

BUSINESS ASSOCIATIONS

AGENCY, PARTNERSHIPS, LLCs, AND CORPORATIONS

2005 STATUTES AND RULES

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2005 Statutes and Rules

compiled by

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§ 1. Agency; Principal; Agent

(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

§ 2. Master; Servant; Independent Contractor

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

§ 3. General Agent; Special Agent

(1) A general agent is an agent authorized to conduct a series of transactions involving a continuity of service.

(2) A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service.

§ 4. Disclosed Principal; Partially Disclosed Principal; Undisclosed Principal

(1) If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is a disclosed principal.

(2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is a partially disclosed principal.

(3) If the other party has no notice that the agent is acting for a principal, the one for whom he acts is an undisclosed principal.

§ 5. Subagents and Subservants

(1) A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.

(2) A subservant is a person appointed by a servant empowered to do so, to perform functions undertaken by the servant for the master and subject to the control as to his physical conduct both by the master and by the servant, but for whose conduct the servant agrees with the principal to be primarily responsible.

§ 6. Power

A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

§ 7. Authority

Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.

§ 8. Apparent Authority

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

§ 8A. Inherent Agency Power

Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.

§ 8B. Estoppel—Change of Position

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

(a) he intentionally or carelessly caused such belief, or

(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.

(2) An owner of property who represents to third persons that another is the owner of the property or who permits the other so to represent, or who realizes that third persons believe that another is the owner of the property, and that he could easily inform the third persons of the facts, is subject to the loss of the property if the other disposes of it to third persons who, in ignorance of the facts, purchase the property or otherwise change their position with reference to it.

(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

§ 13. Agent as a Fiduciary

An agent is a fiduciary with respect to matters within the scope of his agency.

§ 26. Creation of Authority; General Rule

Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

§ 27. Creation of Apparent Authority: General Rule

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

§ 33. General Principle of Interpretation

An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts.

§ 34. Circumstances Considered in Interpreting Authority

An authorization is interpreted in light of all accompanying circumstances, including among other matters:

(a) the situation of the parties, their relations to one another, and the business in which they are engaged;

(b) the general usages of business, the usages of trades or employments of the kind to which the authorization relates, and the business methods of the principal;

(c) facts of which the agent has notice respecting the objects which the principal desires to accomplish;

(d) the nature of the subject matter, the circumstances under which the act is to be performed and the legality or illegality of the act; and

(e) the formality or informality, and the care, or lack of it, with which an instrument evidencing the authority is drawn.

§ 35. When Incidental Authority Is Inferred

Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it.

§ 82. Ratification

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

§ 83. Affirmance

Affirmance is either

(a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or

(b) conduct by him justifiable only if there were such an election.

§ 144. General Rule

A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his authority if made in proper form and with the understanding that the principal is a party.

§ 145. Authorized Representations

In actions brought upon a contract or to rescind a contract or conveyance to which he is a party, a disclosed or partially disclosed principal is responsible for authorized representations of an agent made in connection with it as if made by himself, subject to the rules as to the effect of knowledge of, and notifications given to, the agent.

§ 159. Apparent Authority

A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his apparent authority if made in proper form and with the understanding that the apparent principal is a party. The rules as to the liability of a principal for authorized acts, are applicable to unauthorized acts which are apparently authorized.

§ 160. Violation of Secret Instructions

A disclosed or partially disclosed principal authorizing an agent to make a contract, but imposing upon him limitations as to incidental terms intended not to be revealed, is subject to liability upon a contract made in violation of such limitations with a third person who has no notice of them.

§ 161. Unauthorized Acts of General Agent

A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.

§ 186. General Rule

An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority, except that the principal is not bound by a contract which is under seal or which is negotiable, or upon a contract which excludes him.

§ 194. Acts of General Agents

A general agent for an undisclosed principal authorized to conduct transactions subjects his principal to liability for acts done on his account, if usual or necessary in such transactions, although forbidden by the principal to do them.

§ 195. Acts of Manager Appearing to be Owner

An undisclosed principal who entrusts an agent with the management of his business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal.

§ 195A. Unauthorized Acts of Special Agents

A special agent for an undisclosed principal has no power to bind his principal by contracts or conveyances which he is not authorized to make unless:

- (a) the agent's only departure from his authority is
 - (i) in not disclosing his principal, or
 - (ii) in having an improper motive, or
 - (iii) in being negligent in determining the facts upon which his authority is based, or
 - (iv) in making misrepresentations; or
- (b) the agent is given possession of goods or commercial documents with authority to deal with them.

