Passing the Uniform Bar Exam

Outlines and Cases to Help You Pass the Bar in New York and Twenty-Three Other States

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JuraLaw

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Professional Examination Success Guides

Passing the Uniform Bar Exam:
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Guide to Passing the United Nations Professional Exam: Legal Code

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ABBREVIATIONS

A ..... Grantee (for present estate/ future interest hypotheticals)
AGI ..... Adjusted gross income
AP ..... Adverse possession
A/R..... Assumption of the risk
B..... Buyer
BFP ..... Bona fide purchaser or bona fide purchase
C..... Constitution
CIF ..... Cause-in-fact
Cl..... Clause
CLEO ..... State Chief Law Enforcement Officer
Court (cap.) ..... United States Supreme Court
CP ..... Court of Pleas (UK)
CR ..... Contingent remainder
CSD..... Common Scheme of Development
CSI ..... Compelling state interest
Ct..... Court
Ct. App..... Court of Appeals
Ct. Chan. ..... Court of Chancery (England)
ED ..... Emotional distress
EI ..... Executory interest
Eng. ..... England
ES..... Equitable Servitude
FI..... false imprisonment
FLSA..... Fair Labor Standards Act
FMLA ..... Family and Medical Leave Act
FQJ..... Federal question jurisdiction
FRAP ..... Federal Rules of Appellate Procedure
FRCP..... Federal Rules of Civil Procedure
FRCrP ..... Federal Rules of Criminal Procedure
FRE ..... Federal Rules of Evidence
FS ..... Fee simple absolute (fee simple)
FSCS ..... Fee simple on condition subsequent
FSD ..... Fee simple determinable
FS EL ..... Fee simple on executory limitation
FT..... Fee tail
H.L. ..... House of Lords (England)
IIED ..... Intentional infliction of emotional distress
IT..... Intentional tort
JMOL ..... Judgment as a matter of law
JNOV ..... Judgment non obstante veredicto
J/SL ..... Joint and several liability, or jointly and severally liable
JT..... Joint tenant/tenancy
K..... Knowledge (criminal law) or Contract (all other law)
K.B. ..... King's Bench (UK)
KSC ..... Knowledge to a substantial certainty
L ..... Loss in value
L1 ..... First landlord
Lat. ..... Latin
LE ..... Life estate
LED ..... Life estate determinable
LLC ..... Limited liability company
LLP..... Limited liability partnership
LRM ..... Least restrictive means
MPC ..... Model Penal Code
MSAJ..... Motion to set aside the judgment
N..... Negligence
N.B. ..... Nota bene
NIED ..... Negligent infliction of emotional distress
O..... Original owner, or grantor (in present estates and future interests)
OLQ..... Owner of the *locus in quo*
OO ..... Original owner
P..... Purpose or purchaser
PJ ..... Personal jurisdiction
PJI..... Pattern Criminal Jury Instruction
Q.B. ..... Queen's Bench (UK)
R ..... Recklessness
RAP ..... Rule against perpetuities
RC ..... Real Covenant
Restatement ..... Restatement (of Contracts, Torts, Judgments, etc.)
RFRA ..... Religious Freedom Restoration Act of 1993
RIL ..... Res ipsa loquitur
RPP..... Reasonable prudent person
Rule ..... Federal Rule of Evidence or Federal Rule of Civil Procedure
§..... Section
S..... Sublessee or seller
S.Ct. ..... Supreme Court or U.S. Supreme Court Reporter
SF ..... Statute of Frauds
SJ ..... Summary judgment
SL ..... Strict liability

SMJ .....Subject matter jurisdiction
SP .....Specific performance
T1 .....First tenant
TE.....Tenant/tenancy by the entireties
TO .....True owner
UCC.....Uniform Commercial Code
US.....United States of America or United States Reports (compilation of U.S. Supreme Court opinions)
USC ..... United States Code
VR..... Vested remainder
VR SD..... Vested remainder subject to divestment

INTRODUCTION

HOW THIS GUIDE CAN HELP YOU

The Uniform Bar Examination (**UBE**) is a standardized bar examination that was developed by the National Conference of Bar Examiners (**NCBE**). Passing the Examination requires mastering hundreds of rules, studying countless cases, memorizing myriad tests and becoming proficient in their deployment. Selecting the right study tool is critical to success.

