

1 **13-828. Course of performance.**

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

5 **USE NOTES**

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

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

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

16 ~~In order for performance of the contract to constitute a “course” of performance, the~~
17 ~~evidence must describe more than just an isolated act or instance, but must be sufficiently~~
18 ~~established to indicate reliably the intents of the parties. See J. A. Farnsworth, Contracts § 7.13.~~
19 ~~The concept of course of performance is closely associated with the concepts of waiver (see UJI~~
20 ~~13-842 NMRA) and modification of the contract (see UJI 13-817 NMRA).]~~

1 Evidence of how the parties have performed the obligations of the contract at issue is
2 admissible for the factfinder to consider in determining the meaning of an ambiguous term in the
3 contract. See *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 31, 127
4 N.M. 1, 976 P.2d 1. The conduct of the parties after the contract is made may indicate the meaning
5 that they attach to the term(s) in question. 2 Zachary Wolfe, *Farnsworth on Contracts* § 7.16 (4th
6 ed. 2019). A course of performance, which involves the parties' performance of the contract at
7 issue, should not be confused with a course of dealing, which involves conduct prior to the contract
8 in question. *Id.*
9 [Amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on
10 or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for
11 all cases pending or filed on or after December 31, 2020.]