



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing offer and acceptance. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: In this podcast, we’re going to discuss contracts. More specifically, we’re going to discuss contract formation, including the mechanics of offer and acceptance. Although some of the terms and concepts might be unfamiliar, we’ll explain all of the terminology and concepts that you need to know. To review these rules and illustrate these concepts, we’ll go over two hypotheticals adapted from the California bar exam. Let’s dive into our first hypo, adapted from the [July 2012 California bar exam](#). If you’d like to look up the full question, you can reference the show notes. Okay, onto the question:

Lee Burgess: “Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either, one, pay him \$50,000 per year; or two, pay him \$40,000 per year and agree to convey to him a parcel of land worth about \$50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, ‘I’d like to go with the second option, but I would like a commitment for an additional three years after the first three.’ Della said, ‘Good, I’d like you to start next week.’

Lee Burgess: After Peter started work, Della handed him a letter she had signed, which stated only that he had agreed to work as a dental hygienist at a salary of \$40,000 per year. After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

Lee Burgess: Did Peter and Della enter into a valid contract? What are the terms of the contract? Discuss.”

Lee Burgess: To answer this question, we have to understand a few concepts. With any Contracts question, you always want to start out by mentioning the applicable law: UCC Article 2, or the common law. The governing law matters because it dictates some of the rules we must use. While Article 2 of the Uniform Commercial Code (the UCC for short) applies for all contracts for the sale of



goods, the common law governs service contracts. Here, because we're in a service contract, the common law applies.

Lee Burgess: Now, a valid contract requires, one, an offer by one party; and two, acceptance of that offer by another party. Let's dig into what we mean by the special terms "offer" and "acceptance".

Lee Burgess: An offer is, one, a manifestation of intent to contract by one party; two, with definite or reasonably certain terms; and three, that is communicated to an identified offeree. Acceptance, on the other hand, is a manifestation of assent to the terms of the offer, which indicates a commitment to be bound.

Lee Burgess: When we determine whether we have an offer, it's critically important that we look to see whether the offer has been terminated or revoked. An offer can be terminated in several ways, including by, (a) rejection or counter-offer by the offeree; (b) lapse of time; (c) revocation by the offeror; or (d) death or incapacity of either party. If acceptance does not mirror the terms of the offer or alters the terms of the offer, it is a counter-offer and does not constitute an acceptance.

Lee Burgess: So, let's take a closer look at what a counter-offer is. A counter-offer is an offer with new terms. A counter-offer is both, one, a rejection that terminates the original offer; and two, a new offer. Counter-offers, and recognizing when we have one, is particularly tricky because it often looks like an acceptance with a little twist, or a "but" at the end. However, a question or request for unspecified changed terms, when no substitute terms are offered, isn't a counter-offer, and still allows for acceptance of the offer.

Lee Burgess: Finally, we can have different types of offers, and one of those special types of offers is an advertisement. An advertisement can be a valid offer if it is made to a particular person, outlines the specific details of the offer, and concretely provides the recipient with instructions on how to accept.

Lee Burgess: Okay, with all of that, we're ready to answer our hypo. Based on our facts, we know that we start out with a unique situation: Della's advertisement for a dental hygienist. Here, the advertisement was made to the general public, and didn't specify that just anyone could accept employment. Moreover, Della's need to conduct an interview suggests that the ad was nothing more than an invitation to apply.

Lee Burgess: Next, Della does make a job offer, but the terms are indefinite. Instead of providing concrete terms of employment, Della gives Peter a choice of being paid \$50,000 per year, or being paid \$40,000 per year and the conveyance of a \$50,000 parcel of land at the end of three years of work. Let's look at this both ways. Because there were a couple of options involved and Della allowed Peter



to choose, and his decision would conclude the agreement, this could be construed as an offer. Nevertheless, since we still have two distinct options on the table for Peter to choose from, a court may conclude that this conversation was simply part of preliminary negotiations.

Lee Burgess: Peter then elects to go with the second option, but he adds a little twist! Peter tries to modify the terms of the deal by adding a commitment for employment for an additional three years. Because of this, and regardless of whether the court concludes that Della's two-option statement constitutes an offer, Peter is making a counter-offer. His statement is a counter-offer because he clearly added in a new term to the agreement, and didn't just accept Della's proposal. Peter's counter-offer thereby terminated any offer Della may have made and created a new offer.

Lee Burgess: So, did Della accept Peter's counter-offer? Yes, she did! Della accepted Peter's counter-offer when she said, "Good, I'd like you to start next week." At that point, Della and Peter have an agreement, and Peter will argue that the memo he received at work simply confirmed his salary. In sum, here, we have an offer based on Peter's terms, and Della's acceptance of those terms.

Lee Burgess: That takes us through our first analysis for offer and acceptance. To practice these concepts again, let's take a look at another hypothetical. The next hypothetical is adapted from the [July 2019 California bar exam](#):

Lee Burgess: "Sam owned a classic 1965 Eris automobile. Only 500 such cars were made and they are considered highly valuable. Sam and Art, a classic car specialist, signed a valid written contract. The contract stated in its entirety: Art will serve as Sam's exclusive agent in selling his Eris car. Upon successful sale, Art will earn a commission equal to 10% of the sale price.