Passing the Uniform Bar Exam is an essential resource on any law student's bookshelf. Packed with concise overviews of black letter law, it is ideal for bar exam mastery. It covers nearly 1,000 key cases frequently tested on the Multistate Bar Examination and, by extension, the Uniform Bar Exam. A detailed glossary covers the most frequent terms that students will encounter in bar prep. Streamlined outlines on business associations, constitutional law, contracts and UCC, criminal law and procedure, evidence, federal civil procedure, real property and torts highlight the essential subjects tested on the Multistate Essay Examination.

ABOUT THE UNIFORM BAR EXAMINATION

The Uniform Bar Exam consists of three parts:

- The Multistate Bar Examination (**MBE**). The MBE is a standardized, multiple-choice examination.
- The Multistate Essay Examination (**MEE**). The MEE is a collection of essay questions largely concerning the common law administered as a part of the bar examination in 26 jurisdictions.[1] The MEE can cover any of the following areas: business associations, conflict of laws, constitutional law, contracts and Uniform Commercial Code,[2] criminal law and procedure, evidence, family law, federal civil procedure, real property, torts and trusts and estates.
- The Multistate Performance Test (**MPT**). The MPT is a written performance test developed by the NCBE and used in 33 U.S. jurisdictions.

At the time of publication of this *Guide*, the Uniform Bar Exam, which offers portability of scores across state lines, has been adopted in 25 jurisdictions, including the District of Columbia.[3]

DISCLAIMERS

The purpose of this book is merely to outline key subjects frequently tested on the Multistate Bar Examination and Multistate Essay Examination. It is no substitute for the writing of practice essays and multiple-choice examination drills. The publisher and editors make no warranties or guarantees—express or implied—with respect to the applicant's passing of the Uniform Bar Exam or the bar exam of any jurisdiction.

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[1] Alabama, Alaska (eff. July 2014), Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Guam, Hawaii, Idaho, Illinois, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Northern Mariana Islands, Oregon, Palau, Rhode Island, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming.

[2] The following Uniform Commercial Code subjects are tested: Negotiable Instruments (Art. 3); Bank Deposits and Collections (Art. 4); Secured Transactions (Art. 9).

[3] In addition to the District of Columbia, the following 24 States have adopted the UBE: Alabama, Alaska, Arizona, Colorado, Connecticut, Idaho, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Carolina, Utah, Vermont, Washington, West Virginia, Wyoming

This book takes a multistate approach to subjects frequently tested on the Multistate Bar Examination and Multistate Essay Examination. It does not provide meaningful treatment of the nuances of the laws of the individual jurisdictions that have adopted the Uniform Bar Examination. For example, New York's Advisory Committee on the Uniform Bar Exam has recommended, and the New York Court of Appeals has adopted, a requirement that applicants for admission in New York complete an online course on New York law and take and pass an examination on New York law. This examination, known as the New York Law Exam, consists of 50 multiple-choice questions and requires a minimum of 30 questions to be answered correctly in order to pass. This book does not treat the nuances of New York law tested by the New York Law Exam or the nuances of the laws of any of the other jurisdictions that have adopted the Uniform Bar Examination.

CHAPTER 1.
BUSINESS ASSOCIATIONS

I. INTRODUCTION AND GENERAL PRINCIPLES

A. INTRODUCTION

1. The Business Organization: An Overview

a. Definition

i. A business organization is a legal entity through which investors and entrepreneurs provide goods and services and engage in trade and other wealth-generating activities. Traditionally, the menu of American business organizations was comprised of the general partnership and the corporation. Other entities, such as limited liability companies and limited liability partnerships, are in many ways hybrids or statutorily-created variations of partnerships or corporations.

ii. Although a company may appear to be one business association, it may in reality prove to be a multi-tiered conglomerate comprised of many corporations, partnerships and other business entities. This is in fact the case of many large corporations and other organizations. In order to circumvent limitations as to the kinds of activities they may undertake, many such companies are organized with very general corporate charters whose language is articulated such that they may engage in "any lawful activity," thus allowing them to serve as umbrella organizations of a large and diverse set of subsidiary companies.

b. The Variety of Business Organizations

i. Traditionally, there has been a tension between entrepreneurs, who have long sought to expand the menu of business forms available and governments, which have resisted such efforts by limiting the available menu. In the United States, the entrepreneur nonetheless has a wide variety of business organizations from which to choose, from small, closely held firms to large, public corporations.

