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# AGENCY IN A BUSINESS ORGANIZATION

The law of agency is so basic to the operations of a business that it is important to understand the principles of agency to be able to appreciate the various structures in which an enterprise may operate. Management functions usually occur through agents in most organizations, and most of the legal relationships established in an enterprise occur through the law of agency.

The operations of every business enterprise are conducted by agents, either as employees or independent contractors, like consultants. Even in a sole proprietorship, the sole proprietor will hire other persons to perform certain duties, some as simple as cleaning up the premises and others as complex as managing the entire business. In a partnership, each partner is an agent for the partnership and for the other partners. In a limited liability company, the managers and members may all be agents of the business. And in a corporation, the firm can act only through agents. Although the corporation is a separate legal person, it can act, speak, and hear only through its directors, officers, or shareholders. Therefore, the law of agency plays a role in each business enterprise.

## DEFINITION AND ELEMENTS OF AGENCY

An **agency** is a voluntary, consensual relationship between two persons. The relationship is created by law whenever one person, the **principal**, has a right to control the conduct of the **agent**, and the agent has the power to affect the legal relations of the principal. This relationship does not only occur in a business organization. Any time people ask other people to perform a task on their behalf, an agency relationship may be created. Your first experience with an agency relationship may have occurred when your mother asked you to go to the grocery store and buy a loaf of bread. In this context, your mother, as a principal, was authorizing you, as an agent, to perform a task for her, thereby giving you the authority to affect her legal relationship with the grocery store. In a business context, the legal relationship is more obvious. For example, the cashier at the counter in the local hardware store is an agent of the owner of the store and has the authority to perform legal obligations (and incur legal liability) on behalf of the owner.

Agency relationships can arise in several other situations. Whenever a client asks an attorney to represent the client, the attorney is an agent for the client. The same is true with accountants and other consultants who perform services for individuals and businesses at their request.

It is not necessary that the agency relationship be formalized by a written document, although frequently it is so formalized. Agency authority can be as informal as simply asking someone to perform a task, or as formal as an extensive written agreement that details all duties and obligations of the principal and the agent. For business entities, it is always advisable to use written documents to define and describe legal rights and obligations between the principal and the agent.

## **TYPES OF PRINCIPALS**

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The law of agency generally distinguishes three types of principals: disclosed, partially disclosed, and undisclosed. If an agent is conducting business for a principal, and the person with whom the agent is dealing knows the agent is acting for another and knows the person for whom the agent is acting, the principal is a **disclosed principal**. If a salesperson for IBM is selling hardware and software equipment to a purchaser, and the purchaser is aware that the salesperson is acting on behalf of IBM and that the equipment is manufactured and sold by IBM, IBM is a disclosed principal.

If an agent acts on behalf of a principal but does not disclose the identity of the principal, the principal is **partially disclosed**. In this case, the person dealing with the agent knows that a principal exists but does not know the identity of the principal. If Ned Giles wanted to purchase a new home in an exclusive subdivision but was concerned about everyone in the community knowing that he could afford a home in this subdivision, Ned might authorize an agent to make inquiries of prospective sellers without disclosing Ned's identity. Those agents would approach sellers of property, explaining that they were acting for another, but saying that they wanted to keep the identity of their prospective purchaser anonymous until a particular property was selected and a purchase contract was negotiated. In these cases, the sellers of the property would realize that they were dealing with an agent, but would know that the agent was not personally interested in purchasing the property. Nevertheless, they would not be aware of the identity of Ned Giles until the agent had disclosed Ned's identity after a contract had been completed.

Whenever an agent is acting on behalf of another but has not disclosed that fact or the identity of the person on whose behalf the agent is acting, the principal is **undisclosed**. If Ned Giles were worried that a prospective seller might learn his identity, he could authorize an agent to make inquiries concerning the purchase of property without disclosing that a principal was involved. In this case, the agent would be giving prospective sellers the impression that the agent was personally interested in purchasing the property, and the agent would negotiate a contract, according to Ned Giles's terms, without ever telling the sellers that Ned was the actual purchaser. The sellers would thus be dealing with an undisclosed principal, since the only person they know is the agent. An undisclosed principal may be found in many transactions and in many legal contexts. For example, a trustee who transacts business for the trust she represents may not disclose the existence of the trust but is creating legal rights and obligations on its behalf as an agent. When, as a teenager, you discreetly inquired on behalf of a friend whether a popular, attractive member of the opposite sex might have an interest in a date on Saturday night (pretending the friend knew nothing about this inquiry), you were an agent for an undisclosed principal.

## **TYPES OF AGENTS**

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The law of agency generally distinguishes among several types of agents: general or special agents, servants or independent contractors, and subagents or subservants. A **general agent** is a person who is continuously employed to conduct a series of transactions. The cashier at the hardware store is employed on a daily basis to greet customers, record their purchases, and collect their money. This person, who has ongoing responsibilities for a series of transactions on behalf of the principal, is regarded as a general agent.

