

## QUESTION 2

Sam visited his dentist, Dr. Tooth, for his annual cleaning. The cleaning was a routine procedure performed by a dental hygienist, Carol Gum, who is employed by Dr. Tooth. Ms. Gum is trained as a hygienist and is licensed by the state as such. Dr. Tooth sets the prices for all services including cleanings by Ms. Gum. Additionally, he employs staff for sending out bills and collecting payments. Ms. Gum is paid a salary by Dr. Tooth, but she generally works without supervision in the office. While she only sees Dr. Tooth's patients, she schedules cleaning appointments on her own. Additionally, she attends annual continuing education programs where she learns new cleaning techniques which she is free to employ in her work for Dr. Tooth. Although most dental hygienists are permitted to tell patients the cost of dental procedures, Dr. Tooth has a policy, which he has communicated only to Ms. Gum, that only he is allowed to quote such costs.

During Sam's cleaning, Ms. Gum negligently damaged one of his teeth. She told Sam it would only cost \$50 to repair the tooth instead of the usual fee of \$500 in light of the fact that she damaged it. Sam had the repair work performed by Dr. Tooth who subsequently sent Sam a bill for \$500 for the work.

### QUESTION:

Discuss Sam's obligation to pay Dr. Tooth for the repair work on his tooth.

## DISCUSSION FOR QUESTION 2

Question: What is Sam's obligation to Dr. Tooth for the repair work on his tooth?

An agency relationship is defined by the Restatement (second) of Agency § 1:

- (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
- (2) The one for whom action is to be taken is the principal.
- (3) The one who is to act is the agent.

An agency relationship can be created expressly by agreement. It can also be informally created based on the conduct of the parties. *See Reuschlein & Gregory, Agency and Partnership §12 at 31 (2d ed. 1990).*

An agent is typically viewed as acting for and on behalf of a principal. Additionally, the agent is subject to control by the principal. An agent can enter a contractual obligation with a third party on behalf of a principal. If the agent acts with authority the principal is contractually bound to the third party. *See Restatement (second) of Agency § 140.* If the third party is aware the agent is acting on behalf of a principal only the principal (and not the agent) is bound on the contract. *See Restatement (second) of Agency § 320.*

The authority for an agent to act on behalf of a principal can be created in several different ways. First, a principal can give an agent **express authority**. Second, an agent can have **implied authority** if the agent reasonably believes, in light of the surrounding facts and circumstances, that she has authority. *See Restatement (second) of Agency § 26.* Finally, **apparent authority** exists if actions (or inaction) of the principal reasonably lead a third party to believe the principal has given the agent authority. *See Restatement (second) of Agency § 27.*

Carol Gum is employed by Dr. Tooth who pays her a salary. Consequently, Dr. Tooth has the ability to control Ms. Gum in her employment. Additionally, Ms. Gum only sees Dr. Tooth's patients so he has control over her workload by virtue of providing patients to Ms. Gum. Finally, Dr. Tooth sets the price and collects payment for all services performed in his office including cleanings by Ms. Gum. Consequently, Ms. Gum is acting under the control of and on behalf of Dr. Tooth so an agency relationship exists. Dr. Tooth is the principal and Ms. Gum is the agent.

Dr. Tooth doesn't permit anyone except himself to quote the cost of dental services. Therefore, Ms. Gum doesn't have express authority to tell patients the cost of dental services. Nevertheless, it is customary for most dental hygienists to quote the cost of dental services to patients. However, Ms. Gum is aware this customary practice is inapplicable in Dr. Tooth's office since he has communicated to her that only he is permitted to tell patients the cost of dental services.

Dr. Tooth has not told patients that in his practice Ms. Gum is not permitted to quote the cost of dental services on his behalf. Consequently, a patient could reasonably assume that the customary practice of a dental hygienist telling the patient the cost of dental services applies to Dr. Tooth. The failure of Dr. Tooth to inform patients that his practice operates differently can be viewed as inaction by a principal (Dr. Tooth) that reasonably leads a third party (Sam) to believe the principal's agent (Ms. Gum) had authority to tell him the cost of dental services. This would establish the existence of apparent authority.

Acting pursuant to apparent authority, Ms. Gum acted on behalf of Dr. Tooth and obligated him to fix Sam's tooth for \$50. Therefore, Sam probably is only obligated to pay Dr. Tooth \$50 for repairing his tooth.

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 2**

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. A principal-agent relationship exists when it is agreed that one person will act on behalf of another, subject to his or her control. 1. \_\_\_\_\_
2. Carol Gum is the agent of Dr. Tooth. She is acting on his behalf and he has control of her activities (paying her a salary, controlling the pool of patients, setting prices and collecting her fees) . 2. \_\_\_\_\_
3. An agent can contractually bind a principal to a third party provided the agent has the authority to do so. 3. \_\_\_\_\_
4. Authority can be expressly granted: or 4. \_\_\_\_\_
5. Authority can be implied: 5. \_\_\_\_\_
  - 5a. When the conduct of the parties and other surrounding facts and circumstances reasonably cause an agent to believe she has authority. 5a. \_\_\_\_\_
6. Ms. Gum lacks either express or implied authority to tell Sam the cost for Dr. Tooth to fix his tooth. 6. \_\_\_\_\_
7. Apparent authority can exist if the principal's actions (or inaction) reasonably cause a third party to believe an agent has authority. 7. \_\_\_\_\_
8. Sam may have reasonably believed that Ms. Gum had apparent authority. Hygienists often tell patients the cost of dental services and Dr. Tooth had not informed Sam to the contrary. 8. \_\_\_\_\_

## QUESTION 9

Clopton sold certain goods to Talman & Co. through Vernel who was Talman's chief clerk. Clopton had transacted business with Talman for 10 years. Typically Clopton would contact Talman and ask for the chief clerk. Vernel always answered the call.