ii. The management practices of business organizations can be as diverse as the forms that business organizations can take. While in small firms, owners and managers are generally the same group of people, in large organizations, a large number of generally passive stockholders which is distinct from the managers usually owns the company.[4] Thus, in small firms, where a small number of managers own the business, decisions are usually made by consensus. In large organizations, in contrast, there may be tens of thousands of shareholders, thus rendering decisions by consensus impractical. In these organizations, policy is generally developed through majority voting.

iii. As a final point of contrast, whereas small firms are usually run informally and without a hierarchy, large organizations are run under a formal set of rules establishing tiers of control and duties among shareholders, directors and officers. The relationships among these actors will be explored later on in the chapters that follow.

2. Factors to Consider When Choosing a Business Entity

a. General Overview

[4] The managers may, however, as part of their compensation, own some level of stock in the company.

i. Any individuals who form a business must agree on such fundamental issues as control, ownership and dissolution of the business. When the individuals choose a specific entity through which to conduct the activity, many of these questions are automatically determined through the respective entity's legally-prescribed default settings. The individuals forming the company may then contract around or customize the default settings in order to suit their business needs, as long as the new rules conform to public policy considerations. A clause whose content violates such policy considerations (*e.g.*, one denying the right of third parties to make claims against the reckless conduct of the owners) would be held null and void in the relevant jurisdiction and the default rules would spring into application.

b. Factors

1) Before choosing a business entity, the goals of the business owners should be assessed in light of the following factors:

ii. Tax Treatment

1) The form that a business association takes will have a significant impact on the tax treatment that it receives. The law taxes some business organizations, exempts others fully and offers a gray area for many others in between. Some associations that fall into this gray area include those that are exempted from taxes up until they reach a certain size or profit margin. When they reach such dimensions, they are taxed as ordinary incorporated entities. When this occurs, double taxation applies, since, in addition to the business organization, the dividends of the owners are also taxed. For example, if the business owners form a C corporation, taxation will apply to both the shareholders' dividends as well as to the corporation's profits. If, however, the owners opt for an S corporation, pass-through taxation will occur, with taxation applied only to the shareholders' dividends (the corporation itself will not be recognized under the law as a legal person and thus will not be subject to taxation). In addition to S corporations, limited liability companies and partnerships are subject to pass-through taxation. All of these organizations are "invisible" under the tax code, which taxes only the salaries or dividends of the respective partners or shareholders.

iii. Owners' Liability

1) The way that a business is organized affects the extent to which its owners could be held liable for the business's debts. Some organizations, such as the corporation, shield their managers from company debt whenever the managers exercise business judgment and reasonable investigation. In other organizations, the owners, managers or partners are held personally, jointly and severally liable for the debts of the enterprise, regardless of the extent to which business judgment was exercised. The incorporation of a business thus offers entrepreneurs a valuable protection that permits them to undertake activities that might otherwise prove to be too risky.

iv. Governance

1) Governance deals with the question of whom is given the right to participate in the management and decision making of a

business. The rules of governance are substantially determined by the form that the owners of a company choose and these rules vary substantially among partnerships and corporations, with limited liability companies offering a regime that blends elements of both the corporate and partnership model. Governance may also influence whether the owners are directly responsible for the governance of the organization or whether they govern through others that they have selected. For example, in public corporations, the owners govern through their elected directors, who in turn select the corporation's officers (the president, treasurer, etc.). In contrast, the owners of a closely held corporation are directly responsible for the company's governance.

v. Raising Capital

1) Yet another factor that the choice of entity affects is the extent of options available for entrepreneurs to raise funds for their business. Some organizations require business owners to raise capital directly with their own funds or through loans, while others permit them to raise funds indirectly by, for example, issuing shares of stock. The amount of funds needed to start a business may thus influence the choice of entity. For example, when modest start-up capital is needed, the owners may opt for a limited liability company, but when they must raise more substantial sums, they may form a corporation, which allows for outside investors to purchase company equity in the form of stock.

vi. Exit Strategies

1) Finally, business owners should consider the available exit strategies of their chosen business entity. In some organizations, such as the S corporation, the exit strategy is relatively cumbersome, since there is no ready market to sell shares of equity. In others, such as the public corporation, exiting is far simpler and consists of selling shares of stock on the public market.

