

## OFFER AND ACCEPTANCE

### A. Contractual intention

1. The offeror must intend to be bound by the offer. How do you determine the offeror's intent?
  - a. The offeror's intent is determined by what a reasonable person in the offeree's position would conclude the offeror meant. Offers made in anger or as a joke do not qualify.  
For example: My neighbor offers to sell her \$90,000 2019 BMW, fully customized, for \$5,000. The reasonable person would not believe that I intend to sell a \$90,000 car for \$5,000.
2. Invitation to Negotiate -- What appears to be an offer may not be sufficient to form the basis of a contract. It is important to recognize what does not constitute an offer. Nonoffers include: (1) Most Newspaper advertisements, (2) catalogs, (3) preliminary negotiations, quotes, or estimates, (4) circulars or flyers.
  - a. Quotations may be considered offers if the parties have had previous dealings
  - b. Agreement to make a contract at a future date is not present intent

### B. Definiteness

1. Definite and certain terms -- All of the major terms must be stated with reasonable definiteness in the offer (or, if the offeror directs, in the offeree's acceptance). This would include, but not limited to, identification of the parties, a description of what is being offered, including quantity, consideration to be paid, or exchanged, and time for performance.
  - a. A document that is "too indefinite" may be made definite by referencing writing.  
**Example:** Joe has leased the same apartment for the past five years. When he signs his lease this year, the document only contains the dates for when the lease begins and ends and the increased cost of leasing the apartment; \$1,000. Instead of outlining the rest of the terms of the contract, the lease includes a phrase that indicates that "the lease will follow the terms outlined in the original lease signed by the parties in 2018". Although the document Joe is signing seems to lack definite and certain terms, the reference to the previous lease agreement makes it definite by reference.
2. Implied terms – although an offer must contain definite and certain terms, minor terms that are omitted may be implied by law.  
**Example:** Joe's lease agreement does not indicate how Joe is to pay his landlord each month. Though it would seem that the omission of this detail would mean that the contract is too vague, or indefinite, the courts would imply that the payment should be made by cash, or check.
3. Exceptions to definiteness-- The law has come to recognize certain situations where the practical necessity of doing business makes it desirable to have a contract, yet the situation is such that it may be impossible to adopt definite terms in advance. Two examples of these contracts are listed below.

- a. Requirements Contract – a contract to purchase from the seller all of the product that that the buyer requires  
**Example:** Dell Computer enters into a contract with Intel to buy all of the microprocessor chips it requires. In January Dell needs 7,000 chips to fulfill its orders, in February Dell needs 10,000 chips, in March it needs 2,000. The contract has definite terms in that Dell is purchasing all of the chips it requires from Intel based on the orders they must fill.
- b. Output Contract – a contract to sell all of what a company produces to a given buyer.  
**Example:** A citrus grower in Florida contracts with Minute Maid to sell all of the oranges they produce in the season to the Minute Maid Company. The contract has definite terms in that the citrus grower has committed all of the oranges that it grows to one company, Minute Maid.

### C. Communication of offer to offeree

- 1. An offer must be communicated to the offeree(s) in order for the offeree to accept it.

## II. How is an Offer Terminated?

### A. Revocation of offer by offeror

- 1. Revocation – it must be clear and definite

The offeror has the power to revoke an offer any time before the offer has been accepted. This is true even though the offeror may have promised that the offer would be held open for a period of time. For example, if the offeror stated, "This offer will not be revoked, and you have until October 14 to accept," the offeror may revoke the offer at any time prior to its acceptance.

- 2. Communication of revocation

- a. Although an offer may be revoked at any time, the revocation is not effective until the offeree learns of the revocation. For example, if you choose to mail your revocation to the offeree, the revocation will not be effective until it is delivered and read.
- b.
- c. If the offeree accepts before receipt of the revocation, a contract is formed.

### B. Counteroffer by offeree

- 1. Any change, amendment, or modification of an offer by the offeree is considered a counteroffer which will terminate the original offer. This may include a change to the amount of the offer or a change, or addition, to the terms of the offer among other things.  
**Example:** Ted offers to pay Judy \$4,000 for her 1999 Toyota RAV4. Judy indicates that she will sell the RAV4 to Ted for \$4,500. Judy is in effect refusing Ted's original offer and making a different offer known as a counteroffer.

### C. Rejection of offer by offeree

1. A rejection terminates the original offer.  
**Example:** Arthur makes an offer to sell his 2010 Harley Davidson Sportster motorcycle to Tim for \$10,000. Tim calls Arthur and tells him he is not interested. Therefore, Tim is rejecting the offer.
2. A rejection is usually effective on receipt

#### D. Lapse of time

1. If an offer states a particular date and/or time, the offer terminates on that date if it is not accepted.
2. If no time is stated, the offer terminates after a reasonable time. The determination of what is "reasonable" is dependent on the subject matter of the contract.  
**Example:** A reasonable amount of time will be shorter for perishable items like produce, or other foods, or a company's stock that fluctuates on a daily basis. An offer to sell a home, or car, would typically involve a longer time period.