§ 219. When Master Is Liable For Torts Of His Servants

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

- (a) the master intended the conduct or the consequences, or
- (b) the master was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the master, or
- (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;

- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

§ 228. General Statement [of Scope of Employment Doctrine]

- (1) Conduct of a servant is within the scope of employment if, but only if:
 - (a) it is of the kind he is employed to perform;
 - (b) it occurs substantially within the authorized time and space limits;
 - (c) it is actuated, at least in part, by a purpose to serve the master, and
 - (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
- (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

§ 229. Kind Of Conduct Within Scope Of Employment

- (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
- (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
 - (a) whether or not the act is one commonly done by such servants;
 - (b) the time, place and purpose of the act;
 - (c) the previous relations between the master and the servant;
 - (d) the extent to which the business of the master is apportioned between different servants;
 - (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
 - (f) whether or not the master has reason to expect that such an act will be done;
 - (g) the similarity in quality of the act done to the act authorized;
 - (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously criminal.

§ 230. Forbidden Acts

An act, although forbidden, or done in a forbidden manner, may be within the scope of employment.

§ 231. Criminal Or Tortious Acts

An act may be within the scope of employment although consciously criminal or tortious.

§ 292. General Rule [Liability of Third Person to Principal]

The other party to a contract made by an agent for a disclosed or partially disclosed principal, acting within his authority, apparent authority or other agency power, is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract.

§ 302. General Rule [Liability of Third Person to Undisclosed Principal]

A person who makes a contract with an agent of an undisclosed principal, intended by the agent to be on account of his principal and within the power of such agent to bind his principal, is liable to the principal as if the principal himself had made the contract with him, unless he is excluded by the form or terms of the contract, unless his existence is fraudulently concealed or unless there is set-off or a similar defense against the agent.

§ 376. General Rule [Duties of Agent to Principal]

The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.

§ 377. Contractual Duties

A person who makes a contract with another to perform services as an agent for him is subject to a duty to act in accordance with his promise.

§ 378. Gratuitous Undertakings

One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service or, while other means are available, to give notice that he will not perform.

§ 379. Duty Of Care And Skill

(1) Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.

(2) Unless otherwise agreed, a gratuitous agent is under a duty to the principal to act with the care and skill which is required of persons not agents performing similar gratuitous undertakings for others.

§ 380. Duty of Good Conduct

Unless otherwise agreed, an agent is subject to a duty not to conduct himself with such impropriety that he brings disrepute upon the principal or upon the business in which he is engaged. If the service involves personal relations, he has a duty not to act in such a way as to make continued friendly relations with the principal impossible.

§ 381. Duty to Give Information

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

§ 382. Duty to Keep and Render Accounts

Unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal, an account of money or other things which he has received or paid out on behalf of the principal.

§ 383. Duty to Act Only as Authorized

Except when he is privileged to protect his own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent.

§ 384. Duty Not to Attempt the Impossible or Impracticable

Unless otherwise agreed, an agent is subject to a duty to the principal not to continue to render service which subjects the principal to risk of expense if it reasonably appears to him to be impossible or impracticable for him to accomplish the objects of the principal and if he cannot communicate with the principal.

§ 385. Duty to Obey

(1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.

(2) Unless he is privileged to protect his own or another's interests, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given.

§ 386. Duties After Termination of Authority

Unless otherwise agreed, an agent is subject to a duty not to act as such after the termination of his authority.

§ 387. General Principle [Duty of Loyalty]

Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.

§ 388. Duty to Account for Profits Arising Out of Employment

Unless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.

§ 389. Acting as Adverse Party Without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.

§ 390. Acting As Adverse Party With Principal's Consent

An agent who, to the knowledge of the principal, acts on his own account in a transaction in which he is employed has a duty to deal fairly with the principal and to disclose to him all facts which the agent knows or should know would reasonably affect the principal's judgment, unless the principal has manifested that he knows such facts or that he does not care to know them.

§ 391. Acting For Adverse Party Without Principal's Consent

Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge.

§ 392. Acting For Adverse Party With Principal's Consent

An agent who, to the knowledge of two principals, acts for both of them in a transaction between them, has a duty to act with fairness to each and to disclose to each all facts which he knows or should know would reasonably affect the judgment of each in permitting such dual agency, except as to a principal who has manifested that he knows such facts or does not care to know them.

§ 393. Competition As To Subject Matter Of Agency

Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.

§ 394. Acting For One With Conflicting Interests

Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed.

§ 395. Using Or Disclosing Confidential Information

Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

§ 396. Using Confidential Information After Termination Of Agency

Unless otherwise agreed, after the termination of the agency, the agent:

(a) has no duty not to compete with the principal;

(b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;

(c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal;

(d) has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation.

§ 397. When Agent has Right to Patents

Unless otherwise agreed, a person employed by another to do noninventive work is entitled to patents which are the result of his invention although the invention is due to the work for which he is employed.

§ 398. Confusing or Appearing to Own Principal's Things

Unless otherwise agreed, an agent receiving or holding things on behalf of the principal is subject to a duty to the principal not to receive or deal with them so that they will appear to be his own, and not so to mingle them with his own things as to destroy their identity.