

TOPIC 11: AGENCY & LIABILITY

Overview

Agency law concerns the legal relationship by which one person acts on behalf of another. This chapter will examine the agency relationship and the legal duties owed by principal and agent. It will focus upon the scope of the agency relationship — particularly in the context of the employer-employee relationship. It will introduce the concept of vicarious liability and provide the elements necessary for a principal to be held liable for the actions of the agent. This topic will include liability for contracts entered into by the agent and torts committed by the agent.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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| <ul style="list-style-type: none">• Agency<ul style="list-style-type: none">- Agent- Principal• Types of Principal• Types of Agent• Forming Agency Relationship• Principal Duties | <ul style="list-style-type: none">• Agent Duties• Employee vs Independent Contractor• Vicarious Liability• Agent Contract Authority<ul style="list-style-type: none">- Actual Authority- Apparent Authority- Implied Authority | <ul style="list-style-type: none">• Agent Liability• Respondeat Superior• Frolic and Detour• Terminate Agency |
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TOPIC 11: AGENCY & LIABILITY - QUESTIONS & ANSWERS

1. What is “agency”?

An agency relationship is one in which a party acts on behalf of and with the authority of another party. The “principal” appoints or authorizes the “agent” to act on her behalf. Thus, she is responsible for the actions of the agent taken in furtherance of her duties or per the instructions of the principal. The agent will interact with “third parties” on behalf of the principal. The agency relationship requires an understanding of the relationship between principal and agent, agent and third parties, and the principal and third parties’ roles, responsibilities, and rights.

- *Example:* I hire Betty to negotiate a business deal on my behalf. I am the principal and Betty is my agent for this purpose. Betty will act as my representative in dealing with the third parties to this business deal.

- **Resource Video:** <http://thebusinessprofessor.com/what-is-an-agency-relationship/>

2. What are the types of agent?

The principal will lay out the “scope of the agency”, including the responsibilities and limitations of the agent. Agents generally fall into two categories:

- *Limited Agent* - A limited agent has a special purpose and limited authority to act on behalf of the principal. Unless specifically limited by the principal, actions done in furtherance of that purpose are within the scope of the agent’s authority.
 - *Example:* I hire a real estate agent to represent me in the purchase of a business. She is my limited agent for that purpose. Her authority to act on my behalf is limited to this situation.
- *General Agent* - A general agent has broad authority to act on behalf of the agent. The scope of the agency is not limited to a special purpose.
 - *Example:* Arthur is my employee. He serves a operations manager. As such, he is my general agent with regard to all aspects of operations falling under his responsibility. His authority to act as my agent is not limited to a specific task; rather, it is pursuant to his responsibilities in his position.
- *Independent Contractor* - Agency law considers an independent contractor to be a special form of agent of the principal. The independent contractor is hired to perform a service for the principal but is generally not under the direct control or supervision of the principal. In this way, the agent has very limited ability to represent or act on behalf of the principal outside of the context of the services contract.

Numerous subcategories of agent exist within these broader categories. For instance, an “agent coupled with an interest” is a type of special agent who earns compensation through performing her agency duties (rather than receiving compensation directly from the principal). For example, a sales agent who receives a commission on sales may be an agent coupled with an interest. This type of agency is subject to contract rules and cannot be terminated without violating

the legal rights of the agent or principal.

- *Note:* Other common categorizations of agents include co-agents and sub-agents. Co-agents are multiple agents who serve a single principal for the same purpose. Sub-agents are authorized agents of an agent.
- **Discussion:** Why do you think there is a distinction between a general and limited agent? How should the authority of a limited agent be interpreted? What should be the limits placed upon the authority of the general agent?
- **Practice Question:** Erin is starting an interior design firm. She hires Ann as a senior designer, and Rachel as a design assistant. She hires Rita to handle her bookkeeping and Patricia to handle her business setup and legal matters. What is the status of each of these individuals (employee, independent contractor, general agent, or limited agent)?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-the-scope-of-the-principal-agent-relationship/>

3. What is the agency status of an employee as compared to an independent contractor?

Employee - An employer hires an employee to work on behalf of the employer as part of or in support of the business's core functions. The employee generally works exclusively for the business in the functions for which she is hired. The employer exercises extensive control over the nature, time, and manner of work carried out by the employee. As such, the employee is a general agent of the business to the extent of her authority in the position.