A **special agent** is a person who is employed to conduct a single transaction or a limited number of transactions. When Ned Giles authorizes an agent to negotiate and purchase a piece of property, the agent's task is limited to negotiating for a single transaction (to purchase the property for Ned). Similarly, if a principal asked an agent to negotiate the purchase of several pieces of property, the agent's duties would be limited to the transactions involving designated properties in which the principal is interested. These agents, with limited authority and specific transactional duties, are regarded as special agents.

A **servant** is an agent who agrees to devote time to the principal's business and affairs and whose physical conduct, during the performance of the employment, is subject to the control of the principal. In modern business transactions, employees of a business are included within the traditional agency definition of servants. Whether the principal has a right to control the activities of the agent is usually interpreted from various factors, including the type of business of the principal, the type of activities performed for the principal by the agent, and agreements between the principal and agent that describe the agent's authority. The cashier at the hardware store is probably a servant. This person follows directives given by the owner of the hardware store concerning the manner in which customers are to be greeted, prices are to be ascertained, and cash is to be collected and handled. Most activities of the cashier are subject to the control of the owner and may be changed or modified frequently at the owner's whim and direction. Whenever a principal has a right to control the activities of an agent, the principal is called a **master**. In the law of agency, as described later, the "master/servant" relationship usually results in the master's liability for the acts of the servant that are performed within the scope of the servant's employment.

An **independent contractor** is a person who is conducting a transaction for the principal but is not subject to the control of the principal. These persons are expected to exercise independent judgment, usually within their own professional guidelines and responsibilities, and while they are acting on behalf of a principal, the principal does not have the right to tell them how to act or perform. The classic examples of independent contractors include attorneys, brokers, and consulting persons who have professional training and abilities that make them better able than the principal to accomplish a transaction. For instance, a client will explain to an attorney many facts and issues relating to litigation, and the attorney is expected to exercise professional judgment and to conduct the litigation on behalf of the client to achieve the outcome the client desires. Independent contractor status usually arises with agents who have specialized training, but it is not necessary that an independent contractor have specialized or professional training to serve in that capacity. The major factors used to distinguish an independent contractor from a servant are as follows:

<i>Factor</i>	<i>Servant</i>	<i>Independent Contractor</i>
Compensation	Salary	By the hour or project
Period of employment	Continuous	Project by project
Tools furnished by	Employer	Contractor
Place of work	Employer's premises	Contractor's office or shop
Quality of work	Unskilled/supervised	Skilled/unsupervised
Regularity of work	Part of normal business	Nonrecurring, unique projects

Whenever the relationship between a principal and an agent permits the agent to act individually according to the agent's own judgment, and particularly when an agent is hired for a specialized task that only the agent is capable of performing, an independent contractor status arises.

Whenever one agent hires another to assist in the performance of duties for the principal, the second agent becomes a **subagent**. A subagent is created only if the first agent is authorized to hire the second. An agent may be authorized to hire other agents, based upon the scope of the work that the agent has been requested to perform. The authority also may come from an express or implied agreement between the principal and the agent that grants authority to hire other persons to assist in the tasks the agent is expected to perform. For example, if the owner of a restaurant hired a manager to run the operations of the restaurant, the manager

would have implied authority to hire a chef, dishwashers, waiters and waitresses, and other restaurant personnel. These persons would be subagents of the owner. If subagents are subject to the right of control by the principal, the subagents become subservants. Thus, if the owner of the restaurant can direct the activities of the chef who was hired by the manager, the chef becomes a subservant of the owner. Similarly, in the building of a house, an owner hires a general contractor, who has authority to hire a carpenter, plumber, electrician, and so forth. All of the subcontractors are subagents of the owner, and the term *subcontractor* should provide a clue that these persons are likely to be independent subcontractors, rather than subservants.

## Duties and Obligations between the Principal and the Agent

The law of agency creates a **fiduciary relationship** between the principal and the agent. A fiduciary relationship means that the principal is placing trust or confidence in the agent to be faithful and loyal and to conduct the principal's business with care. When you deposit money with a stockbroker with instructions to buy stock in your name, the broker is in a position of trust and confidence, or a fiduciary position, with respect to your stock purchase transaction. Consequently, when a fiduciary relationship exists, the law implies certain duties that both parties must perform on behalf of the other, which may be amplified or supplemented by a written agreement.

**The Agent's Duties to the Principal** Agents generally owe their principals the duties of obedience, care, and loyalty. An agent has a duty to obey a principal and to perform all tasks the principal has directed, as long as those tasks are consistent with the engagement of the agent.