Recently, Vernel called Clopton and told him Talman was about to expand company operations and needed more goods for its inventory. He said he expected that Clopton would regularly receive larger orders from Talman, and in fact, Vernel placed a large order, larger than was usually transacted over recent years. Little was said regarding the method of delivery and payment. The goods were shipped, delivered, inspected, and accepted by Talman's receiving department and placed into their inventory.

Twenty-nine days later, the CEO of Talman was contacted by her accounting department to verify payment of the recent Clopton delivery. Normally the account would have been routinely paid, but this order was extraordinarily large and the comptroller believed confirmation was in order.

When she found out that Vernel was responsible for the large order, Talman's CEO was infuriated, and immediately fired him. She then had the comptroller cancel the last order placed by Vernel and refused to pay Clopton. Clopton responded by asking for full payment for goods.

### QUESTION:

Discuss the potential liability of the parties. Do not discuss issues, if any, raised by the U.C.C.

## DISCUSSION FOR QUESTION 9

Agency is the legal relationship formed when two parties agree that one shall act contractually for the other; it is a consensual relationship that requires some manifestation by the principal authorizing the agent to act for him and acquiescence by the agent. Appleby v. Kewanee Oil Co., 279 F.2d 334 (1960). The relationship is essentially fiduciary by nature where the agent agrees to act for the benefit of the principal in authorized transactions. Hobson v. Easton, 399 F.2d 781 (1968).

The agent possesses the power to effect legal changes in relations between the principal and third parties. The agent may alter the principal's obligations as though the principal acted for himself. Alvares v. Felker Mfg. Co., 230 Cal.App.2d 987 (1964). Regardless of the parties' intentions, an agent has certain powers depending upon which events bring them into being: (1) express or impliedly authorized powers, (2) apparently authorized powers, and (3) inherent powers for the relationship. King v. Earley, 145 So.2d 831 (1962). Once the principal has indicated that the agent has the power to act affecting the principal's obligations, the power is called the agent's authority. Windsor Steel Prods., Ltd. v. Whizzer Indus. Inc., 157 F. Supp. 184 (1957).

Apparent authority is the power which results in an agent from a principal manifesting some consent to a third party--as in the present case. The prime requirement is that the principal originate the manifestation of authority vis-a-vis anyone else. Grummitt v. Sturgeon Bay Winter Sports Club, 197 F.Supp 455 (1961). An agent's power is the ability to create, change, or destroy legal relations. His authority is sometimes identical with, sometimes smaller than, but never larger than his power. An agent's actual or real authority is derived from a "manifestation" from the principal to accomplish whatever his principal has expressly or impliedly assigned him to do. An agent's apparent authority flows from a "manifestation" from the principal to the third party. While an agent may never have received actual authority to bind the principal, the latter will be liable to third parties who reasonably believe the "apparent" agent has the authority based on the principal's manifestation to third parties. Ratification is the affirmance by the principal to treat the agent's prior unauthorized act as if it was authorized from the inception. The ordinary conduct that creates ratification is acceptance by the principal of the benefits of the agent's transaction. Ratification ought to be distinguished from actual or apparent authority by acquiescence. *Restatement (Second) of Agency* Section 43.

One species of the agency relationship is called master-servant. The former employs the latter and directs his physical conduct. The right to control physical performance is the most important criterion and sets it apart from other agency relationships. *Restatement (Second) of Agency* Section 2. One may possibly be both an agent and a servant. For example, many general agents are servants, such as plant managers. Special agents are those authorized to do only one or few specific acts according to particular instructions. Farm Bureau Mut. Ins. Co. v. Coffin, 186 N.E.2d

## DISCUSSION FOR QUESTION 9

Page 2

180 (1962). Servants who perform tortious acts outside the scope of their authorized employment are often deemed to be "on a frolic of their own" or a detour which will relieve the master from any tort liability under the doctrine of a respondeat superior. Harris v. Oro-Dam Constructors, 269 Cal.App.2d 911 (1969).

Since the agent in the present case exercised power beyond his actual authority, his principal will be bound because of the apparent authority of the agent. However, the agent is liable to the principal for those acts binding the principal and any resulting damages. *Restatement (Second) of Agency* Section 383.



21741

**Essay 9 GradeSheet**

**Seat**

--	--	--

**Score**

--	--

Please use blue or black pen  
and write numbers clearly

1. Agency is a consensual and fiduciary relationship between the parties in which the agent is authorized to act for the principal. 1. \_\_\_\_\_
2. Actual authority in an agent is the result of a principal expressly or impliedly assigning such responsibility to the agent. 2. \_\_\_\_\_
3. If Vernal did not have express authority to place this order, then he acted outside the scope of his employment or agency relationship and violated his fiduciary duty to Talman. 3. \_\_\_\_\_
4. Apparent authority is an agent's authority which results from a principal manifesting some consent to a third party. 4. \_\_\_\_\_
5. Talman may be liable for Vernal's action because of Vernal's apparent authority to bind Talman. 5. \_\_\_\_\_
6. Ratification is the affirmation by the principal to treat the agent's prior unauthorized acts as if they were authorized from inception. 6. \_\_\_\_\_
7. Talman may be deemed to have ratified Vernal's action by placing the goods in inventory instead of refusing delivery. 7. \_\_\_\_\_
8. Vernal may be liable to Talman for his actions to bind Talman and any resulting damages. 8. \_\_\_\_\_
9. Servants who perform tortious acts outside their authorized appointment may not render the master liable under respondent superior if the servant is on a frolic and detour of their own. 9. \_\_\_\_\_

## QUESTION 1

Available Cash Company ("ACC") sought to buy distressed commercial real estate. ACC hired Bob Finder to acquire these types of properties for them. Finder's employment contract with ACC states, in pertinent part, that Finder shall be paid a commission for all properties he locates within certain defined investment parameters. The contract also states that Finder may contract on ACC's behalf with regard to any of those properties without disclosing that the contract is on behalf of ACC.