- *Note:* An individual working on behalf of an employer does not have to be paid to be considered an employee. An unpaid person may be a "gratuitous employee". This may be the case when individuals are volunteering for non-profit ventures or working as part of an internship.
- *Example:* ABC Corp hires me as an internal accountant. I report to ABC Corp from 8:00 - 6:00 on 5 days per week. I work on any and all accounting functions assigned to me by my supervisor.

Independent Contractor - An independent contractor is not an employee; rather, she or it is a separate business that is hired to perform services for or on behalf of another person or business. One way of thinking of an independent contractor is that she has her own business that services the employer as a client or customer. The employer does not directly control the manner and method by which an independent contractor carries out her duties. Also, an independent contractor generally has more than one customer or client. As such, the independent contract is only a limited or special agent of the principal-employer.

- *Example:* I have my own professional accounting practice. I prepare the tax returns for any business or individual who pays me to do so. I do not have any employees. ABC Corp hires me to prepare its annual tax return. I promise to have the return completed within 1 month. I will invoice ABC Corp for my services. I am not an employee of ABC Corp. I am an independent contractor who is hired to perform a specific function for a limited amount of time. While I have a projected deadline, ABC Corp does not control the nature, time, and manner of the services I perform.

While both are independent contractors, and employees are agents of the principal. This distinction is important for

determining a principal's liability for the agent's actions. Generally, absent specific instructions to do a task leading to liability, an employer is not liable for the actions of an independent contractor taken on behalf of the principal.

- *Note:* There are exceptions where an independent contractor may subject an employer to liability for her actions. This is the case when the work performed is inherently dangerous in nature; the tasks performed for the employer are illegal; the work is non-delegable; or the employer ratifies the contractor's actions. A separate cause of action may exist if the employer was negligent in selecting a contractor to perform the duties. That is, she failed to exercise reasonable care in selecting a particular contractor. This may be the case where past performance demonstrated the contractor was unsuitable for the task.

- **Discussion:** Why do you think employees have a different agency status from independent contractors? Is there any reason or justification for treating employees and independent contractors similarly for agency purposes?
- **Practice Question:** Donald drives for Super, a company that provides a network for drivers to pick up and drop off customers who need a ride. The service is very similar to a taxi service. The individuals driving for Super have their own cars and their own insurance. They work whenever they like. The driver logs into an application that notifies her when a Super customer needs a ride. She confirms that they will provide the ride and she is off. The passenger pays Super directly and Super later remits payment to the driver. What factors in this scenario would be used to determine whether Donald is an employee or an independent contractor?
- **Resource Video:** <http://thebusinessprofessor.com/employer-vs-independent-contractor/>

4. What are the types of principal?

Principals are categorized based upon whether their identity is disclosed to third parties with whom the agent interacts on their behalf.

- *Disclosed Principal* - A disclosed principal's identity is known to third parties dealing with the agent.
- *Partially-disclosed Principal* - A partially-disclosed principal is known by third-parties to exist, but her exact identity is unknown. This type of relationship exists when there is some benefit to the principal to remain anonymous to third parties interacting with the agent.
- *Undisclosed Principal* - The existence of an undisclosed principal is unknown to a third party. The third party believes that she is interacting only with the agent.

These categorizations of principal are important in determining the rights and duties of the principal, agent, and third party.