The agent's duty of obedience is an obligation to follow the principal's instructions and directions—essentially, an obligation to do what the principal tells the agent to do. If a principal authorizes an agent to buy goods for the principal's business and to pay for them with a check from the business checking account, it is a violation of this duty if the agent purchases the goods on credit from the supplier. The principal could recover the interest that the supplier charges on the credit account, since the agent did not precisely follow the principal's instructions.

Each agent is expected to use reasonable care and diligence to accomplish the principal's objectives. This means an agent should use personal skill and knowledge and perform all tasks diligently while working for the principal. For example, an attorney would be required to know the law to be applied in the client's case, and an insurance agent would be expected not to permit a policy of insurance to expire or terminate without appropriate notice to the policy owner. Even if an agent is performing without compensation, the agent owes the principal the obligation to use due care and prudence in performing all duties. Consistent with the duty of care is an agent's duty to act in a manner that will not embarrass the principal or bring the principal into disrepute, and an agent always has a duty to provide full information concerning any matters the principal would want to know in regard to the transaction undertaken by the agent.

The agent's duty of loyalty requires that the agent act solely for the interests of the principal while accomplishing the transactions for which the agent is employed. This duty requires the agent to report to the principal the amount of any profits received by the agent on the principal's behalf and to disclose fully any personal adverse or conflicting interests that would affect the agent's ability to act for the principal. Therefore, if an agent were engaged by a principal to find a particular parcel of property for the principal's business, and the agent also had an interest in acquiring a similar piece of property in the same area, the agent could not use negotiations for the principal to assist the agent in personal negotiations for the property, and the agent must disclose to the principal that the agent is also personally seeking a similar piece of property. An agent may not compete with the principal and must disclose all confidential information received on the principal's behalf.

**The Principal's Duties to the Agent** The principal also has obligations to the agent that are implied by law and that may be amplified or supplemented by an agreement. Generally, a principal is obligated to **compensate** an agent, according to the reasonable value of the

agent's services, unless the agent has agreed to act without pay. The principal has a further obligation to provide the agent with the means to perform the agent's services, such as an office, samples of products the agent is expected to sell, transportation, or clerical assistance. The principal also may be obligated under an agreement with the agent to provide other benefits for the agent's service.

The principal has an additional obligation to **indemnify** the agent for any payments or liabilities incurred by the agent whenever the agent is performing a transaction on behalf of the principal. Since the agent is acting for the principal, any expenses or liabilities incurred belong to the principal, and the principal must pay them. Thus, if an agent incurs transportation costs or expenses entertaining the principal's customers, the principal must reimburse the agent under this duty.

The principal is also expected not to embarrass the agent or act in a manner that is harmful to the agent's reputation or self-esteem, and the principal must not interfere with the agent's performance by making the tasks more difficult or by sabotaging the agent's ability to perform the job. If the owner of the hardware store in the earlier example publicly berated the cashier in front of customers and other employees or refused to provide the cashier with a workable cash register to record customer purchases, the owner may have violated these duties to the cashier.

## **AGENCY AUTHORITY**

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Whenever a principal asks an agent to perform a task, the agent has authority to obligate the principal for legal rights and liabilities associated with that transaction. The law of agency has several distinctions concerning the types of authority the agent may enjoy and the rights and liabilities of the principal, the agent, and the other contracting parties whenever an agent negotiates a contract on the principal's behalf.

### **Actual Authority**

An agent is always authorized to do what the principal has told the agent to do. The agent may reasonably infer authority to do acts required to perform the tasks assigned. General agents, who are engaged for a series of continuing transactions, usually may infer greater authority than special agents, who are limited to the authority necessary to accomplish a single assigned transaction. The authority usually and reasonably needed to complete an assigned task is called **actual authority**. For example, if a truck company hires a truck driver to make interstate deliveries of goods, the truck driver has actual authority to operate the truck and may reasonably infer authority to purchase gasoline and make repairs to the vehicle. However, the truck driver probably does not have actual authority to hire an assistant truck driver to help drive the truck, since that is not usually or reasonably inferred as being part of the truck driver's duties.

Actual authority typically is separated into two subcategories: express actual authority and implied actual authority. The *express actual authority* includes the statements that the principal made to the agent, orally or in writing. When the truck company tells the truck driver to drive the truck to South Dakota, the truck driver has express actual authority to do so. *Implied actual authority* is the additional authority the agent may infer from the express authority granted. The truck driver would have implied authority to purchase gasoline on the truck company's behalf while driving to South Dakota, even though the truck driver was not specifically instructed to do so.

