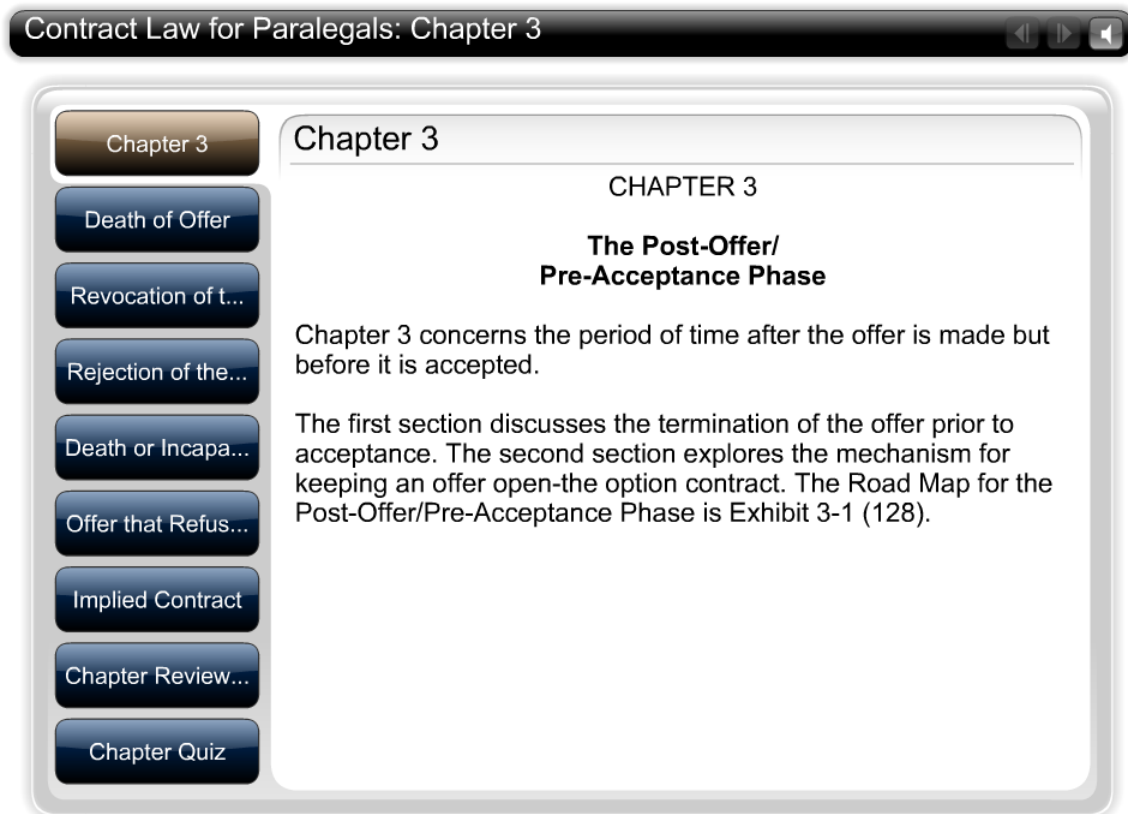


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CHAPTER 3

**The Post-Offer/
Pre-Acceptance Phase**

Chapter 3 concerns the period of time after the offer is made but before it is accepted.

The first section discusses the termination of the offer prior to acceptance. The second section explores the mechanism for keeping an offer open-the option contract. The Road Map for the Post-Offer/Pre-Acceptance Phase is Exhibit 3-1 (128).

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The Post-Offer/ Pre-Acceptance Phase

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The first section discusses the termination of the offer prior to acceptance. The second section explores the mechanism for keeping an offer open-the option contract. The Road Map for the Post-Offer/Pre-Acceptance Phase is Exhibit 3-1 (128).

Death of Offer

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THE DEATH OF AN OFFER PRIOR TO ACCEPTANCE


This section develops the four ways an offer terminates: by the offeree's inaction so the offer lapses; by the offeror's revocation of the offer; by the offeree's rejection of the offer; and by the death or incapacity of the offeror or offeree.