- **Discussion:** How do you feel about the ability of an agent to act on behalf of a undisclosed and partially-disclosed principal? Is this fair to a third party? Why or why not?
- **Practice Question:** Winston is a special agent of ABC Corp hired to negotiate the purchase of intellectual property. He seeks to purchase a premium domain name from Alice. Alice is unaware that Winston wants to buy

the domain name for some third party, but does not know that he works for ABC. What type of agent is Winston? How would it affect Winston's status if Alice found out that he works for ABC? What if she did not know he was buying the domain name for a principal?

- **Resource Video:** <http://thebusinessprofessor.com/types-of-principal-in-an-agency-relationship/>

5. What is required to form a principal-agent relationship?

An agency relationship is created in the following manners:

- **Express Agreement** - A principal and agent may expressly agree to form an agency relationship. The agreement can be oral or in writing. The principal must simply confer the authority upon the agent to act on her behalf. The subject matter of the agency relationship must be legal. The agency has the express authority granted in the agency agreement and the implied authority to undertake tasks incidental to that objective.
 - **Note:** If the duties of the agent include executing a contract subject to the statute of frauds, the agency relationship may need to be in writing to be enforceable. An express agency relationship is often created pursuant to a legal document known as a "power of attorney". The power of attorney may create a general or special agency relationship.
- **Implied Agency** - An agency may be implied from the facts or circumstances surrounding an individual's actions on behalf of another. If the principal acts in a way that demonstrates an intent for an individual to act on her behalf, this may imply an agency relationship. The parties to an agency relationship do not need to understand the law of agency or understand what it means to be a principal or agent.
- **Ratification** - Ratification is a contract principle. If an individual undertakes actions on behalf of another, these actions may be outside of any express or implied authority. If, however, the principal acknowledges and accepts the agent's actions, this is known as "ratification" of the agency relationship. The principal ratifies the agent's actions, after the fact.
 - **Note:** Agency by ratification is only possible when the principal is fully disclosed.
- **By Estoppel** - If a third-party reasonably relies on an agent's representation that she has authority to act on behalf of the principal, the principal may be bound by the actions of the agent. Generally, the principal must act or fail to act in a manner that causes a third party to reasonably believe that an agency relationship exists, when in fact there is no agency. Agency by estoppel is based upon principles of fairness. It would be unfair to detriment a third party who reasonably believed that the agent had authority to act on behalf of the principle, and the principal was the source or cause of that belief.
 - **Note:** Agency by estoppel is only possible with fully-disclosed principals.
 - **Example:** Bill is James' agent. James terminates the agency relationship. Nonetheless, unbeknownst to James, Bill continues to transact with third parties on James' behalf. James fails to notify third parties of Bill's termination. James may be bound to any agreement entered into by Bill.

- *By Necessity* - Agency by necessity arises when one party makes a decision on behalf of another person who is unable to do so. The decision must be essential in nature and it must be in the interest of the principal in making that decision. As such, the law will impute a *de facto* agency relationship where no actual agency exists.
 - Example: Bill is hired to deliver Tom's goods. He drops the goods off at the fulfillment center. The center says that there is no contract in place and intends to reject the goods. Tom is out of country and cannot be reached. The goods will spoil if not accepted. Bill signs the warehousing agreement on Tom's behalf.

- **Discussion:** How do you feel about the ability to form an agency relationship without a principal expressly authorizing the agent to act on her behalf? What intent should be required before a court can find that an implied agency exists? What constitutes ratification of an agent's actions by a principal? When is reliance upon an agent's representations about her authority reasonable? Should a third party be required to verify an agent's actual authority? How great must the need be for a court to find an agency by necessity?
- **Practice Question:** Terrence hires Joe as a general manager of his business. Joe routinely purchases supplies for the business, though this authority is not in his job description. Terrence never gave Joe the authority to enter into these purchase agreements, but he routinely acknowledges Joe's actions and keeps the purchased goods. When Terrence falls sick, Joe handles all store operations, including signing some major purchase orders that Joe generally signs. These purchases were necessary to continue business operations. One of the purchase orders, however, is for the wrong type of goods. The error potentially costs Terrence's business thousands of dollars. When Terrence recovers and learns of the purchase order, he is furious and refuses to honor the purchase agreement. What are the arguments for and against Terrence's liability for Joe's errant purchase order?
- **Resource Video:** <http://thebusinessprofessor.com/methods-of-forming-principal-agent-relationship/>