B. AGENCY

1. Defining Agency

a. Agency can be defined as the fiduciary relation that results from the manifestation of: (i) consent by one person to another that the other will act on his behalf and subject to his control; and (ii) consent by the other to so act.[5] The agent owes a fiduciary duty to a second party, known as the principal, who consents to the agent's acting on his behalf. The agent has the power to alter the legal obligations and rights of the principal, who may be bound by or held liable for the acts or omissions of the agent.

b. A principal is a person who designates an agent to undertake an action on the principal's behalf. Once the principal designates an agent, the agency relationship begins. For example, in *Gorton v. Doty* (Idaho Ct. App. 1937), the plaintiff sued the owner of a vehicle that had been involved in a traffic accident that injured the plaintiff. The owner was not driving the vehicle at the time that the plaintiff was injured. Therefore, he was not directly liable. The court nevertheless found the owner liable for injuring the plaintiff, since he lent the

[5] RLA § 1.

vehicle to a third party, designated the third party and requested that only he drive. The court concluded that an express condition precedent was created for the owner's lending of the car, a condition that was accepted by the third party. Furthermore, there is a presumption that the owner of the car is the principal of a driver borrowing the car. An agency relationship was therefore created and the defendant owner was liable.

c. The dissent argued the possibility that the defendant's request (that only the third party drive) was *not* a favor that she (the owner) was asking that conferred a benefit to her (the owner). Rather, the request was that the law be respected; she did not want some teenage member of the sports league illegally driving the car. Since no evidence showed that the defendant ordered or commanded the third party to take the car, the dissent argued that no agency relationship was established.

d. One factor that can be looked to when determining whether an agency relationship exists is control. When a third party has control, an agency relationship usually exists. For example, a debtor can be held to be the agent of a creditor if the creditor becomes sufficiently involved in the control of the debtor's day-to-day operations.

2. Liability of Principals to Third Parties in Tort

a. Servant versus Independent Contractor

i. The words used in a contract describing the relationship between an owner and operator are not dispositive in determining whether agency exists. The most important factor that courts consider is the degree of control of an owner over a company. The more control exercised over a company and its operator, the more likely it is that an agency relationship exists.

ii. Thus, a principal cannot escape liability for an operator's torts just because the operator is referred to as an "independent contractor" in the contract. The owner can be held liable to a third party for the operator's negligence. In *Humble Oil & Refining Co. v. Martin* (Tex. 1949), the plaintiff was injured by a car rolling out of a service station run by the operating defendant. Although the operating defendant was referred to as a "contractor" in the contract with the defendant owner, an agency relationship was held to exist because the owner exercised much control over the day to day operations of the company. He paid some of the operating defendant's expenses, set store hours and played a role in decision making.

iii. This rule applies even where a franchisor/franchisee relationship exists. As defined in *Murphy v. Holiday Inns, Inc.* (Va. 1975), a franchise is a system for selective distribution of goods or services under a brand name through outlets owned by independent businessmen called "franchisees." When the franchisor exercises sufficient control over the franchisee's activities, an agency relationship arises. In *Miller v. McDonald's Corp.* (Or. App. 1997), for example, the plaintiff injured her tooth when biting into a hamburger and sued the defendant franchisor. Summary judgment for the franchisor was reversed when the court held that there was enough evidence to establish agency—the franchisor maintained a *right to exercise control* over the franchisee's operations. The franchisor was therefore liable for the franchisee restaurant's negligence.

iv. In *Hoover v. Sun Oil Co.* (Del. 1965), on the other hand, an agency relationship was not found. Here, the plaintiff sued a service station

franchisor and operator when he was injured by a fire at the station. The court held that the defendant franchisor did not exercise sufficient control over the franchisee's operations to create an agency relationship and was thus not liable for the franchisee's negligence. Rather, the franchisee was treated as an independent contractor, setting its own decisions and policies, such as store hours and cleanliness. Although Sun Oil Co. products were being sold, this was insufficient to establish an agency relationship.

b. Liability for Torts of Independent Contractors

Generally speaking, no agency relationship arises for acts of independent contractors. However, certain exceptions apply, including the following:

i. When a landowner retains control of the manner in which the independent contractor does the work;

ii. When the independent contractor is incompetent;

iii. When there is a nuisance—an abnormally dangerous activity.