Actual authority may be terminated in several ways. Since it is based upon the agent's understanding of the principal's directions and instructions to the agent, and on the reasonable inferences of authority from the principal's statements, an act or event that causes the agent to know or believe that the principal no longer desires the agent to act terminates the actual authority. The principal and agent may agree on the duration of the agency relationship in advance. If an employee is hired to work in a business for one month, the agreement engaging the employee establishes the length of the actual authority. At the end of the month, when the agreement terminates, the employee (agent) no longer has the actual authority to bind the



employer (principal). In addition, the unilateral act of either the principal or the agent may terminate the actual authority. If the agent says, “I quit,” or the principal says, “You’re fired,” the statement indicates that the agent no longer has authority to represent the principal. Similarly, when the principal’s circumstances substantially change in a manner that should indicate to the agent that the principal would no longer want the agent to accomplish the assigned tasks, the actual authority to perform those tasks ends. For example, if the agent had been told to purchase new draperies for the principal’s office, and before the agent had purchased the draperies, the office building in which the principal’s office was located burned to the ground, the agent should realize that the purchase of draperies for the charred ruins of the principal’s office would no longer be desired by the principal.

Actual authority also may be terminated by “operation of law” through events that eliminate the agent’s ability or reason for acting on the principal’s behalf. *Operation of law* means that statutes or case precedents have determined that upon certain events actual authority will cease even though neither the principal nor the agent might have contemplated those events in forming their relationship. Death or incapacity of either the principal or the agent, for example, terminates actual authority. Various legal techniques have been developed to avoid the unexpected termination of authority and, in some cases, to circumvent completely the problems caused by loss of authority. It is possible to extend an agent’s authority beyond the death or incapacity of the principal by using a written instrument (that is expressly permitted under state law). In some states, such an instrument is called a *durable power of attorney*; this written document authorizes the agent to act for the principal even though the principal is dead or incapacitated. Such an extension of the principal’s existence, however, must be authorized under state law.

#### EXAMPLE

#### Ways in Which Actual Authority Terminates

- by agreement
- by the unilateral decision of either the principal or the agent
- by changed circumstances of which the agent is aware
- by operation of law
  - death or incapacity of the principal or agent
  - except for durable power of attorney when authorized under state law

#### Inherent Authority

Related to actual authority is the concept of **inherent authority**. This type of authority arises from the designation by the principal of a specific kind of agent who typically has certain powers. If the truck company hires a lawyer to negotiate a contract on its behalf, the lawyer has inherent authority to make legal statements and prepare legal documents on behalf of the company, even if the company has not given the lawyer specific directions or instructions concerning these tasks.

#### Apparent Authority

Even if the agent does not have actual authority, he or she may nevertheless obligate the principal in a transaction with a third party under the doctrine of **apparent authority**. Whenever conduct of the principal has caused a third party to believe that the agent has authority, the agent will have apparent authority to obligate the principal, even when the agent knows there is no such authority. As long as the third party reasonably believes that the agent has authority, from appearances created by the principal, the principal will be obligated to the third party. For example, if the cashier at the hardware store has been told by the owner not to accept any returned merchandise, the cashier knows that there is no actual authority to accept returned merchandise from customers. Nevertheless, if the owner does not take steps to inform customers that the cashier does not have this authority, the customers may reasonably believe that the cashier could

accept returned merchandise on behalf of the store. If a customer returns a defective lawn mower and the cashier refunds the purchase price, the owner of the store is obligated by that act. The appearances created by the owner are that the cashier has the authority to make those decisions, and the third person could reasonably believe that the cashier has that authority. Similarly, in many businesses certain employees are responsible for purchasing raw materials and supplies. These purchasing agents may have specific instructions from their principal, the owner of the business, to purchase only certain types of materials and only on certain terms. However, the fact that the suppliers know that these persons are purchasing agents will provide apparent authority to deal with them (and to obligate the owner to pay for the goods purchased) even if the purchasing agents deviate from the specific instructions given by the owner.

### **Ratified Authority**

If an agent did not have either actual or apparent authority, the principal may nevertheless **ratify** a transaction the agent has negotiated. Through ratification, the principal will become obligated as if authority existed at the time the transaction was negotiated. Assume that an alert real estate broker knows Ned Giles is looking for a new home. Without contacting Ned, the broker negotiates with several sellers for homes in an area where Ned would like to live. The broker is acting without any authority from Ned in negotiating these contracts. However, once the broker receives terms from a seller and presents those terms to Ned for his consideration, Ned can ratify the contract negotiated by the broker and agree to be obligated by that contract. Ratification requires that the principal have full knowledge of all material facts concerning the transaction, and the principal must indicate, through words or conduct, that he or she intends to be obligated in the transaction. In this case, even though the broker had no authority to negotiate on Ned's behalf, Ned's subsequent conduct in accepting the agreement would ratify the acts of the agent and obligate Ned to the contract.

