

1 **13-801. Contract; definition.**

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

5 [Any of these four requirements, although not expressly stated, may be found in the  
6 surrounding circumstances, including the parties' words or actions, ~~[what they wanted to~~  
7 ~~accomplish, the way they dealt with each other, and how others in the same circumstances~~  
8 ~~customarily deal or would deal]~~ the parties' conduct, the parties' course of dealing, the parties'  
9 course of performance, or from custom.]

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

13

14

**USE NOTES**

15 When the existence of a contract [~~is in dispute, this instruction should be given with~~  
16 ~~instructions for whichever elements of the purported contract are in dispute (UJI 13-805 to 13-816~~  
17 ~~NMRA)] presents a question for a jury, this instruction should be given. [~~Instructions should be~~  
18 ~~given only for those elements in dispute. The bracketed language with respect to implied promises~~  
19 ~~should be given only when a party claims that the promise which forms the basis of the contract~~  
20 ~~arises from an inference and not from an expression, written or oral.] The element(s) not in dispute  
21 and in dispute should be inserted as the parentheticals in the instruction indicate. The bracketed~~~~

1 language in the second paragraph should be included in the instruction given to a jury, to the extent  
2 the evidence warrants, when a case presents a jury question as to the existence of an implied  
3 contract. Additionally, instructions for any element(s) in question should be given. See UJI 13-805  
4 to 13-814, UJI 13-816 NMRA.

5 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-006,  
6 effective for all cases pending or filed on or after December 31, 2020.]

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

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

20 ~~A true contract may exist, however, where there is no contractual intent or undertaking on~~  
21 ~~the part of the purported promisor. In these situations, when a true contract is found, the~~

1 contractual obligation is founded on the reasonable apprehension by the promisee of an  
2 undertaking by the purported promisor.

3 An implied contract can arise by a course of conduct or through custom and  
4 usage. *Toppino v. Herhahn*, 100 N.M. 564, 673 P.2d 1318 (Ct. App. 1983); *Sanchez v.*  
5 *Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982); *Gordon v. New Mexico Title Co.*, 77 N.M.  
6 217, 421 P.2d 433 (1966); *Trujillo v. Chavez*, 76 N.M. 703, 417 P.2d 893 (1966).

7 The distinction between express and implied contract lies not in legal effect but in the  
8 parties' mode of manifesting assent to the agreement. *State ex rel. Gary v. Fireman's Fund Indem.*  
9 *Co.*, 67 N.M. 360, 364, 355 P.2d 291, 295 (1960); Restatement (Second) of Contracts § 4 comment  
10 a. Assent may be manifested by words or by implication from other circumstances, including  
11 course of dealing, usage of trade, or course of performance. Restatement (Second) of Contracts §  
12 4 comment a.—

13 Although all four elements of a contract must exist, each element need not be independently  
14 expressed. For example, when there has been an explicit offer and acceptance, often there is  
15 consideration and mutual assent, even though not separately expressed. *See Clark v. Sideras*, 99  
16 N.M. 209, 656 P.2d 872 (1982).]“The existence of a contract between parties is generally a  
17 question of law to be decided by the trial court.” *Rio Grande Conservancy Dist.*, 1983-NMCA-  
18 047, ¶ 22, 99 N.M. 802, 664 P.2d 1000, *overruled on other grounds by Montoya v. Akal Sec. Inc.*,  
19 1992-NMSC-056, 114 N.M. 354. However, “when the existence of a contract is at issue and the  
20 evidence is conflicting or admits of more than one inference, it is for the jury to determine whether

1 the contract did in fact exist.” *Segura v. Molycorp, Inc.*, 1981-NMSC-116, ¶ 24, 97 N.M. 13, 636  
2 P.2d 284.

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

12 A contract may be express or implied. *Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 21;  
13 *accord Orion Technical Res., LLC*, 2012-NMCA-097, ¶ 9, 287 P.3d 967. “An implied contract  
14 may be found in written or oral representations, in the conduct of the parties, or in a combination  
15 of representations and conduct.” *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 20, 135  
16 N.M. 128, 85 P.3d 252, *aff’d on other grounds*, 2005-NMSC-003, 137 N.M. 192; *see also Orion*,  
17 2012-NMCA-097, ¶¶ 8-9, 287 P.3d 967 (explaining that an implied contract also may be found  
18 from circumstances, including the parties’ course of dealing or course of performance, as well as  
19 from custom). The legal effect and the elements of express and implied contracts are the same. 1  
20 R. Lord, *Williston on Contracts* § 1:5, at 33, 37-38 (4th ed. 2007).

- 1 [As amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed
- 2 on or after December 31, 2020.]