c. Scope of Employment

i. In order for a principal to be liable for his agent's acts, the agent must be acting within the scope of his employment. Formerly, this meant that the employee must have been working in furtherance of the purposes of the principal. However, a more flexible definition has been recently used by the courts in determining when an agent acts within the scope of employment. Such courts include any acts taken while the agent is engaged in *any foreseeable activity* while he is furthering the purposes of the principal, regardless of whether this activity actually served the purposes of the employer.

ii. A federal court in *Ira S. Bushey & Sons, Inc. v. United States* (2d Cir. 1968) took an especially liberal approach to this question. In Bushey, a seaman working for the defendant United States returned to his ship drunk and opened valves that caused the boat to sink, damaging the plaintiff's drydock. Although the seaman, an agent of the United States, was in no way acting to further the purposes of the United States, his employer, the employer was nevertheless held liable, since it was foreseeable that a seaman would get drunk and cause such an incident. The court held that the employee was thus within his scope of employment.[6]

iii. If a plaintiff wishes to hold a defendant liable for the acts of an employee, the plaintiff has the burden of proving that the defendant's employee was acting within the scope of his employment. This can sometimes lead to unexpected results. For example, in *Manning v. Grimsley* (1st Cir.1981), the plaintiff sued the defendant baseball player and his employer when the defendant threw a baseball at and injured him, after the plaintiff heckled him. The court reasoned that if evidence is presented showing that the defendant threw the ball at the plaintiff as a reaction to the heckler's present interference of his ability to perform, then his employer could be held liable. If, however, it was not directly provoked by the heckler, then the employer would not be liable because the defendant's act, unprovoked, would have been unforeseeable and outside of the scope of his employment. Here, sufficient evidence was

[6] It should be noted that this case seems to contradict § 228 (c) of the Restatement of the Law of Agency, which requires some purpose of the employer to be promoted. It is possible that the judge arrived at this reading of agency law in order to reach a desired result, *i.e.*, the United States, with its deep pockets, reimburse the dry-dock owner.

presented showing that the defendant threw the ball at the plaintiff in reaction to the plaintiff's provoking him. For example, the defendant looked at the hecklers, not just at the stands.

d. Statutory Claims

i. Before a defendant can be sued for the tort of a third party, the plaintiff must prove that an agency relationship between the defendant and the third party exists. To do this, the plaintiff must show that the defendant-principal consented in allowing the agent to act on his behalf and that the agent agreed to act on the defendant-principal's behalf.

ii. In *Arguello v. Conoco, Inc.* (5th Cir. 2000), minority groups sued the defendant for the discriminatory practices of the defendant's stores that allegedly violated federal law. The court held that no agency relationship existed between the defendant and the Conoco-branded stores, since the agreements that allowed the branded stores to sell Conoco gasoline expressly stated that the stores were independent businesses with no agency relationship. However, because the employees of the Conoco-owned stores acted as agents of the defendant when discriminating, an agency relationship exists. The court ruled in favor of the plaintiffs with respect to the Conoco-owned stores.

3. Liability of Principals to Third Parties in Contract

A principal may empower an employee to act on his behalf by granting him authority that may be actual, apparent, express or implied. Furthermore, some relationships give an employee inherent agency power without any explicit act by the principal.

a. Actual Authority

i. Actual authority may be express or implied. A principal gives an agent actual express authority when he explicitly tells the agent to take a certain action. If a principal commands an agent to enter into a contract with a third party, for example and the agent does so, the principal is bound by the contract. The third party can enforce the contract against the principal, even if he did not realize at the time that the agent was acting on behalf of the principal.

ii. Actual authority can also be implied. A principal cannot always think of everything that it would authorize his agent to do. If, in order to carry out the principal's explicit instructions, the agent takes some necessary steps, the principal is bound by the agent's actions. The principal therefore has an incentive to draft good instructions. If the principal does not provide detailed instructions as to how the agent should achieve a particular task, then the principal is bound by whatever the agent does if he carries out the instruction in a normal manner.

iii. Thus, if an employer leaves questions open for an employee without drafting specific terms and negligence results from the employee's decisions, the employer is liable. Of course, this only applies if an agency relationship already exists. If, however, the employee is an independent contractor, the general rule where employers are not bound by the contractors' acts would apply. If an employer leaves open instructions for an independent contractor who acts negligently, the principal is not liable.

