

AGENCY, PARTNERSHIP,  
AND THE LLC:  
THE LAW OF  
UNINCORPORATED  
BUSINESS ENTERPRISES

# LexisNexis Law School Publishing Advisory Board

---

**William Araiza**

*Professor of Law*  
Brooklyn Law School

**Lenni B. Benson**

*Professor of Law & Associate Dean for Professional Development*  
New York Law School

**Raj Bhala**

*Rice Distinguished Professor*  
University of Kansas, School of Law

**Ruth Colker**

*Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law*  
Ohio State University, Moritz College of Law

**David Gamage**

*Assistant Professor of Law*  
UC Berkeley School of Law

**Joan Heminway**

*College of Law Distinguished Professor of Law*  
University of Tennessee College of Law

**Edward Imwinkelried**

*Edward L. Barrett, Jr. Professor of Law*  
UC Davis School of Law

**David I. C. Thomson**

*LP Professor & Director, Lawyering Process Program*  
University of Denver, Sturm College of Law

**Melissa Weresh**

*Director of Legal Writing and Professor of Law*  
Drake University Law School

AGENCY, PARTNERSHIP,  
AND THE LLC:  
THE LAW OF  
UNINCORPORATED  
BUSINESS ENTERPRISES

---

*CASES, MATERIALS, PROBLEMS*

Abridged Eighth Edition

**J. DENNIS HYNES**

*Nicholas A. Rosenbaum Professor of Law Emeritus  
University of Colorado*

**MARK J. LOEWENSTEIN**

*Monfort Professor of Commercial Law  
University of Colorado*

**Library of Congress Cataloging-in-Publication Data**

Hynes, J. Dennis, 1936-  
Agency, partnership, and the LLC : the law of unincorporated business enterprises : cases, materials, problems  
/ J. Dennis Hynes, Mark J. Loewenstein. -- Abridged 8th ed.  
p. cm.  
Includes index.  
ISBN: 978-1-4224-9609-1  
1. Business enterprises—Law and legislation—United States—Cases. 2. Agency (Law)—United States—Cases.  
3. Partnership—United States—Cases. 4. Private companies—United States—Cases. 5. Casebooks. I. Loewenstein,  
Mark J. II. Title.  
KF1365.H96 2012  
346.7302'9—dc23

2011044688

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks and Michie is a trademark of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2011 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 25¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

**Note TO USERS**

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at [www.lexisnexis.com/lawschool](http://www.lexisnexis.com/lawschool).

Editorial Offices  
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800  
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# Dedication

---

**Dedication of First through Fifth Editions  
(from Professor Hynes):**

**To my children**

**Professor Loewenstein dedicates this  
Abridged Eighth Edition to his family.**



# Preface to the Abridged Eighth Edition

---

This edition seeks to incorporate developments in the law of agency and unincorporated business entities since the publication of the Seventh Edition of this casebook in 2007. The courts have considered many issues arising under the revised general and limited partnership acts as well as the limited liability company acts and I have sought to capture the most important of those cases. Significant developments have occurred in relation to limited liability companies, where the courts have decided numerous cases in the past several years.

As in previous editions, most textual omissions, whether of a few words, a paragraph, or several pages, are indicated by an ellipsis. Occasionally the ellipsis is not used where the nature of the text is such that its use would be excessive or distracting, and sometimes text is slightly rearranged for ease of reading. Also, omissions consisting of footnotes or of citations to cases or articles are not indicated. Under no circumstances has editing altered the substance of the text being presented. Footnotes that have been retained from cases are in brackets and carry their original numbers. Footnotes by the author are identified by asterisks. All citations in court opinions to legislation based on one of the uniform acts are treated as if made directly to the uniform act. This avoids the problem of forcing the reader to cope with the different numbering systems of the various states.

I am deeply indebted to my colleague, Professor J. Dennis Hynes, whose meticulous scholarship is reflected in the first five editions of this book and, of course, greatly influences the most recent three editions for which I have been responsible.

*Mark J. Loewenstein*

Boulder, Colorado  
July 2011





# TABLE OF CONTENTS

<b>Introduction</b>	<b>THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES</b> .....	<b>1</b>
A.	THE CORPORATION .....	1
B.	THE DIFFERENT FORMS OF UNINCORPORATED BUSINESSES .....	4
1.	The Sole Proprietorship .....	4
2.	The Business Trust .....	5
3.	The Partnership .....	6
4.	The Limited Liability Partnership (LLP) .....	7
5.	The Limited Partnership .....	7
6.	The Limited Liability Limited Partnership (LLL) .....	8
7.	The Limited Liability Company (LLC) .....	8
<b>Chapter 1</b>	<b>THE AGENCY RELATIONSHIP; THE AMBIGUOUS PRINCIPAL Problem; SUBAGENCY</b> .....	<b>9</b>
	<i>Carrier v. Mcllarky</i> .....	10
	Notes .....	11
A.	AGENCY OR SALE .....	16
	<i>Hunter Mining Laboratories, Inc. v. Management Assistance, Inc.</i> .....	16
	Notes .....	18
B.	AGENCY AND THE LAW OF TRUSTS .....	20
	Notes .....	22
C.	AGENT OR ESCROW HOLDER .....	22
	Notes .....	23
D.	DUAL AGENCY; THE AMBIGUOUS PRINCIPAL Problem .....	24
1.	The Dual Agency Rule .....	25
	Notes .....	25
2.	The Ambiguous Principal Problem .....	26
	<i>Norby v. Bankers Life Co.</i> .....	27
	Notes .....	30
E.	SUBAGENCY .....	31
	Notes .....	32
F.	THE HISTORY OF AGENCY AND OTHER MATTERS .....	32
	Problems .....	33