6. What are the duties of a principal?

Generally, a principal owes the following duties to the agent:

- *Duty to Compensate* - An agency relationship may be paid or gratuitous. The terms of an agency may be laid out in the agency agreement. If the agency agreement does not indicate the terms of compensation, the principal is obligated to provide the agent with reasonable compensation.
 - *Example:* Default rules in a relationship with a sales agent dictate that the agent will earn a reasonable commission on sales induced or completed.
- *Duty to Reimburse* - The principal must reimburse the agent for a reasonable amount expended in carrying out her duties. Reasonable reimbursement includes the cost of travel, meals, lodging, incidental expenses, etc.
- *Duty to Indemnify* - Generally, a principal must indemnify an agent for liability incurred in the performance of her duties. This generally arises when the instructions of the principal subject the agent to liability to a third party.
 - *Note:* If an agent exceeds or acts outside of the scope of her authority, the principal may be relieved from the duty to indemnify. If the principal later ratifies the actions of the agent, she will incur the obligation to

indemnify the agent against liability.

- **Discussion:** How do you feel about the default duties owed by a principal to an agent? Why do you think these are the default standards? Do you believe there should be any other or additional duties of the principal?
- **Practice Question:** Ethan hires Naomi to serve as his buying agent. The employment agreement is very short and lists only Naomi's primary responsibilities and compensation. Pursuant to her job description, Naomi will make purchases for the business but will not disclose that she is an agent of the business. One of her business deals goes bad and a client sues her for breach of contract. What are Ethan's responsibilities in this situation?
- **Resource Video:** <http://thebusinessprofessor.com/duties-of-a-principal-to-an-agent/>

7. What are the duties of an agent?

Agents generally have the following duties to the principal:

- **Loyalty** - An agent has the duty of loyalty to act for the principal's advantage and not to act to benefit herself at the principal's expense. An agent is expected to refrain from undertaking actions personally that would conflict with the purpose of the agency. An employee has a lower duty of loyalty with regard to opportunities that are outside of the employee's duties or responsibilities to the employer. Generally, this means that an agent may not simultaneously represent the principal and another party to a transaction.
 - **Note:** Employees are agents of the employer. If an employee does not have permission, she violates a duty of loyalty by undertaking activities for a third party that are similar to the duties of the employee in the agency relationship. This is seen as competing with the employer. If, however, she performs services unrelated to or not the type of services the employer would seek to provide to the client, she does not breach a duty by providing those services. This is true even if the employee provides those services to a client of the employer.
 - **Example:** I work for ABC Corp as a professional service provider. A potential client comes in to seek the services of ABC Corp. I cannot compete with ABC Corp by trying to convince the client to pay me to serve them personally rather than hire ABC Corp. I also have a side job selling supplies to construction contractors. This is a completely different line of business from ABC Corp. If it does not conflict with ABC Corp's services, I can offer my supplies for sale to the client without violating my duty of loyalty.
- **Duty of Care** - An agent has a duty to exercise due care and diligence when carrying out the responsibilities of the agency. This is often referred to as a duty to not act negligently in carrying out the principal's affairs.
 - **Example:** I work for ABC Corp as an accountant. I represent ABC Corp in every action I undertake as part of my employment, such as preparing client taxes. I have a duty to ABC Corp and the client to exercise reasonable care in carrying out my job duties.
- **Information & Disclosure** - The agent has a duty to protect all confidential information of the principal, such as trade secrets. Further, the agent has a duty to keep the principal fully informed of all material information

acquired as a result of the agency relationship.