iv. When an agent is required to hire an employee in order to complete the work assigned to him by a principal, the hiring is permitted within the agent's authority. In *Mill Street Church of Christ v. Sam Hogan* (Ky. Ct. App.), for example, the defendant church hired Bill Hogan to paint the

church, who then hired his brother, the plaintiff, to aid him. The plaintiff was injured on the job and was awarded compensation, since Bill Hogan had implied authority to hire him. The defendant church challenged this ruling, but the decision for the plaintiff was affirmed because Bill Hogan had authority to hire his brother, since (i) he could not do the work by himself and therefore had implied authority; and (ii) he had apparent authority, since from the plaintiff's perspective, it is reasonable that brother, who hired him in the past, would hire him again. The church, through its actions, implicitly ratified Sam Hogan's painting of the church.

b. Apparent Authority

i. Even when an agent lacks express or implied actual authority, there are situations in which an agent may bind a principal. One such situation involves apparent authority, which applies when the principal represents to a third party that the agent is authorized to enter into a contract. The key to apparent authority is that *the principal must make a representation.*

ii. The third party must reasonably believe that the agent has the authority to act on behalf of the principal. If it is not reasonable, the principal will not be bound. The reasonability test is taken from the third party's perspective. The court is to determine what a reasonable third party would believe. In *Lind v. Schenley Industries, Inc.* (3d Cir. 1960), the plaintiff's supervisor offered him a promotion that would have significantly increased his salary. After working several years without receiving the increased salary, the plaintiff sued to recover. The defendant employer argued that because the plaintiff's supervisor did not have authority to grant the raise, the employer was not bound to deliver it. The court held for the plaintiff, holding that the plaintiff had every reason to believe that his supervisor was an agent authorized to offer the salary increase. Also, since the vice president told the plaintiff that he would be promoted and that his supervisor would tell him his new salary, the plaintiff was reasonable in believing that his supervisor did indeed have such authority.

iii. In an employer-employee relationship, an agency relationship exists that binds an employer to his employee's sales, even when the employer did not agree to a sale, when the sale is reasonable. Apparent authority is imparted upon the employee as soon as he is hired. In *Three-Seventy Leasing Corporation v. Amex Corporation* (5th Cir. 1976), the defendant's salesperson entered into a contract to sell computers to the plaintiff even though the defendant did not give him authority to do so. The defendant later reneged on the contract because of the plaintiff's credit. When the plaintiff sued for breach of contract, the court enforced the contract because it was reasonable for the plaintiff to assume that the salesperson was authorized by the defendant to enter into the transaction. If the sale was not reasonable given the nature of the business, the salesperson would not have been given such authority. For example, a car dealership employee's agreement to purchase a dozen washing machines probably would not be binding on the car dealership, since it would be unreasonable to assume that a car dealership would give an employee such authority to make such as purchase.

c. Inherent Agency Power

i. For many lawyers and commentators, the idea of inherent agency power makes little sense. It is often invoked by courts when they want to

protect a third party, but there is no actual authority or insufficient manifestations by the principal to the third party to justify apparent authority. In such cases, courts commit the principal to acts of the agent that, while not authorized, are very close to that which agents are normally authorized to do.

ii. Inherent agency power allows an agent to enter into binding contracts with third parties even when the details of those contracts exceed the authority given to the agent. The main question that inherent agency questions pose is whether the decisions taken by the agent would *usually* be within his decision-making power. This rule holds true even when there are specific instructions given to the agent telling him that he is unauthorized to make such provisions, provided that such instructions are not made known to the third party.

iii. In *Watteau v. Fenwick* (Queen's Bench 1892), the defendant business owner granted Humble authority to make purchases, an authority that Humble exceeded. The court held for the plaintiff, who sued to enforce the contract. The court reasoned that making the purchases was within Humble's inherent agency power. Principals are bound by all decisions usually within the authority of their agents, even if the principal specifically instructed the agent not to take the actions in question.

iv. When an agent makes decisions that are necessary in order for him to achieve his assigned tasks, the principal is bound by the decisions, even if the agent was not specifically authorized to make them. Consider, for example, *Kid v. Thomas A. Edison, Inc.* (S.D.N.Y. 1917), where the principal was bound by the agent's promise to pay recital fees, even though the principal never authorized the agent to make such decisions. See also *Nogales Service Center v. Atlantic Richfield Co.* (Ariz. 1980), where the plaintiff argued that the defendant's agent had set a certain pricing policy with the plaintiff. When the defendant refused to honor the policy, the plaintiff sued. The court held that even if an agent lacks express and apparent authority to make decisions, the principal can still be bound by the agent's decisions when those decisions fall within the incidental, inherent powers authorized by the agent's post.[7]

d. Ratification

i. Ratification applies in cases where an agent enters into a contract, even though he had no express or implied authority to do so. When the agent lacks inherent agency power, the principal is generally not bound by the agent's decisions.