## **TORTS COMMITTED BY AGENTS**

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The creation of an agency is an extension of the principal's existence. Consequently, the acts of the agent are often attributed to the principal. It is as if the principal committed the act himself. Whenever an agent commits a tort, or misdeed, while performing duties for a principal, the law may require that the principal be liable for the injuries created through the agent's actions. This concept is called **vicarious liability**. Another term for this concept is **respondeat superior**.

### **Liability of the Agent**

The first rule is that the agent is personally liable for any injury caused by the agent's acts. If a truck driver negligently causes an accident at a busy intersection, the truck driver will be personally liable, even though the truck driver is acting as an agent for the trucking company. Similarly, if the cashier at the hardware store steals a customer's credit card and uses it for personal purchases, the cashier is personally responsible for those actions, even though the cashier is acting as an agent of the hardware store.

### **Liability of the Principal**

It is possible that the principal may commit a tort in the selection or supervision of an agent, whether the agent is a servant or an independent contractor. For example, if a truck company hires a driver whose driving record indicates significant prior negligent and improper driving activities (such as convictions for speeding and careless driving), the truck company could be liable for negligent hiring if the driver subsequently causes an accident because of similar reckless driving.

In determining whether the principal will be liable for the acts of its agent, one must distinguish whether the agent is a servant or an independent contractor. Generally, the law requires that principals must be responsible for all acts of a servant, but not for the injuries caused by independent contractors.

Remember that a principal has the right to control the activities of a servant. In most employment relationships, the employer has the right to control the activities of an employee. Thus, if an employee negligently performs activities on behalf of the principal, the principal should have controlled the employee to be certain those activities did not cause harm. Consequently, if the truck driver injures a passenger in an automobile at an intersection, the owner of the trucking company will be liable if the owner had the right to control the truck driver's activities. The owner is responsible for giving the truck driver specific directions concerning driving in a busy intersection and for hiring truck drivers who are capable of driving correctly and safely. However, the owner is not responsible for every act of an employee. The employee must be performing duties within the scope of employment for the owner to be held responsible.

The scope of employment is determined by three factors: (1) the nature of the job the agent was engaged to perform, (2) time and space limitations concerning the agent's whereabouts and activities, and (3) whether the agent caused harm while performing duties that were intended to benefit the principal. For example, if the truck driver parked the truck overnight to rest in a motel and then left the motel without paying the bill, it is questionable whether the motel operator could recover from the trucking company. The truck driver was hired to drive a truck, not to stay in a motel, and consequently, the motel transaction may not have been within the scope of the truck driver's employment. However, if the truck driver's duties require several days of driving to accomplish the delivery, staying in the motel *may* be part of the scope of employment. On the other hand, if the cashier at the hardware store negligently drove into the side of a vehicle while leaving the parking lot at work, the owner of the hardware store should not be liable, since the duties of the cashier have nothing to do with driving an automobile, and driving a vehicle is not within the cashier's scope of employment.

Time and space limitations are imposed upon the agent's whereabouts and activities to determine whether the agent was performing duties within the scope of employment. If the truck driver decided to deviate from an assigned route to visit an aunt in a nearby city and caused an accident while driving to the aunt's house, the owner of the truck company should not be responsible because the truck driver was not on the assigned route at the time the accident occurred. This example raises an important distinction in the law of agency. The principal will be liable if the agent has merely "detoured" from the appointed tasks. As long as the agent is doing the assigned job, such as driving a truck, the owner may be liable wherever the agent is driving under the theory that the agent has merely detoured from the appointed route. On the other hand, if an agent "frolics," the principal will not be liable. An agent is frolicking when the agent's personal objectives become superior to the objectives of the principal. It could be argued that the truck driver's deviation from an assigned route to visit an aunt for personal purposes would make the trip a frolic, so that any accident occurring under those circumstances would not result in liability of the principal. Thousands of cases hinge on whether the agent was acting within the scope of employment, because the circumstances of any particular injury always provide compelling arguments about the three factors required to be proved to hold the principal liable. The most interesting cases usually involve an agent who stops to give aid and is negligent in parking or providing aid, when the agent had no authority or direction from the principal that stopping to give aid or assistance was part of the agent's assigned job.

#### EXAMPLE

#### Scope of Employment

- the nature of the agent's responsibilities
- time and space issues (frolic and detour)
- whether the agent's acts were intended to benefit the principal



## AGENTS FOR A BUSINESS ENTERPRISE

The rules presented in this chapter apply to any situation in a business in which a person or entity authorizes another to perform a job or service. The employees of a sole proprietorship are governed by the agency rules. The directors, officers, and employees of a corporation are agents of the corporation. In a partnership, the partners are agents of each other and of the partnership. Limited liability companies also engage employees and hire managers who act under the agency principles.

Throughout the law of business organizations, the agency relationship of the parties is the underpinning of the business operations. A later chapter explores the employment agreements and other documents used to create formal agency relationships, but even without written instruments, the actions of agents define the legal relationships of the business enterprise.