- *Example:* I am a sale agent for ABC Corp. I receive an offer from a customer to undertake a joint venture with ABC Corp. I have a duty to transmit this information to ABC Corp. I acquired this information as a result of the agency relationship, and it is obviously outside of my unilateral decision-making authority.
- *Obedience* - The agent has a duty to obey the reasonable instructions from the principal.
 - *Example:* I work for ABC Corp selling insurance. ABC provides me detailed training and instructions on what types of policies to write and the client area that I can serve. I have a duty to obey these instructions as agent of my employer.
- *Accounting* - The agent has a duty to account to the principal for monies handled. Further, the agent may have a duty to account to third parties for whom money is handled. This includes situations where an agent collects too much money from a third party and is still in possession of those funds or when an agent intentionally collects funds that belong to the third party and the principal is undisclosed.
 - *Example:* I am a financial advisor for ABC Corp. I am responsible for reporting and keeping accurate records regarding all money or value transferred or received in carrying out my job duties.
- *Note:* The principal-agent relationship is a fiduciary or trust-based relationship. The agent may have any other duties as established in the agency agreement.

- ***Discussion:*** Should the duty of loyalty and care be the same for an agent in every situation? Why or why not? Should these duties vary depending upon whether the agent is a limited or general agent? Why or why not?
- ***Practice Question:*** Carol is an employee of Rob's accounting firm. She is a CPA, but she has been thinking of breaking away from the firm and starting her own practice. One day, a representative from a large corporation walks into the CPA firm and inquires about accounting services. Carol is strongly considering offering her personal services to the representative's firm? Are there any issues in this situation?
- ***Resource Video:*** <http://thebusinessprofessor.com/principal-and-agent-relationship/>

8. To what extent is a principal bound in contract by the actions of the agent?

A principal is generally bound to third parties pursuant to the contracts entered into by the agent on behalf of the principal. This means that the principal is responsible for any obligations incurred by the agent that are within her authority. An agent has varying sources of authority when dealing with third parties.

- *Actual Authority* - Actual authority is the express authority from the principal allowing the agent to enter into obligations (contracts) on her behalf. It can be specific instructions to do so or generally included in her job duties.
 - *Note:* The principal is bound to third parties if disclosed, partially disclosed, or undisclosed.

- *Example:* Arnold is an employee of ABC Corp. He signs an employee agreement indicating that he will sell products manufactured by ABC Corp directly to retailers. He has express authority to enter into any contracts with retailers for the sale of ABC-manufactured goods.
- *Implied Authority* - Implied authority concerns the authority to enter into obligations that a reasonable person would imply from the agent's position, title, or past course of dealings. If an employee has the title of vice president, it implies a great deal of authority to act on behalf of the business. Further, if an employee entered into a previous contract on behalf of the principal, it may imply that she can enter into similar contracts in the future.
 - *Note:* This principle can only apply to disclosed and partially disclosed principals. There can never be implied authority to act on behalf of an undisclosed principal.
 - *Example:* Beth is hired by ABC Corp with the title of Senior Sales Manager. 123 Corp seeks to purchase a shipment of supplies manufactured by ABC Corp. Even if Beth is expressly prohibited in her employment agreement from entering into direct sales agreements, it is reasonable for a retailer to believe that a person with her title has that authority. If a retailer is unaware of Beth's limitations and Beth signs a sales contract on behalf of ABC Corp, ABC Corp will be bound by the contract. Beth may be liable to ABC Corp, but her title implies this authority to transact with third parties in this manner.
- *Apparent Authority* - Apparent authority arises from the reasonable representations of the agent to third parties. That is, when the agent represents that she has authority to enter into a contract on behalf of the principal, her actions will bind the principal if a reasonable person would believe those representations. The 3rd party's belief must generally result from some action or inaction by the principal.
 - *Note:* This principle applies to disclosed and partially disclosed principals. There can be no apparent authority if the principal is not disclosed to the third party.
 - *Example:* Gina works for ABC Corp. She has a generic title of manager. She is limited in her ability to sign purchase agreements on behalf of ABC Corp. She does, however, routinely negotiate the terms of purchase agreements with vendors. She then transmits the purchase agreements to her boss who signs them. The vendor never deals with anyone other than Gina. If Gina decides to start by personally signing the purchase agreement, ABC Corp will likely be bound by the contracts. By signing the agreements, she is representing to vendors that she has authority to do so. It is likely reasonable for vendors to believe that she has this authority, as Gina is the primary point of contact for negotiating the agreements.
- *Ratification* - While an agent may bind the principal to the extent of her authority, the principal is also bound if she ratifies the conduct of the agent that is beyond her express, implied, or apparent authority. That is, if the principal accepts or takes advantage of the agent's actions, she impliedly ratifies those actions as taken on her behalf. In such a situation, this expands the implied and apparent authority of the agent when undertaking future actions.
 - *Note:* Ratification can only take place if the principal is disclosed or partially disclosed.