The Offeree's Inaction (Lapse) (129)

If an offer provides its own termination date, the offer ceases to exist after its termination date and can no longer be accepted.

PARALEGAL EXERCISE 3.1 (129) asks students to describe a situation where the offeror would find it desirable to have an express termination date in the offer.

Why the offeror would want to state a termination date? The



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PARALEGAL EXERCISE 3.1 (129) asks students to describe a situation where the offeror would find it desirable to have an express termination date in the offer.

Why the offeror would want to state a termination date? The date would create certainty in the minds of both parties. If the offeror does not hear from the offeree before the termination date, the offeror knows that the offeree has not accepted and therefore the offeror can take another course of action. The termination date

would also encourage the offeree to give a more prompt acceptance (assuming that the termination date was not in the distant future).

If the offer fails to state a termination date, the offer will expire after a reasonable time. Example 3-1 and Paralegal Exercise 3.2 focus on “reasonable time.”

PARALEGAL EXERCISE 3.2 (129) asks students to arrange the order of four situations. Once an order is established, we ask why this order was selected. Some factors could be: the nature of the subject matter; the size and dollar amount involved in the offer; the offeror’s need for a rapid resolution; and normal practices. Other factors may be added to the list. This exercise has a broader purpose. In that it requires students to develop a theory and test the theory in various circumstances to ascertain its validity.

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Revocation of the Offer

Revocation of the Offer (130)

The offeror may revoke an offer prior to the time of its acceptance by the offeree. See the Restatement (Second) of Contracts § 42 (1979) (provides the rule that the offer is terminated when the offeree receives the revocation).

Hoover Motor Express Co. v. Clements Paper Co. (130) works well on a timeline.

Revocation may also be indirectly communicated to the offeree.



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Rejection of the Offer

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Rejection of the Offer


Rejection of the Offer (133)

The rejection materials are presented by Examples 3-3 and 3-4 and Paralegal Exercise 3.3. We begin by contrasting rejection and revocation. Rejection is termination by the offeree; revocation is termination by the offeror.

We also introduce the concept that a rejection may include the elements of an offer and, therefore, become a counteroffer although not every rejection becomes a counteroffer.

In Example 3-3, the rejection does not contain the elements for a counteroffer.

In the second Example 3-4, the rejection does contain the elements for a counteroffer.



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In Example 3-3, the rejection does not contain the elements for a counteroffer.

In the second Example 3-4, the rejection does contain the elements for a counteroffer.

PARALEGAL EXERCISE 3.3 (133) requires students to begin with the first communication and evaluate whether it is an offer. B&O's December 5th letter is not an offer because it lacks price. Mill's December 8th letter is an offer as to the

iron rails-price (\$54/ton) quantity (2,000 to 5,000 ton), subject matter (iron rails). B&O's December 16th letter is not an acceptance since 1,200 tons is not in the 2,000 to 5,000 ton range. Because it is different from Mill's December 8th offer, it is a rejection.

(See Diagram Below)

Because it meets the requirements of an offer, it is a new offer (counteroffer). B&O's December 18th telegram is a rejection of Mill's counteroffer. When on December 19th B&O attempted to accept Mill's December 8th offer, it was too late because Mill's offer was previously rejected. No contract. Paralegal Exercise 3.3 is based on *Minneapolis & St. Louis Railway Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 75 S.Ct. 168, 30 L. Ed. 376 (1886).

The text works with two general rules-an attempted rejection sent by the offeree is effective as a rejection when received by the offeror, although an attempted acceptance sent by the offeree is effective as an acceptance when sent by the offeree. Compare the Restatement (Second) of Contracts § 40 with § 63. Note the "but clause" in section 40 may apply when the attempted acceptance is sent after an otherwise effective rejection is sent.

Example 3-5 (134) involves a timing problem.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter rejecting the offer.
February 6 - Buyer (Sara) sends letter accepting the offer.
 Seller receives February 6 letter (attempted acceptance).
 Seller receives February 5th letter (attempted rejection).