ii. This is where the concept of ratification applies. If the principal ratifies the agreement, it becomes as though the agent had authority to enter into the contract. Once the plaintiff adopts contract, it becomes binding. However, if the plaintiff, upon hearing about the unauthorized contract, objects to it, he is no longer bound.

iii. Absent actual or apparent authority, inherent agency power or ratification, an individual is not bound by an unauthorized person's representations on behalf of the individual. For example, if a person enters into an unauthorized contract on behalf of an individual who does not ratify the contract, the individual is not bound by the unauthorized contract or by the representations to a third party. For example, in

[7] Note, however, that in this case, the court gave judgment to the defendant, only because of the plaintiff's evidentiary mistake.

Botticello v. Stefanovicz (Conn. 1979), defendants Walter and Mary Stefanovicz were tenants in common on a piece of property. Walter, without the permission of Mary, offered the plaintiff an options agreement to buy the property. The plaintiff apparently had not done a title search and was unaware that the title was held as a tenancy in common. Furthermore, Walter Stefanovicz did not tell the plaintiff that his wife was a tenant in common. Walter later failed to honor the options agreement and the plaintiff sued for specific performance. He argued that there was an agency relationship between Walter and Mary through marriage and that Walter therefore had authority to offer the option. The court rejected this reasoning, holding that marriage on its own does not create agency. The issue it considers is whether a person is bound to a third party when a second person makes unauthorized representations. The court answered in the negative: an individual is not bound by representations made by an unauthorized party to a third party, unless he ratifies the agreement. Here, since Mary did not ratify the agreement, the contract was not enforceable. The judgment was given to the defendant. This case shows that "implicit ratification" is not recognized by the courts. The plaintiff's argument that Mary had ratified the agreement by knowing about it and accepting the money was rejected because she never explicitly signed or ratified the agreement.

e. Estoppel

i. Agency may be created by estoppel if an individual represents himself to be an authorized agent. Agency by estoppel may arise even when the alleged principal does nothing to represent that the individual is in fact an authorized agent. In such cases, courts consider whether the alleged principal either manifested that the alleged agent was authorized or was negligent in doing nothing to stop the alleged agent from deceiving the third party.

ii. The mere representation of a charlatan agent on its own is not enough to establish agency. The principal must contribute to the misrepresentation by either an act or a negligent omission. In *Hoddeson v. Koos Bros.*. (N.J. Super. App. Div. 1957), for example, a con artist represented to the plaintiff that he was the defendant furniture store's salesman, sold her furniture and then left with her money. When the furniture was not delivered, the plaintiff sued the defendant, alleging an agency relationship between the defendant and the third party. Although the trial court found an agency relationship, the appeals court did not, holding that the plaintiff must show that the defendant *did something* to project either express, implied or apparent authority to the con artist. The defendant did no such thing. The court went on to state that this rule was unjust in modern department stores and allowed the plaintiff to recover if she could show that the defendant was negligent in allowing the con artist to sell the furniture. Under such a showing, agency by estoppel will be established. A new trial was allowed with the opportunity for the plaintiff to present such evidence.

f. Agent's Liability on the Contract

i. In order for an agent to avoid personal liability on a contract, he must disclose to the principal that he is acting on behalf of a principal. He must also disclose the identity of the principal. In *Atlantic Salmon A/S v. Curran* (Mass. App. Ct. 1992), the defendant, who partially disclosed that he was a representative of the principal, made representations that he would purchase the plaintiff's salmon. He then never purchased the

salmon. The plaintiff sued for specific performance. The defendant argued that he was merely an agent. The trial court agreed and granted judgment to him, holding that he was simply acting as an agent for Boston International Seafood Exchange, Inc. The appeals court reversed, since Boston International Seafood Exchange was merely a shell organization of Marketing Designs, Inc. and the defendant represented only that he was an agent of Boston International, not Marketing Designs, Inc. Since he never disclosed the true identity of the principal, he was held personally liable for the amount in controversy.

ii. An agent is not liable if he fully discloses the full name of the person for whom he is contracting. In *Atlantic Salmon*, however, this was not the case. Since he only partially disclosed the principal's identity, the court held that he was contracting not in his principal's name, but rather, in his own name. Since he contracted personally, he was personally liable. Otherwise, it is presumed that the agent intended to be a party to the contract when the principal's identity is only partially disclosed. Restatement (Second) of Agency, § 321.

iii. The partial disclosure of the identity of one's principal is insufficient in protecting an agent from personal liability. The third party must know exactly who the principal is or the agent is liable. This helps third parties to evaluate the reputation of the principal and other factors that are important to consider before entering into a contract.