Finder located a small shopping center within ACC's investment parameters. Finder, in his own name, contracted to purchase the property for ACC from Shoppette Co., which owned the property. Shoppette did not know that Finder worked for ACC. Before the sale closed, Shoppette told Finder it wanted more money before it would agree to the sale.

### **QUESTIONS:**

1. Assume that the contract between Finder and Shoppette is valid and enforceable by Finder. Discuss whether ACC may enforce the contract to purchase the property from Shoppette if Shoppette fails to sell to Finder.
2. Discuss Finder's liability to ACC if Finder decides to purchase the property for himself and doesn't disclose it to ACC.

In answering the questions, do not address the applicability of the statute of frauds.

## DISCUSSION FOR QUESTION 1

This question involves the law of agency. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement (Second) of Agency § 1(1) (1958) (the "Restatement, \_\_\_"). CJI-3d ed., § 7:3. Under the facts presented, Finder was the agent of ACC. He was expressly authorized to purchase real estate with pre-established guidelines by virtue of Finder's employment contract. See Restatement § 26. See also H.G. Reuschlein & W.A.Gregory Agency and Partnership, § 14 (West 1979) ("Agency and Partnership § \_\_\_").

### A. SHOPPETTE CO.'S LIABILITY TO ACC.

ACC was the undisclosed principal of Finder. Restatement § 4. Finder was acting within the scope of his agency and had actual authority to act on ACC's behalf. See Restatement § 7. Authority exists "when the agent is carrying on business (or) carrying out a business transaction for his or her principal, which the principal has expressly authorized or which is within the incidental, implied, or apparent authority of the agent." CJI-3d ed., § 7:11. Here, Finder had ACC's express (or "actual") authority.

ACC is an "undisclosed principal." CJI-3d ed., §7:5. The general rule is that a person who contracts with an agent of an undisclosed principal is liable to the principal if the contract was intended by the agent to be on account of his principal, it was within the agent's power to bind his principal, and the principal's existence was not fraudulently concealed. Restatement § 302. Here, Finder was acting on behalf of ACC, he had the power to bind ACC because of his actual authority, and there are no facts that indicate ACC's status as principal for ACC was fraudulently withheld. ACC may therefore enforce the contract to purchase the property from Shoppette.

### B. FINDER'S LIABILITY TO ACC.

An agent is a fiduciary of his principal with respect to matters within the scope of his agency. Restatement § 13; Agency and Partnership § 67. The agent has a duty of loyalty, to act solely for the benefit of his principal unless otherwise agreed. Restatement § 387; Agency and Partnership. If Finder purchases the property for himself, without ACC's consent, Finder will have breached his duty to ACC and will be required to account to ACC for any profits he received. Restatement § 388.



21202

### Essay 1 GradeSheet

Seat

--	--	--

Score

--	--

Please use blue or black pen  
and write numbers clearly

1. Definition or concept of agency: fiduciary relation whereby one person consents to another acting on his behalf, and other person consents to so act. 1. \_\_\_\_\_
2. Finder was agent of ACC; ACC was principal of Finder. 2. \_\_\_\_\_
3. Finder had actual ("express") authority to purchase property on ACC's account. 3. \_\_\_\_\_
4. ACC was the "undisclosed principal" of Finder. 4. \_\_\_\_\_
5. An "undisclosed principal" can enforce a contract with a third person: 5. \_\_\_\_\_
  - 5a. If agent had actual authority/power to bind principal (was acting within the scope of authority); 5a. \_\_\_\_\_
  - 5b. The contract was intended to be on behalf of undisclosed principal; 5b. \_\_\_\_\_
  - 5c. Unless principal's identity was fraudulently concealed. 5c. \_\_\_\_\_
6. Conclusion: ACC can enforce contract to purchase property. 6. \_\_\_\_\_
7. Agent has fiduciary duty (duty of loyalty) to principal. 7. \_\_\_\_\_
8. Finder will have breached duty to ACC (if he keeps the property for himself). 8. \_\_\_\_\_
  - 8a. Finder will be required to account to ACC for any profit he received. 8a. \_\_\_\_\_

#### QUESTION 4

Producer, who manufactures and sells widgets, hired Amy as a sales trainee. Producer introduced Amy to a customer, Tim, saying, "Amy is my new sales representative. From now on, Amy will take your orders for my widgets." Without telling Tim, Producer instructed Amy that she was not permitted to take any widget orders without first consulting Producer.

The next day Tim called Amy to place an order for widgets. Without speaking to Producer, Amy agreed to sell Producer's widgets to Tim. While Amy was taking Tim's order, Tim asked whether the widgets would be grade-A. Not knowing that Producer manufactured only grade-C widgets, Amy assured Tim that Producer would fill his order with grade-A widgets.

Delighted with the contract, Tim suggested that Amy call on Yolanda. Yolanda, who had dealt with Producer for many years, knew that Amy was a trainee who could not make sales without first consulting Producer. Nevertheless, Yolanda placed a widget order with Amy.