In each of the above situations, a disclosed principal is liable to third parties dealing with the agent. If the agent exceeds her express authority, the third party may still have the ability to back out of the contract. The third party is generally

bound by the contract if the principal ratifies the agent's conduct before the third-party finds out about the lack of authority and withdraws.

- **Discussion:** How do you feel about the doctrines of implied and apparent authority? Should an agent have the ability to bind an agent in contract when the agent does not have actual authority to do so? Why or why not? Should the standard be different for limited and general agents? Why or why not? Should the onus be on the employer to protect itself by informing third parties of the limited authority of the agent, or should the onus be on the third-parties to verify the authority of the agent? What is your justification for this opinion?
- **Practice Question:** Kristy is an operations manager for ABC Corp. She has authority to enter into agreements for operational supplies. She does not, however, have authority to enter into sales agreements with retailers of ABC Corp products. In a couple of instances she is called upon to assist in putting together custom sales orders for large retailers. In these situations, Kristy was the primary point of contact with the retailers. 123 Corp learns about ABC Corps products through one of the retailers who previously worked with Kristy. 123 Corp contacts Kristy about putting together a custom sales package. What is Kristy's authority to deal with 123 Corp.? If Kristy enters into an unauthorized agreement with 123 Corp, under what theory might ABC Corp be bound by the contract? Why?
- **Resource Video:** <http://thebusinessprofessor.com/agent-authority-to-contract-for-business/>

9. To what extent are agents liable in contract to third parties and to the principals they represent?

An agent acting within the scope of her authority is not liable to third parties on obligations entered into on behalf of the principal. Even if the agent exceeds her express authority, her implied authority may bind the principal to the agreement and relieve her from any contractual liability to the third party. The important point is that the agent must act on behalf of the principal and disclose that relationship to the third party. If the agent is acting on behalf of a principal, but fails to disclose her agency status, it may subject her to liability to the third party. In some cases, it may also serve to bind the principal once the agency relationship is determined.

- **Note:** If the agent goes beyond her express authority, she may be liable to the principal for any obligations binding the principal to third parties. That is, the principal may be able to recover damages suffered because of the agent exceeding her authority.
- **Example:** I work for ABC Corp. I enter into an agreement with 123 Corp on behalf of ABC Corp. I am not personally obligated to perform the contract. If I fail to tell 123 Corp that I work for ABC Corp (123 Corp believes that I have my own business), I am liable to 123 Corp if ABC Corp does not perform the contract. ABC Corp is obligated to perform the contract if my entering the contract was in my express, implied, or apparent authority. If I did not have express or implied authority, but 123 Corp realized I was acting on behalf of an agent, ABC Corp may be liable if I had apparent authority. In such a situation, ABC Corp may be able to sue me for any losses suffered.

- **Discussion:** Should an agent who exceeds her express authority be liable to the principal? Why or why not? Should she be liable to the third-party? Why or why not?