4. Fiduciary Obligations of Agents

a. Duties during Agency

i. An agent's primary duty is to protect and serve the interests of his principal. It is a duty of loyalty. He is forbidden from accepting any outside compensation in relation to the agency unless the principal is aware of and approves the compensation. Consider the following examples:

1) A purchases land for $125,000 and sells it to B for $200,000. A never tells B how much she paid for it. B has no cause of action.

2) A buys land for $125,000, represents to B that he bought it for $190,000 and sells it to B for $200,000. B may have an action for fraud. However, B must prove damages. Thus, if A can show that the land was actually worth $200,000, then B would have no damages and would not recover.

3) Agency with a Person**.** If, as in the above situation, A buys land for $125,000, represents to his principal that he bought it for $190,000 and sells it to the principal for $200,000, A will have to disgorge the $75,000 profit to the principal, regardless of whether the principal was actually damaged, because A, the principal's agent, owed him a fiduciary duty: "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" (RLA § 388).

ii. One difficult issue that courts have had to struggle with is the question concerning who should keep funds or goods that were improperly obtained through one's agency position. Courts have held that principals have the right to seize the improperly obtained funds. For example, when bribes are obtained through one's agency position, the funds are to be given to the principal. In *Reading v. Regem* (King's Bench 1948), the

plaintiff obtained bribes by using his station in the British army. When the British government discovered what had happened, it seized the money and the plaintiff sued to recover it. The court held that, because the money was obtained through the plaintiff's uniform and position as the Crown's servant, the money belonged to the Crown.

iii. If an agent unjustly diverts business from the principal for his own profits, he becomes liable to the principal in damages. In *General Automotive Manufacturing Co. v. Singer* (Wis. 1963), the defendant solicited the plaintiff's customers for his side business in a way that diverted business from the plaintiff. After the defendant left, the plaintiff sued to recover the defendant's profits. The court ruled in favor of the plaintiff, since the defendant worked at an additional job that was the same kind as the plaintiff's business and in so doing, caused detriment to the plaintiff. There would have been nothing wrong if the agent had informed the principal of his intentions and obtained the principal's approval, but here, he did not do so.

b. "Grabbing and Leaving"

i. An agent's fiduciary duties apply not only during the period of the agency, but also, after its termination. An agent who leaves his employment thus may not use insider information to which he had access during the employment to his profit and to the principal's detriment.

ii. Courts treat the insider information to which agents have access as *trade secrets* to which the principal has an exclusive right to commercially exploit. For example, in *Town & Country House & Home Service, Inc. v. Newbery* (N.Y. 1958), the defendant employees, after leaving their jobs with the plaintiff, used the plaintiff's customer lists to solicit business to a separate, competing cleaning service company that they formed. The plaintiff sued for an injunction. Holding that the defendants' use of the plaintiff's lists in forming their own company constituted unfair competition, the court granted the injunction.

II. SOLE PROPRIETORSHIPS

A. CHARACTERISTICS

1. The sole proprietorship is the most basic of the business organizations that will be explored. So basic is the sole proprietorship that some argue that it is not a business organization in the legal sense of the term, since a business organization involves the direction and ownership of at least two partners.

2. However, the name "sole proprietorship" should not mislead the reader. Certainly, the sole proprietorship is a business fully owned by one person, the sole proprietor, who holds all of the business's liabilities and assets. However, although the owner operates the business in his personal capacity, many other third parties may be involved. A sole proprietorship may involve hundreds of employees and other participants under the direction of the sole proprietor.

3. Regardless of whether it can be formally defined as a business organization, the sole proprietorship is included in this volume because it shares many of the attributes of other business organizations. The study of the sole proprietorship will therefore help build a useful foundation for the study of more complex business entities further on.

B. CREDIT, FINANCING AND UNLIMITED LIABILITY

1. The Use of Credit and Leveraging