When Amy submitted the orders to Producer, Producer refused to fill them. Tim and Yolanda are now suing Amy and Producer for breach of contract based on the orders they placed with Amy.

#### QUESTION:

Discuss the liability of Amy and Producer to Tim and Yolanda for breach of contract. Also discuss Amy's liability to Producer for any damages Producer may incur resulting from Tim's and Yolanda's lawsuits.

## DISCUSSION FOR QUESTION 4

### Producer's liability

Although Producer did not in fact authorize Amy to contract with Tim without first consulting Producer, Producer is liable to Tim based on Amy's apparent authority to do so. Restatement (Second) of Agency sec. 8. "Apparent authority results from a manifestation by a person that another is his agent." Id., comment a. Apparent authority is created in an agent when a principal, by written or spoken words or any other conduct, causes third parties to reasonably believe that the principal consents to have the act done or words spoken on his behalf by the person purporting to act for him. Westinghouse Credit Corp. v. Green, 384 F.2d 298 (Colo.1967), Gilmore v. Constitutional Life Ins. Co., 502 F.2d 1344 (Colo. 1974).

Where a person makes a manifestation that another is agent to a third person, "the rules of interpretation of apparent authority are... the same as those for [actual] authority." Restatement (Second) of Agency sec.8, comment a, illustration 2. Thus a principal may be subject to liability to a third person for breach of a contract made on the principal's behalf by an agent who was apparently authorized. Id. sec. 140 (b) and 144. Commercial Standard Ins. v. Rinn, 100 Colo. 76, 65 P.2d 704 (1937), (holding principal bound by acts within the apparent scope of authority of general agent). Accordingly, when Producer told Tim that Amy was Producer's sales representative and would be taking Tim's future widget orders, Producer cloaked Amy with apparent authority to bind Producer to a contract for the sale of widgets to Tim.

Moreover, Producer probably is responsible for Amy's erroneous representation of the quality of Producer's widgets. "[I]n actions brought upon a contract..., a disclosed . . . principal is responsible for unauthorized representations of the agent made incidental to it, if... true representations as to the same matter are within... the apparent authority of the agent, unless the other party... has notice that the representations are untrue ...." Restatement (Second) of Agency sec. 162. Because describing widgets is reasonably incident to selling those widgets, Amy had apparent authority to bind Producer to her representation that Tim's order would be filled with grade-A widgets. Producer will be liable on a contract for grade-A widgets unless Tim should have known that the representation was untrue.

Producer, however, should not be liable to Yolanda. Although employing Amy as a sales agent may be a manifestation of authorization, Id. sec. 8, comment b, apparent authority exists only to the extent of the third party's reasonable belief. Id. comment a. Based on prior dealings with Producer, Yolanda was aware that Amy was not authorized to take orders without consulting Producer.

### Amy's liability to Tim

Because Amy had apparent authority to bind Producer to a sales contract with Tim and purported to act on behalf of Producer, Amy is not liable to Tim even though Amy violated Producer's orders. Whether an agent can be liable on a contract entered into on behalf of a principal depends on whether the principal is disclosed or undisclosed. An agent who makes a contract on behalf of a disclosed principal whom he has authority or apparent authority to bind is not liable for its nonperformance. Id. sec. 328. This is true even where the agent acts in violation of orders because where the principal is bound, the rights of the third party are not affected. Id. sec. 329, comment f, illustration 6.

Amy's liability to Yolanda

Because Yolanda knew that Amy was not authorized to bind Producer without consulting Producer, Yolanda has no claim against Amy. Id. sec. 329, comment g, illustration 7.

Amy's liability to Producer

An agent has the duties stated in the contract with the principal. In the absence of anything contrary in the agreement, the agent has three major duties implied by law: loyalty, obedience and reasonable care. With respect to obedience, an agent must obey all reasonable directions of his principal. Thus, while the principal may well be liable for the agent's acts in violation of direction through the doctrine of apparent authority, the agent will be liable to the principal for any loss that the principal suffers. Thus, Amy has a duty to Producer to act in Producer's affairs only in accordance with Producer's consent. Id. sec. 383. Amy is liable for loss caused to Producer by Amy's breach of that duty. Id. sec. 401, comment d. Where a third person brings an action against a principal based on the agent's conduct for which, as between the agent and the principal, the agent is responsible, the principal may notify the agent to defend. If the agent fails to do so, the principal is entitled to expenses reasonably incurred in defending or settling the action. Id. at sec. 399, comment h. Thus, Amy may be liable for the costs in defending or settling the action between Producer and Tim.



21453

## Essay 4 GradeSheet

Seat

--	--	--

Score

--	--

Please use blue or black pen  
and write numbers clearly

### Producer's liability to Tim

1. A principal creates apparent authority in an agent when the principal causes third parties to reasonably believe that the person is his agent. 1. \_\_\_\_\_
2. Amy had apparent authority to bind Producer in a contract for the sale of widgets because he informed Tim that Amy would take widget orders. 2. \_\_\_\_\_
3. A principal is bound by the acts of an agent within the apparent scope of the authority of the agent. 3. \_\_\_\_\_
4. Producer is liable for Amy's misrepresentation of widget quality because it was within her apparent scope of authority. 4. \_\_\_\_\_

### Producer's liability to Yolanda

5. Apparent authority for an agent exist only to the extent of a third party's reasonable belief. 5. \_\_\_\_\_
6. Producer is not liable to Yolanda because she knew of Amy's status. 6. \_\_\_\_\_