---

**TABLE OF CONTENTS**

<b>Chapter 2</b>	<b>RIGHTS AND DUTIES BETWEEN PRINCIPAL AND AGENT</b>	<b>37</b>
<hr/>		
A.	DUTIES OF PRINCIPAL TO AGENT	38
1.	Duty of Exoneration and Indemnification	38
	<i>Admiral Oriental Line v. United States</i>	38
	Notes	40
2.	Duty to Pay Compensation	42
	Notes	42
3.	Duty of Care	43
4.	Worker’s Compensation Legislation	44
5.	Duty to Deal Fairly and in Good Faith	44
B.	DUTIES OF AGENT TO PRINCIPAL	45
1.	Duty of Good Conduct and to Obey	46
2.	Duty to Indemnify Principal for Loss Caused by Misconduct	46
3.	Duty to Account	48
4.	The Fiduciary Duties of Agents	48
a.	Commencement of Fiduciary Relationship	48
b.	Duty of Care	49
	Notes	49
c.	Duty of Disclosure	50
	Notes	51
d.	Duty of Loyalty	52
(i)	Loyalty During the Relationship	52
	<i>Gelfand v. Horizon Corp.</i>	52
	Notes	55
(ii)	Post-Termination Competition	58
	Notes	59
	Notes	61
	Problems	62
<hr/>		
<b>Chapter 3</b>	<b>VICARIOUS TORT LIABILITY</b>	<b>65</b>
<hr/>		
A.	THE MASTER-SERVANT RELATIONSHIP	65
1.	The Concept	65
	<i>Jones v. Hart</i>	65
	Notes	66
a.	Is an Employment Relationship Necessary to Respondeat Superior Liability?	69
	<i>Heims v. Hanke</i>	69
	Notes	70
b.	Rationale for Respondeat Superior	72

---

**TABLE OF CONTENTS**

(i)	Arguments Questioning the Theory . . . . .	72
(ii)	Arguments in Favor of or Explanations for the Theory . . . . .	74
c.	Imputed Contributory Negligence . . . . .	74
d.	Limitation to Losses Caused by Tortious Behavior . . . . .	75
e.	Direct Tort Liability of an Employer . . . . .	75
2.	The Independent Contractor Exception . . . . .	76
a.	The Concept . . . . .	76
	Notes . . . . .	77
b.	Limitations to the Independent Contractor Exception . . . . .	79
	<i>Hixon v. Sherwin-williams Co.</i> . . . . .	79
	Notes . . . . .	81
	<i>Estate of Cordero v. Christ Hospital</i> . . . . .	85
	Notes . . . . .	90
3.	Borrowed Servants . . . . .	90
	<i>Charles v. Barrett</i> . . . . .	91
	Notes . . . . .	91
4.	The Scope of Employment Limitation . . . . .	93
a.	Negligent Acts . . . . .	94
	<i>Clover v. Snowbird Ski Resort</i> . . . . .	94
	Notes . . . . .	99
b.	Intentional Torts . . . . .	103
	<i>Bremen State Bank v. Hartford Accident &amp; Indemnity Co.</i> . . . . .	103
	Note . . . . .	105
(i)	The Assault on § 228(1)(c) . . . . .	105
	<i>Ira S. Bushey &amp; Sons v. United States</i> . . . . .	105
	Notes . . . . .	108
	<i>Lisa M. v. Henry Mayo Newhall Memorial Hospital</i> . . . . .	110
	Notes . . . . .	118
(ii)	Restatement (Second) § 219(2)(d) . . . . .	121
	<i>Costos v. Coconut Island Corp.</i> . . . . .	121
	Notes . . . . .	124
(iii)	The Implied Contract Theory . . . . .	126
	<i>Nazareth v. Herndon Ambulance Service</i> . . . . .	126
	<i>Adams v. New York City Transit Authority</i> . . . . .	128
(iv)	Punitive Damages . . . . .	131
(v)	Non-Physical Torts . . . . .	134
B.	THE PARTNERSHIP RELATIONSHIP . . . . .	134
C.	THE UNINCORPORATED NONPROFIT ASSOCIATION RELATIONSHIP . . . . .	135
1.	Liability of the Members . . . . .	136
2.	Liability of the Association . . . . .	136

