

CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS

Statutes, Rules, Materials, and Forms

2000 Edition

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2000 Edition

Selected and edited by

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PREFACE

This Supplement is designed to provide students with the essential statutory provisions, rules, materials and forms needed in courses in Corporations and Business Associations, and to give students a hand's-on grasp of the tools with which the profession works in these areas.

This Supplement includes state and federal statutes and rules; extensive excerpts from Restatement (Second) of Agency; the virtually complete text of the ALI's Principles of Corporate Governance together with selected Comments; selected forms; and other materials.

In general, the federal materials have been edited much more heavily than the other materials, because much of the federal material is more relevant to courses in Securities Regulation than to courses in Corporations and Business Associations. The aim of the editing of the federal materials has been to preserve the substance and the flow of the material, but to winnow out details that are unnecessary for the study of corporation law.

The following conventions have been used in the preparation of this Supplement:

(1) Omissions within a statutory section, rule, form, official comment, instruction, note, or other material are indicated by ellipses (. . .). The omission of an entire statutory section, rule, form, official comment, instruction, or note is not so indicated. However, in the case of the Delaware statute, the Revised Model Business Corporation Act, the Uniform Partnership Act, the Revised Uniform Partnership Act, the Uniform Limited Partnership Act, the Securities Act, and the Securities Exchange Act, the Delaware Limited Liability Company Act, and the Uniform Limited Liability Company Act, the omission of an entire section is indicated in the Table of Contents by an asterisk following the title of the omitted section.

(2) Editorial insertions in the text are indicated by brackets. In some cases, an official text itself includes bracketed material, but the context usually makes clear whether bracketed material consists of editorial insertions or original text.

(3) Sections of the securities acts have been numbered serially, beginning with Section 1, rather than with the number-and-letter combinations used in the United States Code. Rules and forms under those acts have been numbered without the prefatory Part numbers that appear in the Code of Federal Regulations.

I thank the authors, publishers and copyrightholders who permitted me to reprint all or portions of the following works, including:

PREFACE

American Bar Association, Section of Business Law, Committee on Corporate Laws, Revised Model Business Corporation Act.

American Bar Foundation, Commentaries on Model Debenture and Indenture Provisions (1971).

American Law Institute, Restatement (Second) of Agency, Restatement (Third) of Agency, and Principles of Corporate Governance: Analysis and Recommendations.

Aspen Law & Business, Model Business Corporation Act Annotated.

R. F. Balotti and J. Finkelstein, The Delaware Law of Corporations and Business Organizations (3d ed. 1998).

Robert R. Keatinge and Holland & Hart, Form of Operating Agreement of Limited Liability Company.

National Conference of Commissioners on Uniform State Laws, Uniform Limited Liability Company Act (1995), Uniform Partnership Act, Revised Uniform Limited Partnership Act (1995), and Revised Uniform Limited Partnership Act.

Wachtell, Lipton, Rosen & Katz, Form of Preferred Shareholder Rights Agreement.

MELVIN A. EISENBERG

May, 2000

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Chapter 1

INTRODUCTORY MATTERS

TOPIC 1. DEFINITIONS

§ 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.

Comment:

a. Servants and non-servant agents. A master is a species of principal, and a servant is a species of agent. . . .

b. Servant contrasted with independent contractor. The word "servant" is used in contrast with "independent contractor". The latter term includes all persons who contract to do something for another but who are not servants in doing the work undertaken. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal. Thus, a broker who contracts to sell goods for his principal is an independent contractor as distinguished from a servant. Although, under some circumstances, the principal is bound by the broker's unauthorized contracts and representations, the principal is not liable to third persons for tangible harm resulting from his unauthorized physical conduct within the scope of the employment, as the principal would be for similar conduct by a servant; nor does the principal have the duties or immunities of a master towards the broker. Although an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another and who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.

c. Servants not necessarily menials. As stated more fully in Section 220, the term servant does not denote menial or manual service. Many servants perform exacting work requiring intelligence rather than muscle. Thus the officers of a corporation or a ship, the interne in a hospital, all of whom give their time to their employers, are servants equally with the janitor and others performing manual labor. . . .

§ 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.

§ 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.

TOPIC 3. ESSENTIAL CHARACTERISTICS OF RELATION

§ 13. Agent as a Fiduciary

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

§ 14. Control by Principal

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

**TOPIC 4. AGENCY DISTINGUISHED
FROM OTHER RELATIONS**

§ 14H. Agents or Holders of a Power Given for Their Benefit

One who holds a power created in the form of an agency authority, but given for the benefit of the power holder or of a third person, is not an agent of the one creating the power.

§ 14O. Security Holder Becoming a Principal

A creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business.

Chapter 2

CREATION OF RELATION

TOPIC 1. MUTUAL CONSENT AND CONSIDERATION

§ 15. Manifestations of Consent

An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.

TOPIC 3. CAPACITY OF PARTIES TO RELATION

§ 23. Agent Having Interests Adverse to Principal

One whose interests are adverse to those of another can be authorized to act on behalf of the other; it is a breach of duty for him so to act without revealing the existence and extent of such adverse interests.

Chapter 3

CREATION AND INTERPRETATION OF AUTHORITY AND APPARENT AUTHORITY

TOPIC 1. METHODS OF MANIFESTING CONSENT

§ 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.

TOPIC 2. INTERPRETATION OF AUTHORITY AND APPARENT AUTHORITY

TITLE A. AUTHORITY

§ 32. Applicability of Rules for Interpretation of Agreements

Except to the extent that the fiduciary relation between principal and agent requires special rules, the rules for the interpretation of contracts apply to the interpretation of authority.

§ 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.

Comment:

a. Authority an ambulatory power. The agency relation is normally the result of a contract and is always the result of an