This is the example of the overtaking acceptance. The general rule of acceptance in Restatement (Second) of Contracts § 63 and the "but clause" of Restatement (Second) § 40 apply. Acceptance was effective (when sent-February 6) (Restatement (Second) of Contracts § 63) before the rejection was effective (when received-after February 6) (Restatement (Second) of Contracts § 40). The "but clause" of section 40 applies but does not change this result because the acceptance was received before the rejection was received. Therefore, the Seller's offer was accepted and a contract was formed.

PARALEGAL EXERCISE 3.4 (135) changes the facts of Example 3-5 so the Seller received the rejection before receiving the attempted acceptance.

February 1 - Seller (Dan) makes an offer to sell.
February 5 - Buyer (Sara) sends letter rejecting the offer.
February 6 - Buyer (Sara) sends letter accepting the offer.
 Seller receives February 5th letter (attempted rejection).

Seller receives February 6 letter (attempted acceptance).

The "but clause" of section 40 applies because the attempted acceptance was sent after the attempted rejection was sent. Under the "but clause," the attempted rejection was received before the attempted acceptance was received, and therefore the attempted acceptance would act as a counteroffer. The offeror would have seen the rejection before seeing the acceptance and therefore could have relied on the rejection. No contract was formed.

PARALEGAL EXERCISE 3.5 (135) changes the facts of Example 3-5 so the Buyer sends the attempted acceptance before sending the attempted rejection.

February 1 - Seller (Dan) makes an offer to sell.

February 5 - Buyer (Sara) sends letter accepting the offer.

February 6 - Buyer (Sara) sends letter rejecting the offer.

Seller receives February 5th letter (attempted acceptance).

Seller receives February 6 letter (attempted rejection).

The "but clause" of section 40 does not apply because the attempted acceptance was sent before the attempted rejection was sent. Therefore, only the general rules apply.

The attempted acceptance was sent before the attempted rejection was received and therefore the attempted acceptance was effective. A contract was formed. Note that the offeror would see the acceptance first and could rely on the acceptance and there being a contract.

PARALEGAL EXERCISE 3.6 (135) changes the facts of Paralegal Exercise 3.5 and has the attempted acceptance sent before attempted revocation is sent, with the Seller receiving the attempted rejection before receiving the attempted acceptance.

February 1 - Seller (Dan) makes an offer to sell.

February 5 - Buyer (Sara) sends letter accepting the offer.

February 6 - Buyer (Sara) sends letter rejecting the offer.

Seller receives February 6th letter (attempted rejection).

Seller receives February 5 letter (attempted acceptance).

The "but clause" of section 40 does not apply because the attempted acceptance was sent before the attempted rejection was sent. Therefore, only the general rules apply.

The attempted acceptance was sent before the attempted rejection was received, and therefore the attempted acceptance should be effective and a contract is formed.

The Seller, however, may have relied on the attempted rejection since the letter rejecting the offer was received first. If the Seller relies on the rejection, one could argue that the Buyer should be estopped from arguing the acceptance is effective when sent.

But should actual reliance be necessary for the estoppel argument or would the potential for reliance be enough? Note that in Restatement (Second) of Contracts § 40, actual reliance was not necessary for the acceptance that followed a rejection to be only a counteroffer. Why should the order of sending the acceptance and rejection be controlling?

PARALEGAL EXERCISE 3.7 (136) asks whether an offeree could raise questions with the offeror without rejecting the offer. Students are asked to compare the three responses. Which of the responses rejects the offer?

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Death or Incapacity

THE DEATH OR INCAPACITY OF THE OFFEROR OR THE OFFEREE (136)

Restatement (Second) of Contracts § 48 presents the rule on death or incapacity of the offeror or offeree.

PARALEGAL EXERCISE 3.8 (136) gives students an opportunity to apply section 48 of the Restatement to a set of facts. Mary extended an offer to Joan and then died. Joan attempted to accept the offer without knowledge of Mary's death. The attempted acceptance was ineffective. Under section 48, the offeror's death is the event that terminates the offeree's power to accept. The offeree is not required to have knowledge of the offeror's death. Students could be asked why section 48 was written to emphasize the event rather than the knowledge of the event. Which is easier to prove? Is that a good reason?