---

**TABLE OF CONTENTS**

a. In General . . . . . 136

b. For the Actions of Its Affiliates and Chapters . . . . . 137

c. To Its Members . . . . . 137

D. THREE UNUSUAL EXAMPLES OF VICARIOUS TORT LIABILITY . . . 138

1. Vicarious Liability by Estoppel . . . . . 138

2. The “Family Car” Doctrine . . . . . 138

3. Owner Consent and Other Legislation . . . . . 139

E. THE EFFECT ON VICARIOUS LIABILITY OF A RELATIONSHIP  
BETWEEN SERVANT AND INJURED PARTY . . . . . 140

*Schubert v. August Schubert Wagon Co.* . . . . . 140

    Notes . . . . . 141

*Klatt v. Commonwealth Edison Co.* . . . . . 142

    Problems . . . . . 144

---

**Chapter 4 CONTRACTUAL POWERS OF AGENTS . . . . . 147**

A. AUTHORITY . . . . . 147

1. Express Authority . . . . . 147

*King v. Bankerd* . . . . . 148

    Notes . . . . . 152

2. Implied Authority . . . . . 153

    a. Delegation of Authority . . . . . 153

    b. Incidental Authority . . . . . 154

B. APPARENT AUTHORITY . . . . . 154

*Smith v. Hansen, Hansen & Johnson, Inc.* . . . . . 154

    Notes . . . . . 158

*Sauber v. Northland Insurance Co.* . . . . . 161

    Notes . . . . . 163

C. ESTOPPEL . . . . . 166

*Hoddeson v. Koos Bros.* . . . . . 166

    Notes . . . . . 168

D. THE INHERENT AGENCY POWER CONCEPT . . . . . 169

*Autoexchange.com, Inc. v. Dreyer And Reinbold, Inc.* . . . . . 170

    Note . . . . . 173

    Problems . . . . . 173

---

**Chapter 5 FRAUDULENT ACTS OF AGENTS . . . . . 177**

A. THE UNSCRUPULOUS AGENT . . . . . 178

*Entente Mineral Co. v. Parker* . . . . . 178

    Notes . . . . . 182

B. LIMITS TO LIABILITY FOR FRAUD . . . . . 184

---

**TABLE OF CONTENTS**

	Notes .....	185
C.	THE EXCULPATORY CLAUSE .....	187
	Problems .....	189
<b>Chapter 6</b>	<b>THE UNDISCLOSED PRINCIPAL .....</b>	<b>191</b>
A.	RIGHTS OF THE UNDISCLOSED PRINCIPAL .....	191
1.	Assertion of Rights by the Undisclosed Principal .....	192
2.	Parol Evidence Rule .....	193
3.	Exceptions .....	194
	<i>Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.</i> .....	194
	<i>Finley v. Dalton</i> .....	196
	Notes .....	198
B.	LIABILITIES OF THE UNDISCLOSED PRINCIPAL .....	199
1.	Authorized Transactions .....	199
a.	Remedies of the Third Party .....	199
b.	The Election Rule .....	200
2.	Unauthorized Transactions .....	202
	<i>Watteau v. Fenwick</i> .....	202
	Notes .....	203
C.	PAYMENT AND SETOFF .....	206
1.	Payment by the Third Party .....	206
2.	Payment to the Third Party .....	206
3.	Setoff .....	208
	<i>Oil Supply Company, Inc. v. Hires Parts Service, Inc.</i> .....	208
	Note .....	211
	Problems .....	211
<b>Chapter 7</b>	<b>LIABILITY OF THE AGENT TO THIRD PERSONS .....</b>	<b>213</b>
A.	LIABILITY ON THE CONTRACT .....	213
1.	Liability When the Principal Is Unintentionally Undisclosed .....	213
	<i>Jensen v. Alaska Valuation Service</i> .....	213
	Notes .....	216
2.	Liability When the Principal Is Disclosed: Special Circumstances .....	217
	Notes .....	218
3.	Liability When the Principal Is Partially Disclosed or Unidentified .....	220
	<i>Van D. Costas, Inc. v. Rosenberg</i> .....	220
	Notes .....	222
B.	THE AGENT’S WARRANTY OF AUTHORITY .....	224
	Notes .....	225
C.	HARM TO THE ECONOMIC INTERESTS OF OTHERS .....	227