#### E. Death or disability of either party

1. If either the offeror, or offeree, dies or becomes mentally incompetent before acceptance, the offer automatically terminates.

#### F. Subsequent illegality – If the performance of the contract becomes illegal after the offer is made, the offer is terminated.

**Example:** An offer is made to sell \$10,000 worth of fireworks to a company in New Hampshire. Before the offer has been accepted, the legislature in New Hampshire passes a law that prohibits the sale of fireworks. This change in law terminates the offer for the fireworks.

### III. How is an Offer Accepted?

A. Acceptance – There is no particular form or expression required for acceptance. However, there must be a clear expression that the offeree agrees to be bound by the terms of the offer.

#### B. Effect of acceptance

1. The acceptance of an offer creates a binding agreement, or contract.
2. Once accepted, neither party may withdraw from, or cancel the contract without the consent of the other

#### C. Nature of the acceptance

1. Acceptance must be absolute and unconditional. In other words, you must accept exactly what is offered. When the offeree does not accept the offer exactly as it was made, there is no acceptance

#### D. Who may accept?

1. Only the person to whom an offer has been made may accept it. If anyone else attempts to accept, no contract is formed.  
**Example:** Steven offers to sell his business law textbook to Anthony for \$50. Jeffrey learns of the offer and calls Steven to accept the offer for the textbook. Does Steven have to sell Jeffrey the book? **Answer:** No. The offer to sell the book was made to Anthony; therefore, Anthony is the only one who can accept Steven's offer.
2. An offer made to the general public may be accepted by any member of the general public who has knowledge of the offer.  
**Example:** If Ann makes an offer of a reward for the return of a lost cellphone by posting flyers around town. Bill finds the cellphone is able to determine it is Ann's. Bill returns the cellphone without knowing of the reward, must Ann pay the reward to Bill? **Answer:** Legally, Ann has no duty to pay the reward to Bill because Bill was not aware of the offer when he returned the cellphone. However, Ann may volunteer to pay Bill the reward money.

#### E. Manner of acceptance

1. If the offeror specifies a manner, and/or time, for acceptance the offeree must accept in that manner.  
**Example:** Mary indicates that Michael must send a written acceptance to her offer and that the written acceptance must be received by 5:00 pm on July 7, 2020. If Michael calls Mary to accept the offer no contract arises because Michael has not accepted in the manner specified by Mary.

Exception: If the offeror is using a pre-printed form to make an offer, the offeror must take care to identify their specific requirements for the offeree in accepting the offer. The offeror cannot assume that the offeree will interpret the printing on the form as the offeror's specific requirements for acceptance. To avoid confusion, the offeror should modify the form to reflect the manner of acceptance. Or the offeror should make note that the offeree should follow the instructions on the form in order to accept.

2. The offeree's silence, or failure to act, cannot be regarded as acceptance and the offeror may not view it as a substitute for acceptance. Acceptance must be communicated by the offeree

Exception: When a person receives unordered mail merchandise from a seller, he or she has not done business with, he or she has the right "to retain, use, discard, or dispose of it in any manner the recipient sees fit without any obligation whatsoever to the sender."

#### F. Communication of acceptance

1. Unilateral contract
  - a. In a unilateral contract, such as a reward, acceptance is shown by performing the requirements of the offer (i.e., returning the cellphone or finding the lost dog and returning it).
2. Bilateral contract
  - a. In a bilateral contract, acceptance must be communicated to the offeror.

Mailbox rule – when does acceptance take effect when acceptance is sent by mail.

1. An acceptance that has been properly addressed and affixed with the appropriate postage is effective when the acceptance is placed under the control of the U.S. Postal service.
2. Proof of acceptance by mail – testimony under oath, witnesses, and postal receipts are all considered proof

H. Acceptance by telephone

1. Unless required to be in writing, acceptance by telephone is effective when and where spoken into the phone

I. Acceptance by e-mail or fax

1. If the offeree's email server is under the control of an independent service provider and the message cannot be withdrawn, the Courts will apply the mailbox rule to emailed acceptances.
2. The courts will, in most cases, apply the mailbox rule to faxed acceptances if the Parties can show valid proof of transmission.

J. Auction sales

1. At an auction, any statements made by the auctioneer to solicit bids from the audience are considered an Invitation to Negotiate.
2. Most auctions, unless stated, are considered without reserve. In an auction without reserve, each bid at the auction is considered an offer, which is not accepted until the fall of auctioneer's hammer, which signifies acceptance of the highest bid. Any bid may be withdrawn before it is accepted by the auctioneer.
3. Request for Proposal or Request for Bid– State agencies in Massachusetts are often required to solicit bids from contractors or vendors for certain projects (construction, paving, food service). The agency posts notification of the Request for Proposal (Invitation to Negotiate) and then any company interested submits a bid for the project (offer). In most cases, the company that submits the lowest bid is the company who gets the job.