

1 **13-816. Mutual assent; definition.**

2
3 ~~[For there to be mutual assent, the parties must have had the same understanding of the~~
4 ~~material terms of the agreement.~~

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

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

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

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

- 16 1. Neither party knows or has reason to know the meaning attached by the other; or
17 2. Each party knows or has reason to know the meaning attached by the other.]
18

19 **USE NOTES**

20 ~~This instruction should be given where a question of fact exists as to whether the parties'~~
21 ~~objective manifestations of assent indicate that the parties believed they had entered into a contract.~~

22 ~~[If the jury determines that the parties had different understandings, each consistent with their~~

1 ~~subsequent acts, then the jury must determine whether one party's understanding is so~~
2 ~~extraordinary as to create estoppel. Paragraph three enables the jury to make this judgment,~~
3 ~~thereby protecting the reliance interest of the party claiming the sole reasonable interpretation of~~
4 ~~the words and acts of the exchange. Paragraph three differs from UJI 13-804 NMRA in that the~~
5 ~~jury is asked to consider not what the parties actually intended, but whether one party's subjective~~
6 ~~understanding comports with an objective view of the exchange while the other party's does not.]~~

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

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

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

1 “It is elementary in contract law that mutual assent ordinarily must be expressed by parties
2 to an agreement before a contract is made.” *Orcutt v. S&L Paint Contractors, Ltd.*, 1990-NMCA-
3 036, ¶ 11, 109 N.M. 796, 791 P.2d 71 (citing *Trujillo v. Glen Falls, Inc.*, 1975-NMSC-046, 88
4 N.M. 279, 540 P.2d 209). “Mutual assent is based on objective evidence, not the private,
5 undisclosed thoughts of the parties. In other words, what is operative is the objective
6 manifestations of mutual assent by the parties, not their secret intentions.” *Pope v. The Gap, Inc.*,
7 1998-NMCA-103, ¶ 13, 125 N.M. 376, 961 P.2d 1283 (citations omitted); accord *Trujillo*, 1975-
8 NMSC-046, ¶ 7; see also *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 1993-NMCA-156, ¶ 43,
9 117 N.M. 41 (Hartz, J., dissenting) (“Often it is written that a contract requires a ‘meeting of the
10 minds.’ The phrase creates problems because it can readily be interpreted to refer to the
11 unconveyed thoughts of the parties.”). Mutual assent may be manifested in whole or in part by the
12 written or spoken language used by the parties or by the parties’ acts or failure to act. *Trujillo*,
13 1975-NMSC-046, ¶ 7; see also Restatement (Second) of Contracts §§ 18-19 (1981). “The
14 manifestation of mutual assent to an exchange ordinarily takes the form of an offer by one party
15 followed by an acceptance by another.” *Orcutt*, 1990-NMCA-036, ¶ 11.

16 “The Restatement (Second) of Contracts explains the effect of misunderstandings on
17 contracts.” *Pope*, 1998-NMCA-103, ¶ 13. “There is no manifestation of mutual assent to an
18 exchange if the parties attach materially different meanings to their manifestations and (a) neither
19 knows or has reason to know of the meaning attached by the other; or (b) each party knows or has
20 reason to know the meaning attached by the other.” Restatement (Second) of Contracts § 20(1), at
21 58-59 (1981); see also 1 R. Lord, *Williston on Contracts*, § 3:4, at 285 (4th ed. 2007); cf.

1 Restatement (Second) of Contracts § 20(2) and comments c & d thereto (explaining, in part, when
2 a misunderstanding does not prevent the formation of a contract).

3 Secondary sources explain when, despite a manifestation of assent by a party, fraud, duress,
4 mistake, or another invalidating cause may render the resulting contract voidable. See, e.g.,
5 Restatement (Second) of Contracts § 19. Since invalidating causes are in the nature of an
6 affirmative defense, a separate jury instruction should be drafted for any applicable defense.

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