---

**TABLE OF CONTENTS**

	Note .....	227
D.	LIABILITY IN TORT .....	227
	Problems .....	228
<b>Chapter 8</b>	<b>THE DOCTRINE OF RATIFICATION .....</b>	<b>229</b>
A.	THE CONCEPT .....	229
	<i>Evans v. Ruth</i> .....	229
	<i>Dempsey v. Chambers</i> .....	231
1.	Justification for the Concept .....	233
	Notes .....	235
2.	Implied Ratification .....	237
	<i>Manning v. Twin Falls Clinic &amp; Hospital, Inc.</i> .....	237
	Notes .....	238
B.	THE KNOWLEDGE REQUIREMENT .....	239
	<i>Computel, Inc. v. Emery Air Freight Corp.</i> .....	239
C.	CAN SILENCE CONSTITUTE AFFIRMANCE? .....	241
	<i>Bruton v. Automatic Welding &amp; Supply Corp.</i> .....	241
	Notes .....	245
D.	THE NO PARTIAL RATIFICATION RULE .....	247
	Notes .....	247
E.	CHANGED CIRCUMSTANCES .....	248
	Notes .....	248
	Problems .....	249
<b>Chapter 9</b>	<b>NOTICE AND NOTIFICATION; IMPUTED KNOWLEDGE .....</b>	<b>251</b>
A.	INTRODUCTION .....	251
B.	NOTIFICATION .....	251
C.	IMPUTED KNOWLEDGE .....	254
	Notes .....	255
D.	THE ADVERSE INTEREST QUALIFICATION .....	257
	<i>Kirschner v. Kpmg LLP</i> .....	258
	Notes .....	262
E.	THE SOLE ACTOR DOCTRINE .....	263
	<i>Munroe v. Harriman</i> .....	264
	Notes .....	267
	Problems .....	267

---

**TABLE OF CONTENTS**


---

**Chapter 10                    TERMINATION OF THE AGENCY RELATIONSHIP . . . . 271**


---

A.	TERMINATION BETWEEN THE PARTIES TO AN AGENCY RELATIONSHIP . . . . .	271
1.	Termination by Will . . . . .	271
a.	Some Consequences of Termination of an Agency Relationship . . . . .	272
b.	Irrevocable Powers Phrased in Agency Terms . . . . .	272
2.	Termination by Operation of Law . . . . .	273
a.	Death . . . . .	273
	<i>Hunt v. Rousmanier's Administrators</i> . . . . .	273
	Notes . . . . .	274
b.	Loss of Capacity . . . . .	275
	Notes . . . . .	275
B.	NOTICE OF TERMINATION TO THIRD PARTIES . . . . .	277
1.	Termination by Will . . . . .	277
2.	Termination by Operation of Law . . . . .	278
	Problems . . . . .	280

---

**Chapter 11                    THE CREATION OF A PARTNERSHIP . . . . . 283**


---

A.	INTRODUCTION . . . . .	283
B.	THE LIMITED LIABILITY PARTNERSHIP (LLP) . . . . .	284
C.	THE PARTNERSHIP RELATIONSHIP DEFINED AND DISTINGUISHED FROM OTHER RELATIONSHIPS . . . . .	286
1.	An Early Test of Partnership . . . . .	286
2.	Partnership as Mutual Agency . . . . .	286
3.	The Uniform Partnership Act (1914) and the Revised Uniform Partnership Act (1997) . . . . .	287
	Notes . . . . .	291
	<i>Martin v. Peyton</i> . . . . .	291
	Notes . . . . .	295
	<i>Byker v. Mannes</i> . . . . .	296
	Notes . . . . .	300
D.	THE UNDERLYING THEORY OF PARTNERSHIP — AGGREGATE OR ENTITY? . . . . .	303
	<i>Fairway Development Co. v. Title Insurance Co. of Minnesota</i> . . . . .	305
	Notes . . . . .	307
E.	INCOME TAX CONSIDERATIONS — A BRIEF SUMMARY . . . . .	308
F.	CONTRIBUTIONS OF PROPERTY TO THE PARTNERSHIP . . . . .	308
1.	Ambiguities Concerning Ownership of Particular Property . . . . .	308
	Notes . . . . .	311
2.	The Special Matter of Title to Real Property . . . . .	312

---

**TABLE OF CONTENTS**

3.	The Property Rights of a Partner . . . . .	312
	Notes . . . . .	314
	Problems . . . . .	314
<b>Chapter 12 THE OPERATION OF A PARTNERSHIP . . . . .</b>		<b>319</b>
A.	CONTRACTUAL POWERS OF PARTNERS . . . . .	319
1.	Actual Authority . . . . .	320
	<i>Summers v. Dooley</i> . . . . .	320
	<i>National Biscuit Co. v. Stroud</i> . . . . .	322
	Notes . . . . .	323
2.	Apparent Authority . . . . .	324
	<i>Burns v. Gonzalez</i> . . . . .	324
	Notes . . . . .	328
	<i>Rnr Investments Limited Partnership v. Peoples First Community Bank</i> . . . . .	329
	Note . . . . .	333
3.	Partner Liability by Estoppel . . . . .	334
	A HYPOTHETICAL . . . . .	334
a.	Is There a Duty to Speak? . . . . .	335
b.	The Reliance Conundrum . . . . .	337
	Notes . . . . .	338
B.	TORT LIABILITY FOR THE WRONGS OF PARTNERS . . . . .	339
1.	In General . . . . .	339
2.	The Fraudulent Partner . . . . .	339
C.	THE NATURE OF A PARTNER'S LIABILITY — JOINT AS OPPOSED TO JOINT AND SEVERAL LIABILITY . . . . .	341
D.	SUITS AGAINST THE PARTNERSHIP . . . . .	342
E.	SUITS BY THE PARTNERSHIP . . . . .	342
F.	NOTICE AND NOTIFICATION TO THE PARTNERSHIP . . . . .	343
G.	RIGHTS AND DUTIES AMONG PARTNERS . . . . .	344
1.	Fiduciary Duties . . . . .	344
a.	The Duty of Loyalty . . . . .	344
(i)	Duty During Formation of Partnership . . . . .	344
	<i>Corley v. Ott</i> . . . . .	344
	Note . . . . .	346
(ii)	Pre-Empting Business Opportunities . . . . .	346
	<i>Meinhard v. Salmon</i> . . . . .	346
	Notes . . . . .	350
(iii)	Leaving the Business . . . . .	351
(iv)	Dealing with Conflicts of Interest . . . . .	353