### Amy's liability to Tim

7. An agent who makes a contract on behalf of a disclosed principal whom she has power to bind is not liable for its nonperformance. 7. \_\_\_\_\_
8. Amy is not liable to Tim even though Amy violated Producer's orders. 8. \_\_\_\_\_

### Amy's liability to Yolanda

9. Because Yolanda knew that Amy was not authorized to bind Producer without consulting Producer, Yolanda has no claim against Amy. 9. \_\_\_\_\_

### Amy's liability to Producer

10. In the absence of a contract, the law imposes on an agent the duty of loyalty, obedience and reasonable care. 10. \_\_\_\_\_
11. Amy has a duty of obedience to Producer to act in Producer's affairs only in accordance with Producer's consent. 11. \_\_\_\_\_
12. Amy is liable for loss caused to Producer by Amy's breach of that duty. 12. \_\_\_\_\_

## QUESTION 1

Alice has operated a successful athletic club for years. Although recovering from a stroke, she decided to add a spa to the club. Since she knew nothing about running a spa, she entered into a verbal arrangement with Barbara to manage it. Alice provided Barbara with an office and space to operate the spa and sell spa products and merchandise. Alice paid Barbara a regular salary plus a 10% commission on the gross sales of all spa products and merchandise she sold. She also agreed to pay Barbara \$25 for any new athletic club memberships she sold.

Barbara ordered merchandise for the spa under the "Alice's Athletic Club" name and signed Alice's name to delivery receipts. Alice was aware that Barbara conducted business in this fashion.

At the end of the first month Alice paid Barbara, in addition to her salary, the 10% commission Barbara earned selling spa products. Barbara also received \$200 for signing up eight new athletic club members. From the outset, however, the spa lost money. While some spa creditors were paid from the athletic club's account, Barbara failed to pay, or submit for payment, many spa creditor invoices. Seeing little or no prospect for improvement in the situation, Barbara quit a few months later.

Unbeknown to Alice, Barbara also worked for a major supplier of spa merchandise while she was employed by Alice. Barbara received payments from the supplier for all spa merchandise purchased for Alice's Athletic Club.

Barbara recently submitted a claim to Alice for sales commissions on the spa merchandise she sold before quitting, plus a \$300 bill for signing up twelve new members.

### QUESTIONS:

Discuss Alice's:

1. liability to the creditors;
2. legal obligation to pay the commission and the sign-up bonus Barbara claims to be owed; and
3. ability to recover the commissions and sign-up bonuses already paid to Barbara.

## DISCUSSION FOR QUESTION 1

This question deals generally with the law of agency. Agency is a consensual, fiduciary relationship between two or more parties, concerning contractual and other rights, liabilities and duties. 2A C.J.S. AGENCY § 4. An agency arises when one person (the principal) manifests an intention that another person (the agent) shall act on behalf of the principal. 2A C.J.S. AGENCY § 17. Each party must have the capacity to form the agency relationship. Although Alice has recently had a stroke, there is nothing in the facts that would indicate a lack of mental capacity to enter into this transaction.

No consideration is required to establish an agency relationship and the agency agreement does not need to be evidenced by a writing. Thus, despite that the agreement between Alice and Barbara was verbal, it is nonetheless valid.

An agent has the power to create legal relationships for her principal especially where she is a general agent authorized to do all acts connected with a particular business. 2A C.J.S. AGENCY §§ 143, 144. Here, Barbara was hired to “manage” the spa and therefore, it appears that she was vested with general agent authority. An agent's authority can be **actual** (where the parties agree that the agency exists), **apparent** (where the principal holds one out to a third party as being his agent), or **ratified** (where the principal agrees to be bound by the previously unauthorized acts of another or retains the benefit of the bargain - i.e. the merchandise). Here, the authority can be seen to be actual (Alice hired Barbara to be the manager of the spa), apparent (Alice gave Barbara an office and allowed her to run the spa), or ratified (by paying at least some of the creditors through the business account). 2A C.J.S. AGENCY §§ 146, 147, 157. Also, by allowing Barbara to accept delivery of spa products, Alice authorized those transactions. Delivery to an agent with authority to receive is equivalent to delivery to the principal. 2A C.J.S. AGENCY § 145.

Despite this, an agent must act within the course and scope of her agency. Even if Barbara was cloaked with proper authority, she owed a fiduciary duty to act in the best interests of her principal. That duty is one of **undivided loyalty**. If an agent has interests adverse to the interests of her principal (e.g. self-dealing or obtaining secret profits), she breaches this duty by failing to disclose them. A breach of the duty of loyalty also may occur where the agent acts on behalf of two different principals with adverse interests. Barbara breached this duty of loyalty by selling products for both Alice and the supplier of spa merchandise.

Where the agent has committed an intentional tort or intentionally breached her fiduciary duty, the principal may, in addition to any other remedies she has, refuse to pay the agent for any compensation related to the fiduciary breach. 2A C.J.S. AGENCY § 63, 71. Thus Alice will not be liable for any commission claimed by Barbara that was related to Barbara's breach of loyalty. Alice will be liable, however, for purchases that Barbara made from suppliers where Barbara had actual or apparent authority (or for actions Alice ratified). Alice will not have to pay for the merchandise supplied to the spa upon which Barbara collected a sales commission.

**DISCUSSION FOR QUESTION 1**  
**Page Two**

Alice will not be able to recover the \$200 bonus payment for spa memberships that Barbara sold, and she must pay the \$300 bonus payment Barbara earned before she quit. The bonus payment was related to bringing in new clients to the club and was not related to the breach of loyalty. Alice does not owe the unpaid commission for gross sales, however, and she may recover the commission already paid because of Barbara's breach of her fiduciary duty in that Barbara did not disclose that she was receiving payment from the merchandise supplier.