### KEY TERMS

agency	special agent	indemnify
principal	servant	actual authority
agent	master	inherent authority
disclosed principal	independent contractor	apparent authority
partially disclosed principal	subagent	ratification
undisclosed principal	fiduciary relationship	vicarious liability or respondeat
general agent	compensate	superior



### CASES

#### **RIVIELLO v. WALDRON**

*47 N.Y.2d 297, 418 N.Y.S.2d 300, 391 N.E.2d 1278 (1979).*

FUCHSBERG, JUDGE

Plaintiff Donald Riviello, a patron of the Pot Belly Pub, a Bronx bar and grill operated by the defendant Raybele Tavern, Inc., lost the use of an eye because of what was found to be negligence on the part of Joseph Waldron, a Raybele employee. The jury having decided for the plaintiff, in due course the trial court entered a judgment in his favor for \$200,000 plus costs and interest from the date of the verdict. . . .

As was customary, on the Friday evening on which Riviello sustained his injuries, only two employees manned the Pot Belly. One was the bartender. The other was Waldron, who, in this modest-sized tavern, wore several hats, primarily that of short-order cook but also the ones that went with waiting on tables and spelling the bartender. Though his services had been engaged by Raybele's corporate president in the main to improve business by introducing the sale of food, his testimony showed that the fact that,

as a local resident, he was known to most of the customers in this neighborhood bar figured in his hiring as well. There was also proof that, in the time he had been there, when not preparing or serving food or relieving the bartender, he would follow the practice of mingling with the patrons.

Nor was Riviello a stranger when he entered the premises that night. Living nearby, he had frequented the establishment regularly for some years. The two men knew one another and, after a while, Riviello gravitated to the end of the bar near the kitchen, where, during an interval when he had no food orders to fill, Waldron and another patron and mutual friend, one Bannon, were chatting. Riviello joined in the discussion, which turned to street crime in the neighborhood. In the course of the conversation, Waldron exhibited a knife, variously described as a pocketknife or, according to Bannon, a boy scout knife, containing a small blade and screwdriver attachment, which he said he carried for protection. At this point Waldron broke away to go to the kitchen to fill a food order for another patron. Several minutes later, while Waldron was returning from his chore to rejoin Bannon and Riviello, the latter suddenly turned and, as he did so, his eye unexpectedly came in contact with the blade of the knife which Waldron still had in his hand. On defendant's case, Waldron largely confirmed these facts, but added that he was "flipping" the knife, presumably as one might flip a coin, as he was coming from the direction of the kitchen and inadvertently struck the plaintiff. No one else so testified.

Applying the pertinent legal precepts to this factual framework, we first note what is hornbook law: the doctrine of *respondeat superior* renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment. . . . The definition of “scope of employment,” however, has not been an unchanging one.

Originally defined narrowly on the theory that the employer could exercise close control over his employees during the period of their service, as in other tort law contexts . . . social policy has wrought a measure of relaxation of the traditional confines of the doctrine (see Restatement, Agency 2d, §219, Comment [a]). Among motivating considerations are the escalation of employee-produced injury, concern that the average innocent victim, when relegated to the pursuit of his claim against the employee, most often will face a defendant too impecunious to meet the claim, and that modern economic devices, such as cost accounting and insurance coverage, permit most employers to spread the impact of such costs (see Prosser, Torts [4th ed], §69; Seavey, Agency, §83).

So no longer is an employer necessarily excused merely because his employees, acting in furtherance of his interests, exhibit human failings and perform negligently or otherwise than in an authorized manner. Instead, the test has come to be “whether the act was done while the servant was doing his master’s work, no matter how irregularly, or with what disregard of instructions’ ” . . .

Surely, the fact that Waldron, at the precise instant of the occurrence, was not plying his skills as a cook, waiter or bartender did not take him beyond the range of things commonly done by such an employee. The intermittent demands of his work meant that there would be intervals in which his function was only to stand by awaiting a customer’s order. Indeed, except perhaps in a world of complete automation, as portrayed for instance in Charlie Chaplin’s classic film “Modern Times,” the busiest of employees may be expected to take pauses and, when they do, engage in casual conversation, even punctuated, as here, by the exhibition to others of objects they wear or carry on their persons.

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Given all this, it was permissible to find as a fact that Raybele could have anticipated that in the course of Waldron’s varied activities in the pursuit of his job, he

might, through carelessness, do some injury. The specifics of the act, though it was not essential that they be envisaged, could be, as here, the product of an inattentive handling of the pocketknife he had described to Riviello and Bannon, or a similar mishandling of a paring knife he could have had in his hand as he left the kitchen, or perhaps a steak knife with which he was on his way to set a table. Or, perchance, instead of a knife, with equal non-malevolence it could in similar fashion have been a pen, a comb, a nail file, a pencil, a scissors, a letter opener, a screwdriver or some other everyday object that he was displaying. In any of these cases, an instant of inattention could render each an instrument of injury.