---

**TABLE OF CONTENTS**

	<i>J &amp; J Celcom v. At&amp;t Wireless Services, Inc.</i> . . . . .	356
	Note . . . . .	363
(v)	Fiduciary Duties and Freedom of Contract . . . . .	363
	<i>Labovitz v. Dolan</i> . . . . .	363
	QUESTION . . . . .	367
	<i>Singer v. Singer</i> . . . . .	367
	Notes . . . . .	369
b.	The Duty of Care . . . . .	371
c.	The Duty of Full Disclosure . . . . .	372
	<i>Walter v. Holiday Inns, Inc.</i> . . . . .	372
d.	The Duty of Good Faith and Fair Dealing . . . . .	375
	Notes . . . . .	378
	<i>Bohatch v. Butler &amp; Binion</i> . . . . .	379
2.	The Right to an Accounting . . . . .	383
3.	Suits Among Partners . . . . .	384
	Notes . . . . .	385
H.	CLAIMS BY CREDITORS OF THE PARTNERSHIP . . . . .	386
1.	Rights Against Partnership Assets . . . . .	386
2.	Rights Against the Personal Assets of Individual Partners . . . . .	387
I.	CLAIMS BY PERSONAL CREDITORS OF A PARTNER AGAINST THE PARTNERSHIP INTEREST OF THE PARTNER . . . . .	388
	<i>Tupper v. Kroc</i> . . . . .	389
	Notes . . . . .	393
	<i>Bauer v. Blomfield Co./holden Joint Venture</i> . . . . .	393
	Problems . . . . .	396
<b>Chapter 13</b>	<b>DISSOCIATION OF A PARTNER AND DISSOLUTION OF A PARTNERSHIP . . . . .</b>	<b>399</b>
	<i>Dreifuerst v. Dreifuerst</i> . . . . .	400
	Notes . . . . .	403
A.	CAUSES OF DISSOLUTION UNDER UPA AND RUPA . . . . .	405
1.	Dissolution at Will . . . . .	405
	<i>Page v. Page</i> . . . . .	406
	Notes . . . . .	409
2.	Judicial Dissolution . . . . .	410
	Notes . . . . .	412
	<i>Horizon/cms Healthcare Corp. v. Southern Oaks Health Care, Inc.</i> . . . .	413
	Note . . . . .	417
3.	Wrongful Dissociation . . . . .	418
	<i>Saint Alphonsus Diversified Care, Inc. v. Mri Associates, LLP</i> . . . . .	418
	Notes . . . . .	421

---

**TABLE OF CONTENTS**

4.	Judicial Expulsion . . . . .	421
	<i>Brennan v. Brennan Associates</i> . . . . .	422
	Notes . . . . .	427
B.	NOTICE OF DISSOLUTION AND TERMINATION OF AUTHORITY AMONG PARTNERS . . . . .	428
1.	Termination of Authority . . . . .	428
2.	Notice of Dissolution — Lingering Apparent Authority . . . . .	428
	Note . . . . .	429
C.	CONTINUING THE BUSINESS . . . . .	429
1.	Continuation Clauses . . . . .	429
	<i>Hunter v. Straube</i> . . . . .	429
	Notes . . . . .	431
2.	Liability of an Incoming Partner . . . . .	433
3.	Liability of a Withdrawing Partner . . . . .	433
	<i>Redman v. Walters</i> . . . . .	434
4.	Creditors' Claims . . . . .	435
5.	Rights of a Retired or Dissociated Partner or the Estate of a Deceased Partner When the Business is Continued . . . . .	436
	Notes . . . . .	438
D.	WINDING UP; LIQUIDATION; TERMINATING THE BUSINESS . . . . .	440
1.	Winding Up and Liquidation . . . . .	440
	<i>Resnick v. Kaplan</i> . . . . .	441
	Note . . . . .	443
	<i>Marr v. Langhoff</i> . . . . .	443
	<i>Ohlendorf v. Feinstein</i> . . . . .	445
2.	Termination . . . . .	447
a.	Settlement of Accounts . . . . .	448
b.	The Judicial Sale . . . . .	449
	<i>Prentiss v. Sheffel</i> . . . . .	449
c.	The Losing Venture: Claims Among Partners . . . . .	451
	<i>Kovacik v. Reed</i> . . . . .	451
	Notes . . . . .	454
	Problems . . . . .	454
<b>Chapter 14</b>	<b>THE LIMITED PARTNERSHIP . . . . .</b>	<b>457</b>
A.	HISTORICAL BACKGROUND . . . . .	460
B.	ORGANIZATIONAL DEFECTS . . . . .	461
	<i>Briargate Condominium Ass'n v. Carpenter</i> . . . . .	462
C.	THE AGREEMENT OF LIMITED PARTNERSHIP . . . . .	466
	Note . . . . .	467