21202

### Essay 1 GradeSheet

Seat

--	--	--

Score

--	--

Please use blue or black pen  
and write numbers clearly

1. Agency is a consensual relationship between two or more parties. 1. \_\_\_\_\_
2. Agency relationship is a fiduciary relationship. 2. \_\_\_\_\_
3. The duty of an agent to her principal is one of undivided loyalty.  
(The Answer must use the word "loyalty" to receive credit). 3. \_\_\_\_\_
4. An agent has the power to create legal relationships for her principal or  
power to bind principal. 4. \_\_\_\_\_
5. An agent must act within the course and **scope** of her agency. 5. \_\_\_\_\_
6. Each party must have the capacity to form the agency relationship. 6. \_\_\_\_\_
7. No consideration is required to form the agency relationship. 7. \_\_\_\_\_
8. An agent's authority may be **actual (express or implied)**. 8. \_\_\_\_\_
9. An agent's authority may be **apparent (inherent)**. 9. \_\_\_\_\_
10. A principal also may subsequently **ratify** an agent's actions. 10. \_\_\_\_\_
11. Alice will be liable for payment to creditors where Barbara had agent authority. 11. \_\_\_\_\_
12. Barbara breached her fiduciary duty (of loyalty) by selling spa merchandise  
for a party other than Alice. 12. \_\_\_\_\_
  - 12a. Alice does not owe Barbara the commission Barbara claims she earned  
by selling the spa merchandise. 12a. \_\_\_\_\_
  - 12b. Alice may recover the commission already paid because of Barbara's  
breach of fiduciary duty (of loyalty). 12b. \_\_\_\_\_
13. The breach of fiduciary duty is not related to bonus payments. 13. \_\_\_\_\_
  - 13a. Bonus payments paid cannot be recovered. 13a. \_\_\_\_\_
  - 13b. Alice must pay the balance of bonuses owed. 13b. \_\_\_\_\_

## QUESTION 1

Marsha drove a truck, made routine deliveries, and undertook other driving responsibilities for Pukaberry Farms. She was responsible for maintaining her own operator casualty insurance, paying for any traffic tickets she might receive while operating a Farms vehicle, and being available “on call” for driving assignments, both on weekdays and weekends. When “on call,” Marsha had the right to refuse any Farms assignment and to drive for other companies, which she did on occasion. One weekend, Marsha was called by Farms to drive to Finleytown. She agreed to the assignment. Marsha’s instructions were “to proceed due west by way of Cootztown where she was to remain overnight.” Also, she was specifically told not to smoke while in the Farms’ truck.

The next day, Marsha drove the Farms’ truck towards Cootztown by way of Rockville, where she conducted some personal business. From Rockville, she proceeded directly toward Cootztown. Before arriving at Cootztown, Marsha stopped at a gas station to fill the truck with gasoline and get a pack of cigarettes. She purchased the cigarettes and was smoking one while standing in the parking lot of the station. Before returning to the truck, she attempted to extinguish the lit cigarette against the side of a large steel container. Unfortunately, the container held a flammable liquid and ignited, causing a fire and serious damage to the property.

### QUESTION:

Assuming that Marsha was negligent in extinguishing her cigarette, discuss whether Farms may be vicariously liable for the resultant damage to the gas station.

## DISCUSSION FOR QUESTION 1

Agents may be classified as either non-servant agents or servant (“employee”) agents. The characterization depends upon whether the principal has the right to control the conduct of the agent in performance of the principal’s business. If indeed there is such control, then the principal is a master and the agent is a servant—a servant is an agent employed by a master to perform service in affairs whose physical conduct in performance of the service is controlled or is subject to the right to control by the master. *Restatement (Second) of Agency Section 2(2)*.

Servants (“employees”), as such, are identifiable and distinguished from independent contractors who contract with the employer to do something for the employer but who are not controlled by the employer. An independent contractor is not subject to the employer’s direction or control of the physical conduct in the performance of his duties. One reason to distinguish servants from other agents is to determine the applicable rules applied to the field of the master’s tort liability for acts of his servants. By general agency rules, an innocent master may be liable for the tortious conduct of his servant—the broad principle of *respondeat superior* applies only in the master and servant relationship. That principle results in liability from unauthorized acts done within the general area of employment by the servant to fall to the master. The master, however, is liable only for those acts which are within the “scope of the servant’s employment.” Marlowe v. Bland, 69 S.E. 762 (1910), Herr v. Simplex Paper Box Corp., 198 A. 309 (1938).

Generally, a principal is not liable for the unauthorized physical torts of an independent contractor. Dumas v. Lloyd, 286 N.E.2d 566 (1972). Deciding whether one is a servant or independent contractor depends upon matters of fact relative to the amount of control one has over the other. Some factors indicative of control are: the extent of control limited by agreement; the kind of occupation, the work done, and the skill required; who supplies the instrumentalities or tools for the person doing the work, etc.