Lee Burgess: Sam showed his Eris to Bob, who had learned of the car when he saw a 'For Sale' sign Sam had decided to place on it while parked in his driveway. Bob, wanting to add the Eris to his personal collection, mailed Sam a signed letter later that day offering to pay \$250,000 for the car. When Sam received the letter, he telephoned Bob and said he accepted the offer. They agreed to meet the following week for payment and exchange of title.

Lee Burgess: The next day, Charlie saw an advertisement for Sam's Eris in a classic car trade publication. Art had placed the ad prior to Bob making the agreement to sell to Sam. Charlie drove to Sam's house and offered \$300,000 for the car and said he would mail a written contract to Sam that day. Sam said he would think about it. He did not inform Charlie of his agreement with Bob. When Charlie's contract arrived, Sam signed it, placed it in a stamped envelope addressed to Charlie, and dropped it in the mailbox.



Lee Burgess: Sam died in his sleep that night. Bob and Charlie filed timely claims against Sam's estate seeking title to the car. Is there offer and acceptance between Bob and Sam? What about between Charlie and Sam?"

Lee Burgess: To answer this question, let's go over a few additional rules and terms. First, let's talk about advertisements as offers. Typically, advertisements are not treated as offers; they are invitations to make an offer. An advertisement transforms into an offer if it's sufficiently definite in its terms, it can be accepted without any additional negotiations, and the circumstances demonstrate the advertiser intended to enter into the contract.

Lee Burgess: Second, let's talk about another specific rule: the mailbox rule. To understand the mailbox rule, let's dig into the timing of an acceptance. Unless the offeror states otherwise, acceptance of an offer is deemed acceptable once the acceptance is sent or communicated. However, an offer is revoked when notice of the revocation is received by the offeree. A communication is received when it comes into the possession of that person. Unless there's an agreement to the contrary, an offer can't be accepted after it's revoked.

Lee Burgess: Now, under the mailbox rule, acceptance is effective as soon as the letter is dispatched. If the offeror mails a letter to the offeree revoking the offer, but the offeree sends a letter to the offeror accepting the offer before receiving the revocation letter, a valid contract has been created. This is because the acceptance was effective *before* the revocation became effective. In other words, we need to look at the timing of the acceptance and the timing of any possible termination to the offer.

Lee Burgess: As you know, to have a valid contract, we need to have an offer, acceptance, and consideration. For our purposes today though, we're only going to look into offer and acceptance. Alright, with those rules in our rearview mirror, let's tackle our question.

Lee Burgess: First, we're going to look at whether there was offer and acceptance between Sam and Bob. Remember, the first step in our analysis is to look at which law governs – the UCC or the common law. Contracts for the sale of goods – those things that are moveable, tangible objects – are governed by the UCC. Because the contract involves the sale of a 1965 Eris automobile – a good – the UCC governs the contract.

Lee Burgess: Next, we need to determine whether there was an offer and acceptance between Sam and Bob. Here, we need to first assess the sign on the car that indicated it was for sale. As opposed to being an offer, this "For Sale" sign was an advertisement – an invitation for a potential buyer to deal. Primarily, there was nothing about the sign that indicated that negotiations wouldn't be entertained, and there wasn't any additional indication that Sam intended for



the sign to be a final offer. Because it wasn't an offer, we need to turn to Bob's response to the "For Sale" sign to determine whether that constitutes an offer.

- Lee Burgess: Bob responded to the sign by mailing a signed letter offering to pay \$250,000 for the car. The letter provided the key terms of the deal, including the price. Although he used the language "the car" and didn't specify the 1965 automobile, it is likely sufficiently definite because of the context of the letter. The letter was also actually received by Sam.
- Lee Burgess: Sam then promptly accepted the offer. After receiving Bob's offer, Sam called Bob and accepted the offer orally over the phone. The parties then agreed on the location where the final exchange would occur. Therefore, we have an offer and acceptance between Sam and Bob.
- Lee Burgess: Let's turn to whether there was also offer and acceptance between Sam and Charlie. For the same reasons we already noted, the UCC also governs the contract for the sale of the car – a movable good – between Sam and Charlie. Here, we have to analyze the advertisement placed by Art, as that is what Charlie responded to. The fact pattern doesn't provide us much information about the ad, because we only know that there was an ad placed. There's no indication about the price of the car or any other details about the deal. We can conclude that the ad was an invitation to deal, and not an offer. But we have another communication: Charlie showing up in-person at Sam's house. There, Charlie's verbal statement to Sam offering to buy the car for \$300,000 constitutes an offer as it is definite on its terms, shows an intent to be bound, and is clearly communicated to the offeree.
- Lee Burgess: So, do we have acceptance? Sam did not immediately accept Charlie's verbal offer, stating he would instead think about it. Later, Sam received a contract from Charlie in the mail. At that point, Sam signed the contract and placed it in the mailbox. Under the mailbox rule, an acceptance is deemed effective when it is mailed. At this point, a valid contract is formed even if the offeror has not yet received the acceptance. By placing the contract in the mailbox, Sam accepted the offer and it became effective when he did so. Sam was still living when he mailed the response, and the contract – unlike an offer – doesn't terminate upon death. As a result, we have an offer and acceptance between Sam and Charlie.
- Lee Burgess: To dig into this question more – including which contract defenses Charlie and Bob would try to employ – check out the full answer to this California July 2019 practice question.
- Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you



don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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