---

**TABLE OF CONTENTS**

D.	THE LIMITED PARTNER	468
1.	The Control Question	468
a.	In General	468
	<i>Holzman v. Deescamilla</i>	468
	Note	469
	<i>Gateway Potato Sales v. G.B. Investment Co.</i>	470
	<i>Pitman v. Flanagan Lumber Co.</i>	474
	Note	475
b.	Control of the Corporate General Partner	476
	<i>Zeiger v. Wilf</i>	476
2.	Suits by Limited Partners	483
	Notes	484
3.	Limitations on Distributions and Transfer of Interests	485
4.	Duties of Limited Partners	487
	<i>Ke Property Management, Inc. v. 275 Madison Management Corp.</i>	487
	Note	490
5.	Mandatory Capital Contributions: The Voting Rights of Limited Partners and the Relationship of the Partnership Agreement to the Partnership Certificate	490
6.	Rights of Personal Creditors of Limited Partners	491
	<i>Baybank v. Catamount Construction, Inc.</i>	491
	Notes	496
7.	Withdrawal Rights of a Limited Partner	497
8.	Merger of a Limited Partnership into Another Entity	497
9.	Inspection Rights of Limited Partners	498
E.	THE GENERAL PARTNER	499
1.	Powers of a General Partner	499
2.	Fiduciary Duty of the General Partner	499
	<i>Appletree Square I Limited Partnership v. Investmark, Inc.</i>	499
	Notes	502
	<i>Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.</i>	504
	Notes	510
	<i>Brickell Partners v. Wise</i>	512
	Note	516
3.	Withdrawal of General Partner	516
	Problems	516
<b>Chapter 15 THE LIMITED LIABILITY COMPANY</b>		<b>519</b>
A.	INTRODUCTION	519
B.	TAX MATTERS	521

---

**TABLE OF CONTENTS**

1.	The Kintner Regulations . . . . .	521
2.	The Check-the-Box Regulations . . . . .	522
C.	SECURITIES LAWS ISSUES . . . . .	522
D.	THE CREATION OF AN LLC . . . . .	523
	<i>C &amp; J Builders And Remodelers, LLC v. Geisenheimer</i> . . . . .	524
	Notes . . . . .	527
	<i>Elf Atochem North America, Inc. v. Jaffari</i> . . . . .	528
	Note . . . . .	534
E.	THE ENTITY THEORY AND THE LLC . . . . .	535
	<i>Litchfield Asset Management Corporation v. Howell</i> . . . . .	535
	Notes . . . . .	541
	<i>Abraham &amp; Sons Enterprises v. Equilon Enterprises, Llc</i> . . . . .	542
	Notes . . . . .	546
	<i>Premier Van Schaack Realty, Inc. v. Sieg</i> . . . . .	547
	Note . . . . .	551
F.	THE OPERATION OF AN LLC . . . . .	552
1.	The Management of an LLC . . . . .	552
	<i>Pinnacle Data Services, Inc. v. Gillen</i> . . . . .	552
	Note . . . . .	554
a.	Authority and Apparent Authority of Members . . . . .	555
	<i>Taghipour v. Jerez</i> . . . . .	555
	Notes . . . . .	558
b.	Fiduciary Duties of Members . . . . .	562
	<i>Mcconnell v. Hunt Sports Enterprises</i> . . . . .	562
	Notes . . . . .	568
	<i>VGS, Inc. v. Castiel</i> . . . . .	569
	Notes . . . . .	574
	<i>Katris v. Carroll</i> . . . . .	576
	Note . . . . .	580
2.	Claims Among Members . . . . .	580
a.	Derivative Claims . . . . .	580
	<i>Wood v. Baum</i> . . . . .	580
	Notes . . . . .	585
b.	Direct Claim for Oppression . . . . .	586
	<i>Pointer v. Castellani</i> . . . . .	586
	Notes . . . . .	594
3.	Limitations on Distributions . . . . .	596
4.	Transferability of Interests . . . . .	596
	<i>Condo v. Conners</i> . . . . .	596
5.	Exit Privileges . . . . .	599