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THE DEATH OR INCAPACITY OF THE OFFEROR OR THE OFFEREE (136)

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Offer that Refuses to Die


THE OFFER THAT REFUSES TO DIE (136)

This section begins with the express option contract and ends with an implied by law option contract.

The Classical (Express) Option Contract (137)

This subsection introduces the option contract. We separate the option contract from the main contract offer. The option contract is a subsidiary contract (a second contract) whose only function is to prevent the offeror from exercising its power to revoke.

If the offeror cannot revoke for the duration of the option contract, the offeree need not be concerned whether the offeror will revoke (also, the offeree's attempted rejection and the death or incapacity of the offeror will not preclude the offeree from accepting the offer during the existence of the



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(See Diagram Below)

Examples 3-7 through 3-9 (137) present several situations in which an offeree may want unfettered time to evaluate whether to accept the main contract offer.

PARALEGAL EXERCISE 3.9 (137) asks students to create three additional factual situations where it would be advantageous for the offeree to have time to evaluate the offeror's offer.

We note that the offer for the option contract could be made by the party who made the main contract offer or by the offeree of that main contract offer. Also in this paragraph we develop the consideration for the promise not to revoke.

PARALEGAL EXERCISE 3.10 (140) requires students to look for the main contract offer (David's promise to sell to Mary Jane). An option contract is not present here so David can revoke his offer to Mary Jane and sell to Darron.

PARALEGAL EXERCISE 3.11 (140) adds a three month option contract to Paralegal Exercise 3.10. Therefore, David cannot revoke his offer for three months. If David sold to Darron and Mary Jane never accepted, there would be no contract between David and Mary Jane and, therefore, David would not be in breach of contract.

But if Mary Jane did accept within the three months and David sold to Darron (even if he sold before Mary Jane accepted), David has breached his contract with Mary Jane.

PARALEGAL EXERCISE 3.12 (141) raises the question whether both the death or incapacity of the offeror and the offeree should have the benefit of an express option contract. The Restatement (Second) of Contracts § 37 only addresses the death or incapacity of the offeror so if the offeror were to die or become incapacitated during the life of an express option contract, the offeree would still have the power to accept the main contract offer. Since section 37 is silent as to the death or incapacity of the offeree, it would seem that the offeree's personal representative could not accept the main contract offer even if an express option contract existed if the offeree died or became incapacitated and the offeror revoked the main contract offer.

For example, Owner of Blackacre offered to sell Blackacre to Buyer for Buyer's promise to pay \$300,000. Owner and Buyer also entered into an express option contract so the Owner's power to revoke would be negated for 90 days. Thirty days after making the offer, Owner dies and Owner's personal representative attempts to revoke the main contract offer. Under section 37, the offeree has the power to accept the main contract offer until the expiration of the express option contract (60 more days).

If, however, the Buyer rather than the Owner died 30 days after the main contract offer was made, the Buyer's personal representative would not have the power to

accept the main contract offer on behalf of the Buyer's estate if the offeror attempted to revoke the offer. Is this a fair result?

The final paragraph of this subsection relates to when the acceptance of the main contract offer is effective if an option contract has been created. Restatement (Second) of Contracts § 63(b) states that acceptance is effective when received by the offeror.

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Implied Contract

The Implied Option Contract (141)

This subsection takes the discussion a step further. If the parties have not created an express option contract, will the court imply an option contract? The initial discussion of an offer for a unilateral contract is necessary here because the offeror could, under classical theory, revoke prior to the offeree's full performance. Thus the creation of an implied option contract precludes the offeror from terminating after the offeree has begun performance but before full performance. The offeror should not be able to take advantage of the offeree in this fashion. Therefore, when the offeree relies by beginning performance, the offeree should have an opportunity to complete the performance and thus form a contract.

