

## OFFERS, COUNTEROFFERS, & THEIR REVOCATION

By

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### Generally

In the most general terms, the sale agreement usually describes the price and terms of the transaction, any conditions or contingencies agreed upon by the parties, and the time and place of closing or “settlement.” At closing, the buyer pays the amount due for the purchase price, if financing is involved the note and trust deed are signed by the buyer, the seller conveys a signed deed to the buyer, escrow records all documents that must be recorded, and prepares a “closing” or “settlement” statement, disclosing to each side all sums paid, received, and charged.

Generally, the sale agreement is first prepared and signed by the buyer before submission to the seller for consideration. At this early stage, before it is actually accepted by the seller, the document is merely an “offer,” or a “proposal” by the buyer to purchase the seller’s property. The offer is usually accompanied by a check or promissory note, known as “earnest money.” Offers do not become binding contracts until they have been legally accepted. *More about that later.*

### Timing of the Offer

In Oregon, there is a statewide residential sale agreement form published by Oregon Real Estate Forms, LLC (“OREF”). This article will reference that form. [*A sample of the 2013 OREF Sale Agreement form is attached [here](#).*] The form has a place for the buyer to insert a period of time within which the offer is to remain open. After that deadline passes, the offer will automatically become void and cannot be accepted by the seller without consent of the buyer. [*Line 437-440, 2013 OREF Sale Agreement.*] The amount of time a buyer should leave an offer open for the seller’s consideration can vary from case to case. Much depends upon the circumstances of the particular transaction; if the buyer is in a hurry and wants to tie up the property quickly, he or she may limit the amount of time the offer remains open to a day or two. In other instances, say where the seller and buyer are in different states, more time may be allowed for the seller to accept.

Basic contract law generally provides that an offer may be withdrawn or “revoked” at any time prior to acceptance. As discussed below, much confusion can be generated when one party attempts to withdraw their offer or their counteroffer.

### Counteroffers

If the seller's acceptance changes the terms of the buyer’s offer in *any material respect*, it amounts to a rejection of the offer and constitutes a counteroffer on the newly changed terms. If the seller makes a counteroffer to the buyer’s offer, it means that the ball is back in the buyer’s court to decide whether to accept, reject, or counter. This process can become very confusing if each side makes a counteroffer to

the other's counteroffer – leaving the parties to wonder which part of their offer or counteroffer has been accepted and which part has been rejected.

***Example ~ Suppose Buyer offers to purchase Seller's property for \$250,000, and Seller agrees upon all of the terms of the offer, but wants to increase the price to \$260,000. Seller can do so by preparing a counteroffer form changing only that price term. The language in the counteroffer does not require any "magic words" but should essentially convey the following message: "Seller accepts all terms of Buyer's offer except the sales price, which shall be \$260,000." Note that this counteroffer is a material change to the Buyer's offer and therefore it is an automatic rejection of Buyer's original offer – it does not need to expressly say so. Once rejected by Seller's \$260,000 counteroffer, Buyer's original \$250,000 offer is no longer capable of being accepted by Seller unless Buyer agrees in writing – i.e. if Buyer rejects the Seller's counteroffer, the transaction is dead – the Seller cannot try to go back and accept Buyer's original \$250,000 offer – it was already rejected by Seller's \$260,000 counteroffer.***

***Tip ~ All parties to the real estate negotiation process must give serious strategic attention to the consequences of making counteroffers. For example, if Seller rejects buyer's \$250,000 offer by making a \$260,000 counteroffer, Buyer could simply reject the counteroffer, terminate negotiations, and find another seller to work with.***

When making offers and counteroffers, the parties should strive to use "plain English." As noted above, there is no magic language necessary to make a counteroffer. The party making the counteroffer must simply make it clear, in writing, which terms are accepted, which are rejected, and which new terms are being substituted. If only a single term is being changed, the best course is to identify the changed term and then state that "All of the remaining terms of X's offer shall remain the same."

During the offer-counteroffer process, the issues get continuously refined (like a pyramid, from general to specific), until a final agreement is reached. However, the more changes one has to an offer or counteroffer, the greater the need for clear and concise writing.

***Example ~ If Seller wants to change the sale price, amount of earnest money deposit and length of time for Buyer to apply for financing, the following language might be used for a counteroffer to Buyer's offer:***

***"Seller accepts Buyer's offer, subject to the following changes: (a) Sales price to be increased to \$260,000; (b) Earnest money deposit to be increased to \$7,500; (c) Buyer to submit loan application within three (3) business days following mutual acceptance of this counteroffer."***

### **Revocation of Offers and Counteroffers**

Occasionally, disputes can occur when sellers or buyers change their minds after submitting a written offer or counteroffer to the other side. The general rule is that an offer or counteroffer may be revoked at any

time before acceptance by the other side. The problem gets complicated, however, in determining exactly when "acceptance" has occurred.

In all cases, the acceptance of an offer or counteroffer must be communicated to the one making it, before the contract becomes binding. Until the acceptance has been communicated to the offeror [*i.e. the one making the offer*], the circle is not yet complete, and may be effectively revoked if communicated to the offeree [*i.e. the recipient of the offer*] before it becomes legally binding. This is the moment that the law says there has been a "meeting of the minds."

***Example ~ Buyer makes an offer to purchase Seller's property. Seller signs the offer, places it in a desk drawer for delivery back to Buyer the next morning. Later that same evening, Buyer changes his mind and, not knowing of Seller's signed acceptance in the desk drawer, calls Seller and verbally revokes the offer. Is Buyer's revocation effective, since it occurred before he became aware of Seller's acceptance?***

Although all cases are different, and there can be exceptions, the general rule is that the Buyer's revocation – occurring before Seller's acceptance was communicated to him – is effective.

It generally makes no difference whether this scenario involves offers or counteroffers. For example, if Seller makes a counteroffer to the Buyer; Buyer receives it, but before Buyer's acceptance is communicated to the Seller, Seller communicates his revocation of the counter offer – it is an effective revocation.

***Tip #1 ~ A complete discussion of the law of contracts is beyond the scope of this article, and various facts and circumstances, including the specific terms of the sale agreement itself, can change the outcome of the above example. However, the rule to remember in all revocation situations is that it is the timing of the revocation that is critical. If the offer or counteroffer has already been made, but its acceptance has not yet been communicated to the one making the offer or counteroffer, a communicated revocation stands a better chance of being effective the earlier it is communicated to the other side.***

***Tip #2 ~ Under the OREF Sale Agreement, communication to the agent is the same as communication to his/her principal.***

***Tip #3 ~ Oral revocations should be avoided, and when they occur, they should always be immediately followed up with a written confirmation to the agent and/or the principal.***

**Conclusion.** The "take-away" for all Realtors® is this: Timing is everything. Buyers and sellers do change their minds. If your client is hesitant, it is better that he or she not make an offer (or counteroffer) unless they are prepared to live with it. And in those cases in which your client decides to revoke their offer (or counteroffer), it is imperative that it be immediately communicated [*e.g. via email, facsimile, or written addendum personally delivered*] before acceptance is communicated back.