---

**TABLE OF CONTENTS**

6.	Expulsion of a Member . . . . .	600
7.	Claims of Creditors of Members . . . . .	600
8.	Inspection of Books and Records . . . . .	600
9.	Bankruptcy of a Member . . . . .	601
G.	SERIES LLCs . . . . .	601
H.	THE L3C . . . . .	602
I.	DISSOLUTION OF AN LLC . . . . .	603
	<i>R &amp; R Capital, LLC v. Buck &amp; Doe Run Valley Farms, LLC.</i> . . . . .	603
	Notes . . . . .	609
	<i>Holdeman, Exr v. Epperson</i> . . . . .	611
	Note . . . . .	617
	Problems . . . . .	617
<b>Table of Cases</b> . . . . .		<b>TC-1</b>
<b>Index</b> . . . . .		<b>I-1</b>

---



# GLOSSARY

---

**Agency** — The agency relationship is a consensual relationship created when one person (the agent) acts on behalf of and subject to the control of another (the principal).

**Agent** — An agent is a person (which can include an entity, like a corporation, partnership, or LLC) who acts on behalf of and subject to the control of another.

**Agent's agent** — This sometimes confusing phrase describes the situation where a person acts on behalf of and subject to the control of an agent for another (the agent's principal) but is not responsible to and does not have the power to create liability for the agent's principal. The phrase is confusing because a subagent (see below) also is an agent of an agent. (The difference is that the subagent is also the agent of, and thus possesses the power to create liability for, the remote principal.) The confusion can be dispelled only by seeing the language in context. Although sometimes ambiguous, the phrase can serve the useful purpose, once a situation is analyzed, of sharply delineating the relationship of the parties in just a few words.

**Apparent authority** — Apparent authority is the power of an agent to bind the principal to unauthorized contracts. The power is created by manifestations, which can be subtle and indirect, of the principal to the third party that are reasonably relied upon by the third party.

**Borrowed servant** — A servant (employee) is borrowed when exposure to vicarious liability for the torts of the employee is shifted from the lending employer to the borrowing employer. The standards for determining when an employee is borrowed are in conflict and confusion in the law of many states today. The majority rule appears to require both a transfer of the allegiance of the employee and control by the borrowing employer before vicarious liability is shifted from the lending employer to the borrowing employer.

**Business trust** — This is a form of doing business through use of a trust. The business trust recently has received significant statutory treatment in some states. At the present time it is infrequently used except in specialized security transactions. It is covered in the Introduction immediately following this glossary.

**Co-agent** — A co-agent is one of two or more agents of a principal. Co-agents can be in a hierarchical relationship, like that of a president of a corporation and her secretary. Under such circumstances, co-agency appears confusingly like agency because the secretary functions throughout the working day under the direction and control of the president and may even have been hired by the president. Yet the secretary is a co-agent, not the president's agent, because both the president and the secretary work on behalf of their common employer.

**Control** — To exercise authority over; dominate; direct; regulate. This word has different meanings in the law of agency depending upon context. If, for example, the issue being pursued is liability for the physical torts of another, a special kind of control, over physical conduct and over the details of the activity, is required.

**Disclosed principal** — A principal is disclosed when a third party has notice of the principal's existence and identity. Under such circumstances, the agent acting in the transaction is not a party to the resulting contract in the absence of special facts, like guaranteeing the contract.

**Employee** — The term employee is a defined term in the Restatement (Third) of Agency § 7.07 and is used to describe an agent for whose torts the principal is vicariously liable. Thus, an employee is "an agent whose principal controls or has the right to control the manner and means of the agent's performance or work." It replaces the term "servant," used in earlier Restatements of Agency and in many common law cases. The new definition makes clear that the term is not limited to traditional, compensated employees, as the definition goes on to provide that "the fact that work is performed gratuitously does not relieve a principal of liability." The term might also exclude an agent who is an

---

## GLOSSARY

employee for purposes of federal and state laws, but whose principal lacks the right to control the manner and means of the agent's performance of work.

**Employer** — This term is used in the Restatement (Third) of Agency to describe a principal who is vicariously liable for the torts of its "employee" agent. See the definition of "employee." The term "employer" replaces the term "master," used in earlier Restatements of Agency and in many common law cases. As used in the Restatement (Third) of Agency, the term "employer" includes principals who, for other purposes (such as coverage under various federal and state laws regulating the employment relationship), are not "employers."

**General agent** — A general agent is an agent authorized by the principal to conduct a series of transactions involving a continuity of service, like a manager of a business.

**Independent contractor** — This is an ambiguous phrase in the law of agency. It can mean a nonagent, such as a building contractor who contracts to build something for an owner but who is not subject to control over the physical conduct of the work and who does not act on the owner's behalf, but rather merely benefits the owner by the work being done as performance under an ordinary contract. The phrase "independent contractor" also refers to a nonservant agent, such as a real estate broker or a lawyer, who acts as agent for another but who is not subject to control over the physical conduct of the work. A principal is not liable for the physical torts of a nonservant agent (independent contractor).