Example 3-15 (142) involves an offer for a unilateral contract and illustrates the hardship placed on the offeree under classical contract theory. We then introduce Restatement (Second) of Contracts § 45 which creates an option contract when the offeree relies. Note that in subsection (2) of section

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The Implied Option Contract (141)

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Example 3-15 (142) involves an offer for a unilateral contract and illustrates the hardship placed on the offeree under classical contract theory. We then introduce Restatement (Second) of Contracts § 45 which creates an option contract when the offeree relies. Note that in subsection (2) of section 45, the offeree must

complete performance to gain the benefit of the option contract. The text then applies section 45 to

Example 3-15.

The discussion then shifts to an offer for a bilateral contract. Example 3-16 describes the offeree's position under classical contract theory if the offeree relies on the offeror's promise without accepting it: no contract. Restatement (Second) of Contracts § 87(2) is then introduced. Section 87(2) parallels section 45 by doing for offers for bilateral contracts what section 45 did for offers for unilateral contracts.

Example 3-17 demonstrates section 87(2). Note is taken that section 87(2) is not restricted to offers for bilateral contracts but could also apply to offers for unilateral contracts. Example 3-18 develops this theme.

PARALEGAL EXERCISE 3.13 (144) asks students to apply the three doctrines-classical contract theory, Restatement (Second) of Contracts § 45, and Restatement (Second) of Contracts § 87(2) to one fact situation using an offer for a unilateral contract. The offeree is preparing to perform. Under classical contract theory-no contract, the offer was revoked prior to acceptance and there was no express option contract to negate the offeror's power to revoke; under section 45-no contract, the offer was revoked prior to acceptance and there was no implied option contract to negate the offeror's power to revoke because the offeree must have done more than just prepare; and under section 87(2)-contract, the attempted revocation was ineffective because the implied option contract negated the offeror's power to revoke (assuming that offeree completed performance).

PARALEGAL EXERCISE 3.14 (145) asks students to change the facts in Paralegal Exercise 3.13 to have the offeree performing. The answer to section 45 changes because the offeree has now begun performance. Note that the offeree must complete performance for contract formation and breach.

PARALEGAL EXERCISE 3.15 (145) asks students to change the facts in Paralegal Exercise 3.14 so the offer becomes one for a bilateral contract and the offeree is preparing when offeror attempts to revoke. Under classical contract theory-no contract; under section 45-no contract (section 45 only applies to offers for unilateral contracts); under section 87(2)-contract if the offeree completes performance.

PARALEGAL EXERCISE 3.16 (145) changes Paralegal Exercise 3.15 from preparation to performance. The answers are the same as in Paralegal Exercise 3.15 and for the same reasons.

Chapter Review Answers

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TRUE/FALSE QUESTIONS

1. F
2. T
3. F
4. T
5. F
6. F
7. T
8. T
9. T
10. T
11. F
12. F
13. T
14. F (if option contract then offer can be accepted)
15. T
16. F
17. T
18. T

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TRUE/FALSE QUESTIONS

1. F
 2. T
 3. F
 4. T
 5. F
 6. F
 7. T
 8. T
 9. T
 10. T
 11. F
 12. F
 13. T
 14. F (if option contract then offer can be accepted)
 15. T
 16. F
-

17. T
18. T
19. T
20. T
21. F
22. T

FILL-IN-THE-BLANK QUESTIONS

1. A reasonable time
2. Revocation
3. Rejection
4. Counteroffer
5. Option contract
6. Implied option contract
7. Express option contract
8. Section 45
9. Section 87(2)
10. Section 87(2)

MULTIPLE-CHOICE QUESTIONS

1. a, b, c, & d
2. b & e
3. e
4. b & e
5. a, b, & c
6. a, b, c, & e
7. b & c
8. a & e
9. a, b, & d
10. c & e

SHORT-ANSWER QUESTIONS

1. First consider the City's offer. Does the City's offer state how long it will remain open? If the offer does not state a termination date, it will remain open for a reasonable time. A reasonable time may be determined by such factors as the City's urgency in acquiring the property, the timetable established by the City to acquire property, the location of the property in relation to the schedule of the work to be done, the amount of the offer in relation to the value of the property, and the history of the City's acquisition of property for similar projects.
-

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