- **Practice Question:** Agnes is an agent of Emory Corp, a technology company that sells subscriptions to its cloud-based software. Agnes has the general title of manager, but has no express authority in her employment agreement. Agnes routinely negotiates sales agreements with large companies that are clients of Emory Corp. Agnes enters into an agreement with Tech, LLC that is far larger than any deal Agnes previously negotiated. The agreement is very poorly negotiated and it will cause a huge loss for Emory Corp. What is Emory Corp's obligation? What are Agnes's potential obligations and liabilities?
- **Resource Video:** <http://thebusinessprofessor.com/agent-liability-to-third-parties/>

10. To what extent are principals liable for the torts committed by agents?

An individual is always liable for her own conduct. Whenever an individual is held liable for the actions of another, this is known as “vicarious liability”. In the context of agency, the agent is acting vicariously for the principal. A principal is responsible for the tortious acts of an agent pursuant to a doctrine known as “*respondeat superior*”. More specifically, an agent may create legal liability for the principal for actions taken by the agent “within the scope of the agency”. In such cases, the principal and agent are “jointly and severally” liable for the harm caused by the agent's conduct. An act is within the scope of the agency if the purpose behind the action taken is to advance the interests of the principal. As such, if any act taken by an employee in an effort to advance the employer's interest is a tort, the employer may be liable for that conduct.

- **Note:** Generally, intentional torts are generally not considered to be within the scope of an employee's duties or employment. As such, a principal will not be liable for the intentional torts committed by an employee unless the principal ordered or condoned the tortious conduct. Even if a tort is within the scope of employment, it will not relieve the agent from personal liability for her actions.
- **Example:** I am an employee of a corporation. While carrying out my duties, I act negligently and harm a third party. The third party sues the corporation and me. The corporation will be liable for my negligent act because I was acting within the scope of my job responsibilities when I committed the tort.

- **Discussion:** How do you feel about a business being held liable for the tortious activity of its agents (employees)? Does it matter if the tort is negligence, intentional, or strict liability? How do you think the court should define “within the scope of employment”?
- **Practice Question:** Mitchell is an employee of Big Corp. His primary responsibilities are to deliver company goods to retailers. When out driving to a retailer's location, Mitchell is following too closely and accidentally rear ends Bertha. Bertha sues Mitchell for negligence. What is the likely result for Big Corp?
- **Resource Video:** <http://thebusinessprofessor.com/principal-liable-for-torts-of-an-agent/>

11. What is a “frolic and detour”?

A “frolic and detour” is a general defense to vicarious tort liability. It states that the principal should not be liable for the tortious acts of the agent when the agent is acting outside the scope of her employment and for the benefit of someone other than the employer. Plainly stated, an employee who is on a frolic or detour is no longer acting for the employer.

- *Frolic* - A frolic is when an employee abandons the employer's business objectives and pursues personal interests.
- *Detour* - A detour occurs when an employee substantially deviates from an employer's instructions or rules.

Generally, both a frolic and detour must be present to relieve an employer from liability for the agent's actions.

- *Example*: An employee providing services for her employer at the location of a client is an agent acting within the scope of her employment. If, however, the employee takes the company vehicle and goes on a personal errand that is not authorized, the employee is likely outside the scope of her employment. Suppose while running these errands she gets into an automobile accident that is her fault. The employer would be able to argue that the deviation from her duties as employee was a frolic and detour and relieved her of liability for the employee's tort.