The Restatement (Third) of Agency abandons this term. To determine whether a principal is vicariously liable for the tortious conduct of its agent, the Restatement (Third) has a special definition of the term "employee." If the agent falls within this definition (which focuses on the degree of control that the principal has over the agent), the agent is an employee and the principal has respondeat superior liability for the employee's tortious conduct. The Restatement (Third) also uses the term "nonagent service provider" in some comments to capture one of the meanings of "independent contractor" set forth here.

**Inherent agency power** — This is a controversial doctrine in the literature of agency. It states that a general agent has the power to bind a principal to unauthorized acts beyond the customary doctrines of apparent authority and estoppel if the acts done "usually accompany or are incidental to" authorized transactions. The Restatement (Third) of Agency abandons this term.

**LLC** — The acronym "LLC" stands for "limited liability company." This relatively new form of doing business in an unincorporated form is described in the Introduction immediately following this glossary and is covered in detail in Chapter 15. All states allow the creation of LLCs.

**LLLP** — The acronym "LLLP" stands for "limited liability limited partnership." It refers to a limited partnership in which not only the limited partners but also the general partners have limited liability. This relatively new form of doing business is described in the Introduction immediately following this glossary and is covered in Chapter 14. Legislation enabling the creation of LLLPs is rapidly being adopted by the states.

**LLP** — The acronym "LLP" stands for "limited liability partnership." It is a recent innovation in the law of partnership, following the widespread adoption of statutes authorizing the LLC. It refers to a general partnership in which the partners have limited liability. This new form of doing business is described in the Introduction immediately following this glossary and is covered in Chapter 11. All states have legislation providing for the LLP.

**Master** — The word "master" is a term of art in the law of agency. It identifies a principal who employs an agent to perform services and who controls or has the right to control the physical conduct of the agent in the performance of the service. A master is vicariously liable for the physical torts of its servant under the doctrine of respondeat superior. The Restatement (Third) of Agency has abandoned this term in favor of the term "employer." See the definition of "employer" above.

**On behalf of** — This is an essential element of the agency relationship. It means acting *primarily*



---

## *GLOSSARY*

for the benefit of another, not merely benefiting another by one's actions. A person who acts on behalf of another ordinarily is a fiduciary of the other, due to the trust being placed in the actor under such circumstance.

**Partially disclosed principal** — A principal is partially disclosed when the third party has notice that the agent is acting on behalf of someone but does not know the identity of the principal. Under this circumstance it is inferred, subject to agreement, that the agent is a party to the contract. The Restatement (Third) of Agency abandons this term in favor of the term, “unidentified principal.”

**Partnership** — A partnership is an association of two or more persons to carry on as co-owners a business for profit. It can be formed without any papers being filed and without the owners even realizing that they are creating a partnership. The partnership is described more fully in the Introduction immediately following this glossary and is covered in detail in Chapters 11–13.

**Principal** — A principal is the one for whom action is taken. The action is taken on behalf of and subject to the principal's control.

**Respondent superior** — This Latin phrase means “let the master answer.” It is a shorthand and classic expression for the doctrine that a master (or employer) is vicariously liable for the torts of its servant (or employee) committed within the scope of employment.

**Servant** — The word “servant” is a term of art in the law of agency. A servant is an agent who is employed to perform service and whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master. Janitors and construction workers are examples of servants, although they are unlikely to appreciate being called servants. In part because the word “servant” is passé in today's language, the word “employee” is usually used in its place. “Employee” is less exact, however, because there exist servants who are not employees and employees who are not servants. Despite this possible confusion, the Restatement (Third) of Agency abandons the term “servant” in favor of the term “employee,” albeit one specially defined. See the definition of “employee” above.

**Sole proprietorship** — A sole proprietorship occurs when a person carries on a business as its sole owner. No forms need be filed with the state in order to create a sole proprietorship. The proprietor is personally liable for the debts of the business and pays income taxes on the net income of the business. The sole proprietorship is covered in the Introduction immediately following this glossary.

**Special agent** — A special agent is an agent who is authorized to conduct a single transaction or a series of transactions not involving continuity of service, such as a real estate broker.

**Subagent** — Subagency exists when an agent (A) is authorized expressly or (more commonly) implicitly by the principal (P) to appoint another person (B) to perform all or part of the actions A has agreed to take on behalf of P. If A remains responsible to P for the actions taken, B is a subagent and A is both an agent (to P) and a principal (to B). B is an agent of P as well as A, which underscores the importance of P's express or implied consent to this relationship.

**Undisclosed principal** — A principal is undisclosed when the third party is unaware that the agent is acting for a principal and thus assumes that the agent is contracting on its own behalf. Under these circumstances the agent is a party to the contract (as is the undisclosed principal).

**Unidentified principal** — This term is employed in the Restatement (Third) of Agency to describe what many courts and the earlier Restatements referred to as a “partially disclosed principal.” See the definition of that term above.

