**Acceptance**

Welcome to this podcast on Acceptance brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is the basic concepts related to acceptance of an offer. Acceptance is simply the name given to the action of an offeree in making the offeror’s promise enforceable. In this podcast, we look at the basic attributes of acceptance, as well as specific issues related to the mirror image rule, the permitted method and manner of acceptance, and acceptance by silence.

Recall that a contract is a promise or set of promises which the law enforces. That is, in order to have a contract, we need promises, basically a manifestation of intention to act or refrain from acting in a specified way. This exchange of promises results in a manifestation of mutual assent. Ordinarily, the manifestation of mutual assent takes place by virtue of an offer by the offeror, which creates the power of acceptance in the offeree, and is then followed by an acceptance by the offeree. Most of the time then we will be looking at the events that occur in a factual situation to see if a party has, in fact, accepted an offer. Also, remember that in contracts we use an objective test to evaluate the facts. That is what a reasonable person would believe in the circumstances.

An offer creates a power of acceptance in the offeree, which the offeree may choose to accept. If the offeree wants to accept, Restatement § 50 directs that “acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” So, what does this mean? Let’s break this down. Generally, an acceptance must have the following three attributes: (i) show commitment to the terms of the offer, (ii) be in the method and manner invited or required by the offer; and (iii) be made by a person to whom the offer is directed while the offer is still open (meaning the power of acceptance is still present). If an acceptance is made, then there is mutual assent.

Let’s look at an example. Martin needs a dog sitter for when she goes out of town. Martin sends Julian a text that says “I’m going to Orlando this weekend and need a dog sitter for my dogs, Angus and Porter. If you can watch them Saturday and Sunday and walk them twice a day, I will pay you $75 per day.” This would be an offer creating the power of acceptance in Julian. Presume that Julian texts back to Martin, “Yes, I’ll do it.” Is this an acceptance? I believe so. First, the “Yes, I’ll do it” response does appear to demonstrate an intention or commitment to accept the offer. The response is made on the terms of the offer without any attempt to alter or qualify the terms. Second, the response is in the manner required as it is a return promise to perform the dog walking and by an acceptable method of acceptance, by text. Finally, the acceptance made by Julian and communicated to Martin occurs when Julian sent the text to Martin. Presuming that Julian has acted promptly, it would seem that the offer is still open.

Of course, it’s not always apparent whether an offeree has accepted an offer.

Let’s turn to the first of the criteria, commitment, or intention to make an acceptance. Here, we evaluate the facts to determine whether the circumstances indicate an intention to enter into a binding agreement. In our example with the dog sitting, Julian affirmatively said: “Yes, I’ll do it.” Similarly, Julian could have shown commitment by simply saying “I accept.” On the other hand, if Julian responded that he would think about it or that he would consider it or he responds questioning what times the dogs need to be walked, there would not be a commitment constituting an acceptance.

What happens if Julian responds that he will sit the dogs for $100 per day? Under the mirror image rule, in order to be an acceptance, the commitment must be made on the terms proposed by the offeror without variation. Accordingly, Julian’s response attempting to accept for $100 per day would not be an acceptance. It is a rejection and a counteroffer. This might be compared with a grumbling acceptance, however, which will often be seen as an acceptance. So, if Julian says “Yes, I’ll do it, but I’m really busy and wish you were paying me more,” this would still likely be an acceptance because Julian has still shown commitment to the terms of the offer. However, a conditional response is not an acceptance. If Julian texts Martin that he will walk the dogs if he does not have homework, there’s no acceptance because he had not affirmatively committed to the terms of the offer.

The second element looks at the method and manner of acceptance. The offeror is master of the offer and can specify how the offer may be accepted. However, where there is no specification, an acceptance can be made in any manner and by any medium reasonable under the circumstances. In terms of manner of acceptance, this means that an acceptance can ordinarily be made by a return promise to perform or by actual performance. In terms of the method of acceptance, an acceptance made by any means that is reasonable under the circumstances is acceptable. In our dog walking hypothetical, Martin sent her offer by text message and did not specify how Julian could accept. It would probably be reasonable for Julian to accept by a return text message promising to walk the dogs because (i) a return promise of walking the dogs would appear to be an acceptable manner of acceptance here; and (ii) an acceptance via text to Martin would appear to be an acceptable method of acceptance as it is the same method used by the offeror and the offer did not state otherwise. However, an acceptable method of acceptance would also likely be for Julian to simply call Martin and accept. Perhaps even an email would be a sufficient method.