Further, since, as a result of our decision, this case will return to the Appellate Division for consideration of the facts, it is not amiss to add the following observations: Waldron’s own testimony that he had “flipped” the knife (though not intending any injury) was no part of plaintiff’s case. If it had been, it is not to be assumed that this kind of motion, any more than would the twirling of a chain containing sharp pointed keys or the tossing of a coin, or some other gesture, whether used as an aid to communication or an outlet for nervous energy, would be beyond the broad ambit of the employer’s general expectation. For one employing men and women takes them subject to the kind of conduct normal to such beings.

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LuPiano, J., dissenting.

As the record fails to provide a reasonable predicate for the conclusion that the negligent act was within the scope of Waldron’s employment, it must be viewed as having occurred outside that employment as a matter of law. Waldron’s unexpected knife flipping was not actuated by a purpose to serve Raybele. Assuming Waldron was available to prepare food for bar patrons at the time the accident occurred, he was not engaged in preparing or serving food when he flipped his own knife accidentally in plaintiff’s eye. Indeed, Waldron was satisfying a personal desire to converse with friends. There is no explanation of his knife play which in any manner connects it with furthering the duties entrusted to him by his employer. Not only was this act dissimilar to any act he was authorized to perform, it was an act not commonly done by food preparers or foreseeable by his employer. . . .

## LIND v. SCHENLEY INDUSTRIES, INC.

*United States Court of Appeals, Third Circuit, 1960. 278 F.2d 79.*  
BIGGS, CHIEF JUDGE

This is a diversity case. Lind, the plaintiff-appellant, sued Park & Tilford Distiller’s Corp., the defendant-appellee, for compensation that he asserts is due him by virtue of a con-

tract expressed by a written memorandum supplemented by oral conversations as set out hereinafter. . . . The evidence, including Lind’s own testimony, taking the inferences most favorable to Lind, shows the following. Lind had been employed for some years by Park & Tilford. In July 1950, Lind was informed by Herrfeldt, then Park & Tilford’s vice-president and general sales-manager, that he would be

appointed assistant to Kaufman, Park & Tilford's sales-manager for metropolitan New York. Herrfeldt told Lind to see Kaufman to ascertain what his new duties and his salary would be. Lind embarked on his new duties with Kaufman and was informed in October 1950, that some "raises" had come through and that Lind should get official word from his "boss," Kaufman. Subsequently, Lind received a communication, dated April 19, 1951, signed by Kaufman, informing Lind that he would assume the title of "District Manager." The letter went on to state: "I wish to inform you of the fact that you have as much responsibility as a State Manager and that you should consider yourself to be of the same status." The letter concluded with the statement: "An incentive plan is being worked out so that you will not only be responsible for increased sales in your district, but will benefit substantially in a monetary way." . . . In July 1951, Kaufman informed Lind that he was to receive 1% commission on the gross sales of the men under him. This was an oral communication and was completely corroborated by Mrs. Kennan, Kaufman's former secretary, who was present. On subsequent occasions Lind was assured by Kaufman that he would get his money. Lind was also informed by Herrfeldt in the autumn of 1952 that he would get a 1% commission on the sales of the men under him. Early in 1955, Lind negotiated with Brown, then president of Park & Tilford, for the sale of Park & Tilford's New Jersey Wholesale House, and Brown agreed to apply the money owed to Lind by reason of the 1% commission against the value of the goodwill of the Wholesale House. The proposed sale of the New Jersey Wholesale House was not consummated.

Notice to produce various records of Lind's employment was served on Park & Tilford but one slip dealing with Lind's appointment as district manager was not produced and is presumed to have been lost. The evidence was conflicting as to the character of the "incentive compensation" to be offered Lind in connection with his services as a district manager. Herrfeldt designated the incentive an "added incentive plan with a percentage arrangement." Kaufman characterized the plan as "bonuses and contests." Weiner, Park & Tilford's Secretary, said that the incentive was a "pension plan." Kaufman testified, however, that the pension plan had nothing to do with the bonus incentive he referred to.

The record also shows that Lind commenced his employment with Park & Tilford in 1941, that from 1942 to 1950 he worked on a commission basis, that on August 31, 1950, he became an assistant sales manager for the New York metropolitan area at \$125 a week, which was raised to \$150 a week on October 1, 1950, plus certain allowances. After Lind became district manager on April 19, 1951, he continued to receive the same salary of \$150 a week but this was increased to \$175 in January 1952. On February 1, 1952, Lind was transferred from New York to New Jersey to become state manager of Park & Tilford's business in New Jersey. He retained that position until January 31, 1957, when he was transferred back to New York.