The law assumes that a master will not authorize a negligent act by his servant. The question of liability for a servant by a master lies in determining how far a servant can depart from his authorized conduct while still remaining within the scope of his employment and thereby binding the master for the servant’s actions. Usually, if the tort is minor and not a serious departure from the conduct authorized, the act will be within the scope of the servant’s employment. Magnolia Petroleum Co. v. Guffey, 102 S.W.2d 408 (1937). When vehicles are involved, this distinction is often called a “detour” versus a “frolic.” A minor deviation is called a “detour” and is normally still within the scope of employment. A major deviation is called a “frolic” and is usually outside the scope of employment. The distinction is a factual issue in most cases. Howard v. Zaney Bar, 85 A.2d 401 (1952). The fact that a servant was motivated to benefit himself will not alone prevent the deviation from being a detour versus a frolic if some purpose of the master was also the motivating cause. Bajdek v. Toren, 157 N.W.2d 437 (1968). In situations where the master’s purpose is fulfilled, but the servant deviates from a specified route or plan to meet his own purposes, the servant is no longer within the scope of employment. Kroiak v. Chicago Express, Inc., 76 A.2d 266 (1950). But,

**DISCUSSION FOR QUESTION 1**  
**Page Two**

the employee may re-enter his employment under control of the master. If the departure was not so great to be an abandonment of the service and within a permissible zone of deviation, the master is liable for the actions of the servant. For this to occur, the employee need not return to the place where he deviated from the specified route. Marriott v. National Mut. Cas. Co., 195 F.2d 462 (1952). Whether a servant is within such a zone-permissible only in the sense that he is considered still within his employment—is a factual determination and one of law for the court. Kohlman v. Hyland, 210 N.W. 643 (1926).

In the present case, first there is some question whether Marsha was a servant or an independent contractor raised by her responsibility to insure herself, pay her own traffic tickets, her right to refuse work, and to work for others. All other facts and indicia show she was under the control of Farms. Under the master/servant tests outlined above, Marsha is most likely a servant. As for the deviation from her prescribed route, she probably is only guilty of a “detour” and re-entered her employment before the accident.

With regard to smoking, Marsha was instructed not to smoke in the truck, not to not smoke. Nevertheless, there is a split of authority whether masters are generally liable for “deviation” acts such as smoking. Some courts hold that these acts are purely personal and outside the scope of employment. Herr v. Simplex Paper Box Corp., 198 A. 309 (1938), while others hold the master liable on the grounds that these acts are necessary for the convenience and comfort of the servant. DeMirjian v. Ideal Heating Corp., 278 P.2d 114 (1954). An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed. It is more likely than not that Marsha’s intent to fuel the truck was within her employment and overrides her personal deviation in smoking.

ESSAY Q1

SEAT

--	--	--

ISSUE

- |  | YES                       | NO                    |
|--|---------------------------|-----------------------|
| 1. Under the doctrine of "respondeat superior," a principal is vicariously liable for the actions of his agent, if:  | 1. <input type="radio"/>  | <input type="radio"/> |
| 1a. that agent was a servant ("employee"), not an independent contractor.  | 1a. <input type="radio"/> | <input type="radio"/> |
| 2. Lack of control is the critical distinction between Independent Contractor and a Master/Servant ("Employee") relationship.  | 2. <input type="radio"/>  | <input type="radio"/> |
| 3. Indicia of control here are:  |                           |                       |
| 3a. Whether the agent's work is distinct as compared to the principal (master/employer)'s business.  | 3a. <input type="radio"/> | <input type="radio"/> |
| 3b. Ownership/supply of the instrumentalities or tools for the agent to use in doing the work.   | 3b. <input type="radio"/> | <input type="radio"/> |
| 3c. Whether the agent is permitted to, and does in fact, provide the same services to others.  | 3c. <input type="radio"/> | <input type="radio"/> |
| 3d. Whether the agent is hired for a limited period (by the job, etc.).  | 3d. <input type="radio"/> | <input type="radio"/> |
| 4. Agent must be acting within the scope of her employment at the time to impart vicarious liability.  | 4. <input type="radio"/>  | <input type="radio"/> |
| 5. Identify issue of minor deviation ("detour") versus major or substantial deviation ("frolic").  | 5. <input type="radio"/>  | <input type="radio"/> |
| 5a. Explain or apply issue of frolic versus detour.  | 5a. <input type="radio"/> | <input type="radio"/> |
| 6. Identify abandonment of service (whether an agent who was once within the scope of employment, has left the scope of his employment, thus principal is no longer vicariously liable). | 6. <input type="radio"/>  | <input type="radio"/> |
| 7. Discuss the concept of re-entry to service, (when an agent who has once abandoned service re-enters service, and the principal resumes being vicariously liable).                     | 7. <input type="radio"/>  | <input type="radio"/> |

## QUESTION 2

Acme Moving Company, Inc. (Acme) advertises its services in a variety of publications and provides a toll-free number to contact them. Customer called Acme, and Acme sent one of its employees to Customer's home. Acme's employee assessed what the move would cost and provided a written proposal. Customer agreed to the cost and signed the proposal.

When Acme receives a proposal, Acme posts the proposal on its web site which is accessible only to moving companies used by Acme. The first company to respond is given the job. The moving company then contacts the customer directly and makes all the arrangements for the move. In this case, Interstate Carriers, Inc. (Interstate) was awarded the job.

Interstate owns its own truck and other necessary moving equipment. The Interstate employee assigned to the moving job was Moe Mover. Mover works for Interstate, is paid by the hour, and does the work according to Interstate's direction.

Pursuant to its agreement with Acme, as soon as a job is awarded, Interstate places Acme magnetic signs on its truck and gives a hat and shirt with Acme's logo to Mover to wear while moving. Also by agreement, Interstate is not permitted to collect payment from customers. Instead, Interstate is to tell customers to mail payment to Acme and, in turn, Interstate is to receive its payment for the move from Acme.

After successfully moving Customer's furniture, Customer paid Mover, in cash, for the cost of the move. Interstate had failed to tell Customer to mail payment to Acme. Mover absconded with the money.

### **QUESTION:**

Discuss the relationships among Acme, Interstate, and Mover, and whether Acme can successfully seek payment for the move from Customer or Interstate.