- **Discussion**: How do you feel about the doctrine of *respondeat superior*? Should a principal be held liable for the tortious acts of an agent if committed within the scope of employment? Why or why not? How would you define scope of employment? Does it matter to you if the agent was also acting in her personal interest when committing the tort? In your opinion, how much of a deviation from her job duties must an employee vary in order for it to be considered a frolic and detour? Can you think of any situations in which a frolic or detour should still subject a principal to liability?
- **Practice Question**: Mitchell is an employee of Big Corp. His primary responsibilities are to deliver company goods to retailers. When out driving to a retailer's location, Mitchell decides to stop by his house and have lunch. Big Corp has a strict policy against taking work trucks home or using company trucks for any purpose other than delivering Big Corp products to retailers. When backing out of his driveway, Mitchell hits Tom who is out jogging. Tom suffers injuries and sues Mitchell and Big Corp. What will Big Corp have to show to defend the action for Mitchell's negligence? What facts in this situation may hinder Big Corp's defense?
- **Resource Video**: <http://thebusinessprofessor.com/vicarious-liability-for-torts-of-agent/>

12. When and how does the agency relationship terminate?

The establishment, duration, and termination of the agency relationship is generally governed by the agreement between the principal and agent. In the absence of an express agreement, several default rules apply regarding the point at which the agency relationship terminates. Below are common rules for terminating the agency relationship:

- *Withdrawal by Either Party* - A principal or agent may withdraw from the relationship at any time. This legal authority is separate from the contractual right to withdraw.
 - *Note*: While withdrawal terminates the agency relationship, it may lead to liability of the withdrawing party.
 - *Example*: Daisy hires Jeb as a sales agent for her new product line. Jeb will earn a commission on sales of the product. Jeb studies the product lines, develops a sales plan, and hits the road. Shortly after the relationship begins, Daisy decides to hire Luke and fire Jeb. Daisy's withdrawal terminates the agency

relationship with Jeb. Jeb, however, may have the legal right to seek damages against Daisy for terminating the relationship.

- *Withdrawal by Both Parties* – The parties can terminate the agency relationship upon mutual consent.
- *Termination by the Principal* – Either party may terminate the agency relationship, even if it violates a contractual agreement between the parties. A principal will be subject to a breach of contract action for terminating the agency relationship if the agent’s status is part of an agreement that is supported by consideration and terminating the agency relationship will harm the agent’s rights.
 - *Note:* This scenario commonly arises in an agency “coupled with an interest”. An agency relationship is coupled with interest when the agent has a specific interest in the subject matter of the agency, such as a consignment of goods for resale.
 - *Example:* I enter into a contract with Ernest to package and sell his products on the Internet. In exchange for my effort, I will keep in percentage of the sale value. As such, the agency is coupled with an interest and cannot be revoked without breaching a contract.
- *Renunciation by the Agent* – The agent can renounce the business of the principal and terminate her agency status and authority. This may, however, violate a contractual relationship between the parties.
 - *Example:* I enter into a contract to serve as your agent. I may terminate the agency by renouncing my duties. Unless I have a justification, my actions will likely violate my contractual obligations to you.
- *Duties of Agent Complete* – If the purpose of the agency ceases to exist, the agency relationship terminates. This often arises when the agent discharges all of her agency obligations. Further, it could arise when the subject matter of the agency no longer exists.
 - *Example:* You higher me to represent you in the sale of your real estate. The real estate is the subject of an eminent domain action and is taken by the government. The agency relationship terminates when the purpose of my agency is gone.
- *Death or Incapacity* – The agency relationship terminates upon the death or incapacity of either party.
- *Bankruptcy* – The agency relationship terminates upon the liquidation or reorganization of either party.

The above situations resulting in termination of the agency relationship are default rules. The parties may reserve any rights or restrictions on terminating the agency relationship within their agreement.

- **Discussion:** How do you feel about either party’s right to terminate the agency relationship? What should the remedy be if termination of the agency relationship by a party violates a contract between the parties? Should a party have additional rights if she is harmed by the termination of the agency and the other party’s rights are not? Why or why not?
- **Practice Question:** Earl runs a showroom for baby products. Gayle, the inventor of a new product, consigns a

large quantity of goods with Earl. Earl agrees to display the goods and represent them to potential retailers. Earl earns a percentage of all future sales to the retailer as compensation for his services. Can Gayle cancel the agency relationship?

- **Resource Video:** <http://thebusinessprofessor.com/when-does-agency-relationship-terminate/>