

1 **13-817. Modification of contract; definition.**

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

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

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

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

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

11 [Even a contract that requires modifications to be in writing may be modified orally.

12 However, the oral modification must be proven by clear and convincing evidence.]

13 **USE NOTES**

14 This instruction should be given when the validity of a contract modification is at issue.

15 Use the first set of bracketed language when there is an issue as to whether a party benefitting from

16 the modification gave consideration for it, including whichever of the four bracketed choices are

17 supported by the evidence. Use the second set of bracketed language when an oral modification

18 is alleged to have been made to a written contract with terms requiring that modifications be in

19 writing. In such a case, the jury should also be instructed that an oral modification must be proven

20 by clear and convincing evidence. See UJI 13-405 NMRA.

1
2 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013,
3 effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme
4 Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31,
5 2020.]

6 **Committee commentary.** — “[I]n the absence of a prohibiting statute, [a] written contract
7 may be orally modified by the parties who made the original agreement.” *Wendell v. Foley*, 1979-
8 NMCA-052, ¶ 11, 92 N.M. 702, 594 P.2d 750. A course of dealing may also modify an
9 agreement. *See Medina v. Sunstate Realty, Inc.*, 1995-NMSC-002, ¶ 14, 119 N.M. 136, 889 P.2d
10 171; Wal-Go Assoc. v. Leon, 1981-NMSC-022, 95 N.M. 565, 624 P.2d 507 (lessor’s policy always
11 to redeposit lessee’s checks modified contract so that lessee was not in breach when its check was
12 returned marked “insufficient funds”). Because New Mexico still adheres to the pre-existing duty
13 rule, new consideration is necessary whenever a change benefits only one party. See, e.g., Jaynes
14 v. Strong-Thorne Mortuary, Inc., 1998-NMSC-004, ¶ 11, 124 N.M. 613, 954 P.2d 45.

15 The ability of the parties to modify a contract orally may be circumscribed by their written
16 agreement. *Danzer v. Prof'l Insurers, Inc.*, 1984-NMSC-046, 101 N.M. 178, 679 P.2d 1276 (oral
17 modification of a written contract failed because contract called for modification in writing of the
18 party to be charged). Nevertheless, a contract that requires modifications to be in writing may be
19 modified orally if there is clear and convincing evidence that an oral modification was made. See
20 Medina, 1995-NMSC-002, ¶¶ 12-15 (holding the trial court erred in excluding evidence of oral

1 modification of a contract requiring modifications to be in writing); *Valley Bank of Commerce v.*
2 *Hilburn*, 2005-NMCA-004, ¶ 23, 136 N.M. 74, 105 P.3d 294; *Powers v. Miller*, 1999-NMCA-
3 080, ¶ 10, 127 N.M. 496, 984 P.2d 177 (requiring that oral modifications to written contracts that
4 specify that modifications must be in writing must be proven by clear and convincing evidence).
5 [As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed
6 on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective
7 for all cases pending or filed on or after December 31, 2020.]