\* \* \*

The jury clearly found that Kaufman had apparent agency power to offer Lind the 1% commission and this verdict may be reversed only if there is no substantial evidence which could support the verdict.

\* \* \*

The problems of "authority" are probably the most difficult in that segment of law loosely termed, "Agency." Two main classifications of authority are generally recognized, "actual authority," and "apparent authority." The term "implied authority" is often seen but most authorities consider "implied authority" to be merely a subgroup of "actual" authority. Mechem, *Agency*, §§ 51-60 (4th ed. 1952). An additional kind of authority has been designated by the Restatement, *Agency* 2d, § 8A and 161(b) as "inherent agency." Actually this new term is employed to designate a meaning frequently ascribed to "implied authority."

"Actual authority" means, as the words connote, authority that the principal, expressly or implicitly, gave the agent. "Apparent authority" arises when a principal acts in such a manner as to convey the impression to a third party that an agent has certain powers which he may or may not actually possess. "Implied authority" has been variously defined. It has been held to be actual authority given implicitly by a principal to his agent. Another definition of "implied authority" is that it is a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers. It is this concept that is called "inherent authority" by the Restatement. In many cases the same facts will support a finding of "inherent" or "apparent agency." Usually it is not necessary for a third party attempting to hold a principal to specify which type of authority he relies upon, general proof of agency being sufficient. *Pacific Mut. Life Ins. Co. of California v. Barton*, 5 Cir., 1931, 50 F.2d 362, certiorari denied 1931, 284 U.S. 647, 52 S.Ct. 29, 76 L.Ed. 550.

In the case at bar Lind attempted to prove all three kinds of agency; actual, apparent, and inherent, although most of his evidence was directed to proof of "inherent" or "apparent" authority. From the evidence it is clear that Park & Tilford can be held accountable for Kaufman's action on the principle of "inherent authority." Kaufman was Lind's direct superior, and was the man to transfer communications from the upper executives to the lower. Moreover, there was testimony tending to prove that Herrfeldt, the vice-president in charge of sales, had told Lind to see Kaufman for information about his salary and that Herrfeldt himself had confirmed the 1% commission arrangement. Thus Kaufman, so far as Lind was concerned, was the spokesman for the company.

It is not necessary to determine the status of the New York law in respect to "inherent agency," for substantially the same testimony that would establish "inherent" agency

under the circumstances at bar proves conventional “apparent” agency. . . . There is some uncertainty as to whether or not the third person must change his position in reliance upon these manifestations of authority, but this is of no consequence in the case at bar since Lind clearly changed his position when he accepted the job of district manager with its admittedly increased responsibilities.

\* \* \*

Testimony was adduced by Schenley tending to prove that Kaufman had no authority to set salaries, that power being exercisable solely by the president of the corpora-

tion, and that the president had not authorized Kaufman to offer Lind a commission of the kind under consideration here. However, this testimony, even if fully accepted, would only prove lack of actual or implied authority in Kaufman but is irrelevant to the issue of apparent authority.

\* \* \*

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

## PROBLEMS

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1. What is the difference between a servant and an independent contractor? Describe the facts you would consider important in making this distinction.
2. Describe a situation in which you acted as an agent of another. Indicate the type of authority you had, and describe the events that resulted from your use of that authority.
3. State the differences among the following agency relationships (for example, type of agent, type of authority, scope of employment issues, and so on):
  - a. an accountant to a client,
  - b. a secretary to an executive,
  - c. a nurse to a doctor,
  - d. a clerk to the owner of a retail store,
  - e. a real estate broker to a seller of property,
  - f. a real estate broker to a purchaser of property,
  - g. a director of a corporation to the shareholders,
  - h. an officer of a corporation to the directors,
  - i. a gardener to a homeowner, and
  - j. a paralegal to an attorney.

## PRACTICE ASSIGNMENTS

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1. Find a newspaper article about an agent acting on behalf of a principal. Describe the authority of the agent, and explain the duties the agent has to the principal based upon the story in the article.
2. Make a list of specific acts you would allow and limitations on authority you would give to your agent if you were using an agent to buy a car.
3. As you come and go from your class, identify the members of the faculty and staff that you see, and decide whether they are employee-servants or independent contractors. Think of a circumstance in which one of them could commit a tort, and imagine a circumstance in which one of them could obligate your college/university in a contract. Describe the legal principles (and additional facts you might need to establish) that would be used to hold your college/university liable for their acts.
4. Go to a current movie and make a list of the principals and agents you see in the film. Describe whether the parties are entering into contractual relationships or committing torts, and indicate whether the principals will be liable for the acts of the agents and why. Also describe any disputes between principals and agents and indicate the fiduciary duties that may have been breached between them.