are prepared by including definitional instructions where possible in the statement of issues, *see Gallegos v. Citizens Ins. Agency, Inc.*, 108 N.M. 722, 779 P.2d 99 (1989), and by including only those instructions, or portions thereof, that are pertinent to the particular matters in dispute, *see* Introduction to UJI ch. 8. "Stock" instructions and damage instructions are omitted from this example.~~]

[13-302A] **Statement of theory for recovery;** [13-801] **Contract; definition**

In this civil action the plaintiff Jones seeks compensation from the defendant Smith for damages that plaintiff says were caused by breach of contract.

A contract is a legally enforceable promise. [~~It is formed by an offer and an acceptance.~~]In this case, the parties dispute whether there was an offer and an acceptance.

[13-302B] **Statement of factual contentions of plaintiff, causation and burden of proof**

To establish his claim of breach of contract on the part of Smith, Jones has the burden of proving each of the following:

1. Smith offered to sell Jones his dog for $500.
2. Jones accepted Smith's offer.
3. Smith refused to sell the dog to Jones.

Jones also contends and has the burden of proving that such breach of contract was a cause of his damages.

~~[[13-302B]~~

~~To establish his claim of breach of contract on the part of Smith, Jones has the burden of proving each of the following:~~

~~1. Smith offered to sell Jones his dog for $500.~~

~~2. Jones accepted Smith's offer.~~

~~3. Smith refused to sell the dog to Jones.~~

~~Jones has the burden of proving that such breach of contract was a cause of his damages.~~]

[13-302C] **Statement of denial and affirmative defense**

Smith denies that he offered to sell his dog to Jones. In the alternative, Smith contends and has the burden of proving that he withdrew any offer to sell the dog before Jones accepted the offer or that Jones failed to accept the offer within a reasonable time.

[13-805] **Offer; definition**

An offer is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

First, the communication must have included a definite promise by Smith showing his willingness to contract;

Second, the material terms upon which that willingness was based must have been definite;

Third, the terms must have been communicated to Jones;

Fourth, by the communication Smith must have intended to give Jones the power to create a contract by accepting the terms.

In this case, the parties agree that the terms at issue were communicated to Jones. What is in dispute is whether the terms were definite and whether the communication was one which included a definite promise by Smith showing his willingness to contract and by which Smith intended to give Jones the power to create a contract by accepting the terms.

[13-807] **Acceptance; definition**

An acceptance is a statement or conduct made by one party to the other, showing that party's agreement to the terms of the other party's offer. For Jones to have accepted Smith's offer, he must have informed Smith by a statement or conduct that he agreed to the terms of the offer.

[13-808] **Acceptance; terms of the offer**

[~~A reply is not an acceptance if it adds a material qualification or requests a new condition not in the offer. If, however, you determine that Jones's reply departs from the terms of Smith's offer, that reply is still an acceptance if Jones makes it clear in the reply that his acceptance is not dependent on Smith's agreement to the new term.~~]

If Jones responded to an offer by conditioning acceptance on new terms that added, varied or changed any term of the offer, the response was a rejection of the original offer and operated as a new offer that could be accepted or rejected by Smith.

If Jones' response to an offer included additional or different terms but did not condition acceptance on agreement to those terms, the response operated as an acceptance of the original offer.

[13-806] **Offer; revocation; effect of performance**

An offer may be withdrawn at any time before notice of its acceptance has been received. To have withdrawn his offer, Smith must have notified Jones that the offer was withdrawn. Once notice of withdrawal has been received, the offer may no longer be accepted and any attempt to accept thereafter will not be effective. If Jones was notified that the offer was withdrawn, Jones could no longer accept the offer.

[13-813] **Acceptance; timeliness of acceptance; power of revocation**

In order for a communication to be an acceptance, it must have been received by Smith within a reasonable time. What constitutes reasonable time should be determined by you from the surrounding circumstances.

[13-804] **Contract; intentions of the parties**

You should determine the intentions of the parties by examining their language and conduct, the objectives they sought to accomplish, and the surrounding circumstances.

[13-822] **Breach of contract; definition**

For you to find Smith liable to Jones, you must find that Smith breached his contract with Jones. A person may breach a contract by failing to perform a contractual obligation when that performance is called for.

[As amended, effective March 1, 2005; as amended by Supreme Court Order No. _____, effective _____.]