A question with the method of acceptance sometimes arises where an offer will specify a method of acceptance, such as stating “let me know by return text message.” While the offer specifies a response by text, if Julian personally and speedily goes to Martin and says “I accept,” such an acceptance by personal delivery would also be a speedy method of acceptance as good as text. Sometimes an offer will specify that acceptance must be made by a certain method, such as by text message or by a signed document. If the parties nevertheless proceed as if an acceptance made by another method is sufficient, there is likely to be an effective acceptance due to the conduct of the parties. This would be true despite the earlier specification in the offer.

When it comes to the manner of acceptance, issues can arise here. Most often, we presume that an offer can be accepted by a return promise to perform or by performing the act requested by the offer. In such cases, Julian could accept by promising to walk the dogs or by just doing the requested walking of the dogs. Sometimes, though, an offer will state a manner of acceptance. For instance, Martin might want to know that the dogs will be cared for while she is out of town, so her text to Julian might specify “you need to let me know if you will walk the dogs by Friday.” In such cases, it seems that just walking the dogs might not be what Martin wants, she actually wants to know before she goes out of town that Julian has promised to walk the dogs. Other questions about whether an offeree can accept by a return promise or if the offeree must actually perform are determined by the language of the offer and discussed more fully in another podcast on bilateral and unilateral contracts.

Occasionally, there will be a question whether silence is an effective method of acceptance. The general rule is that silence is not an acceptance. Like most legal rules, there are exceptions to this and silence can be an acceptance in four limited cases: (i) where the offeree takes the benefit of the offer; (ii) where prior conduct gives reason to believe that silence would be acceptance; (iii) where the offeree exercises dominion over goods; or (iv) where the offer states that it may be accepted by silence and the offeree remains silent with the intention of accepting. In these cases, it will be important to look at the particular circumstances of the offeree’s conduct.

Suppose that Julian has walked Angus and Porter for $20 per walk in the past and makes clear that he will walk the dogs every Tuesday during the fall semester of school and charge Martin the price. Martin never affirmatively tells Julian to walk the dogs, but allows the dog walking to continue through the fall semester, knowing that Julian intends to be paid. Most likely Martin has accepted here by one of the limited cases in which silence is acceptance. That is, Martin has taken the benefit of the offer, the dog walking. It might also be the case that the second of the limited cases applies here as well. That is, Martin’s past conduct has given reason to believe that silence would be acceptance here, if perhaps she always leaves the gate door open for Julian. It would seem that if there’s any misunderstanding here, Martin could have cleared it up, but instead allowing the dog walking to continue knowing that Julian expected payment. In this type of case, Martin’s silence would be an acceptance. But, these cases are not common.

The third and final element regarding acceptance looks to determine whether the person purporting to accept has the power of acceptance. Simply, sometimes there is a question about who can accept an offer. In general, an offer can only be accepted by the person or persons to whom it is addressed. In our dog walking hypothetical, that would be Julian. If José is with Julian when he received the offer from Martin and sees the text message, José, a third party, is not able to accept the offer because it was not made to him.

Where an offer is made to a group of persons, such as a public offer made to an unlimited number of persons, the terms of the offer, viewed on an objective basis, will dictate who can accept. For instance, if Martin offers to her entire class the dog walking opportunity, the reasonable person would understand that only one person can accept. Recall the advertisement in the well-known case of *Lefkowitz v. Great Minneapolis Surplus Store* that was an offer to the public by virtue of the newspaper advertisement that specified acceptance would be made on a *first-come first-served basis*. The offeree accepted when he came to the store and was the first customer wanting to purchase the coat.

Even if the correct person is attempting to accept, they can only accept if they have knowledge of the offer. Suppose Martin’s dog Angus gets loose and she offers a reward of $50 to anyone finding the dog. Notice that this offer specifies a manner of acceptance, finding the dog. If José, not knowing of the reward, performs as requested by finding Angus and returning him to Martin, there’s no acceptance because even though Jose responded in the manner required by the offer by actually finding the dog, he did not know of the offer. Of course, if José finds Angus loose and finds about the offer before returning Angus to Martin, then there is an acceptance because José knew of the offer when he returned the dog.

At this point, you should be able to explain that acceptance is the promise given in response to an offer. You should be able to identify and apply the criteria for an acceptance: (i) commitment to the terms of the offer, (ii) in the method and manner invited or required by the offer; and (iii) made by a person to whom the offer is directed while the offer is still open.

I hope you’ve enjoyed this podcast on Acceptance.

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