

COUNTEROFFER AND AMENDMENTS: A REFRESHER

I. Offer and Acceptance

A. A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can simply do nothing. A buyer can request that the seller respond in writing, however, the seller has no legal obligation to do so.

B. An offer remains open until one of the following occurs:

1. The offer automatically expires at a specific time and date set forth in the offer;
2. The offer is revoked;
3. The offer is rejected or countered; or
4. The offer is accepted.

C. Generally, an offer can be revoked at any time before it is accepted by the seller.

1. A revocation does not need to be in writing.
2. Even if the offer has a stated expiration date in the absence of a payment or other consideration, an offer can be revoked prior to its stated expiration date. *Hollingshead v Morris*, 172 Mich 126 (1912); *Board of Control of Eastern Michigan University v Burgess*, 45 Mich App 183 (1997).

D. A counteroffer is deemed a rejection of the offer and itself becomes an offer.

1. Sellers cannot simultaneously “accept” and materially modify an offer.
2. Once an offer is rejected, it cannot be accepted.
 - (a) So, if a seller presents a counteroffer, and buyer rejects the seller’s counteroffer, the seller cannot resurrect and accept buyer’s original offer.
 - (b) A seller with two (or more) outstanding counteroffers runs the risk that both will be accepted and then the seller will be contractually obligated to sell the property to two different buyers.

E. An acceptance involves a signature and the communication of that fact.

1. Unless the contract expressly provides otherwise, this “communication” must be in the form of delivery of the signed acceptance.

2. Typically, you cannot create a binding contract by orally communicating the fact that the acceptance has been signed.

3. Delivery of the acceptance can be to the offeror or his or her agent.

II. Amendments

A. Once the parties have entered into a valid and binding contract, either party may, at any time, propose an amendment to that contract.

1. A party is under no obligation to accept a proposed amendment; however, once accepted, it becomes a binding portion of the original agreement.

2. Where there is a conflict between the terms of a contract and a subsequent amendment to the contract, the latter document controls.

3. A seller who receives a proposed amendment can accept, reject or counter that amendment. Or the seller can do nothing.

(a) If the seller rejects a buyer's proposed amendment (or does nothing), the original contract stands "as is."

(b) A seller cannot use the fact that the buyer has proposed an amendment to a contract to get out of the original contract.

III. Changing the Rules By Written Agreement

A. The general rules of contract law discussed above can be changed if the parties agree that they will be changed. This is done through written provisions in the contract itself.

1. For example, a seller could in fact include a provision in his counteroffer stating that in order to accept the counteroffer, the buyer must not only deliver a signed contract but must also deliver a certified check in the amount of \$10,000 and copies of the buyer's last three tax returns.

2. In some areas, REALTORS® are using forms whereby the buyer's acceptance of the seller's counteroffer is only effective if the seller, in turn, accepts the buyer's acceptance of the seller's counteroffer. This method is designed to permit the seller to present counteroffers to more than one buyer at the same time.