## DISCUSSION FOR QUESTION 2

### Creation of Agency between Acme and Interstate.

Both Acme and Interstate are independent business entities. In determining if Interstate is an employee or an independent contractor, the key element is the right to control. In determining the right to control, the factors considered include working for different employers, owning the tools of the trade, the amount of control over the specific job, payment of a flat amount for the work performed and the length of the employment. When Interstate does a job for Acme, however, it is acting on behalf of Acme by actually carrying out work that a customer hired Acme to do. By acting in this capacity, Interstate may be an agent for Acme. *See Restatement of Agency*, Section 1, which defines an agency as a relationship that arises when one person (principal) manifests an intent that another (agent) shall act on his behalf.

An agency relationship can be created expressly by agreement or by the conduct of the parties. In this case, Acme posts the jobs on its web site and the first contractor to respond gets the job. These actions establish that Acme and the responding contractor have created a consensual agency relationship with Acme as the principal and Interstate as the agent.

### Scope of Agency.

An agency relationship can be created in three different ways: (1) the principal and agent can agree that the agency exists and the scope of the authority (actual authority); (2) the principal may hold out another as his agent (apparent or implied authority); and (3) the principal may agree to be bound by previously unauthorized acts of the agent (ratification).

1. Actual authority. Here Interstate had actual authority to move Customer's furniture. The actual authority is expressed in the agreement between Acme and Interstate to move the Customer's furniture, but the agreement expressly prohibits Interstate from receiving payment. Therefore, Interstate had no actual authority to receive payment from Customer.
2. Ratification. Ratification may be shown by an express statement of the principal or it may be implied such as through silence. At no time did Acme ratify Mover's acceptance and retention of the payment for services.
3. Apparent (or implied) authority. Mover has apparent or implied authority to do all things necessarily related to the moving of the furniture. Customer could reasonably believe that Mover had authority to receive payment for the work since Customer was not told otherwise. From all appearances, Mover was a general agent of Acme. An agent has general authority to collect payment for services rendered. Acme's failure to notify Customer of the payment requirement and Mover's apparent authority to receive payment relieves Customer from any liability to Acme for further payment.

**Creation of Agency between Interstate and Mover.**

Mover is an employee of Interstate. An employee is one who is subject to the supervision of the principal in the details of the work and who is compensated on a time basis. Interstate has the right to control the work done by Mover. Mover is an employee of Interstate and is therefore an agent of Interstate. Interstate as the principal is liable for the actions of its employees under the doctrine of *respondeat superior* if the actions of the employee occurred within the course and scope of the employment. In determining if the employee was acting in the course and scope of employment, three tests are used: (i) Was the conduct of the same general nature as, or incident to the employee's job; (ii) was the conduct substantially removed from the authorized time and space limits of the employment; and (iii) was the conduct actuated at least in part by a purpose to serve the employer?

Here, Mover was acting within the course and scope of his employment when he received the payment. The conduct of receiving payment was related to the job Mover was hired to do, it was related in time and space to the job of moving Customer's property, and receiving the money for payment was actuated at least in part by a purpose to serve the employer. Since the principal is liable for the actions of its agent, Interstate is liable for the actions of Mover and Interstate is liable to Acme for payment of the money.

**ESSAY Q2**

SEAT

--	--	--

<u>ISSUE</u>	POINTS AWARDED
<b>Acme's Relationship with Interstate</b>	
1. Principal liable for torts committed by agent.	1. ○
2. Agency is a consensual relationship which arises when one person manifests an intent that another shall act on his behalf.	2. ○
3. An agency relationship may be created by express agreement or by conduct of the parties.	3. ○
4. The actions of posting the information on the web site and the acceptance by IC creates an agency relationship between IC and AMC.	4. ○
5. The scope of the agency is determined by:	
5a. Actual authority	5a. ○
5b. Implied apparent authority	5b. ○
5c. Ratification	5c. ○
6. IC had actual authority to move the furniture but not to receive payment.	6. ○
7. IC had implied authority to receive the payment.	7. ○
8. AMC may not collect a second time from Customer.	8. ○
9. Interstate may be independent contractor.	9. ○
10. The single overriding factor in determining if an independent contractor relationship exists is the right to control.	10. ○
<b>Ed's Relationship with Interstate</b>	
11. Ed was subject to the supervision of IC and therefore Ed is an employee of IC.	11. ○
12. An employer is liable for the actions of its employees under the <i>respondeat superior</i> doctrine if the action occurred within the course and scope of the employment.	12. ○
13. Respondeat superior applies only if the act is within the course and scope of employment. Three tests are used to determine course of employment:	13. ○
13a. Was the conduct of the same general nature as, or incident to the employee's job.	13a. ○
13b. Was the conduct substantially removed from the authorized time and space limits of the employment.	13b. ○
13c. Was the conduct actuated at least in part by a purpose to serve the employer.	13c. ○
14. Ed received the payment within the course and scope of his employment.	14. ○
15. IC is liable to AMC for payment.	15. ○

## QUESTION 7

Irene engaged Sal to promote and sell her new invention, the Instant Potato, a cooking device for restaurants that peels, cooks, and mashes potatoes automatically. Irene has worked with Sal in the past, and knows that Sal promotes and sells inventions nationwide and has used assistants to help him do so in the past.

Irene promised to pay Sal part of the sales price for each Instant Potato he sells. Unbeknownst to Irene, Sal asked Henry to help him and agreed to pay Henry for any Instant Potato Henry sells.

Sal sold an Instant Potato to Dave's Diner. The contract with Dave's Diner was signed by Sal and made no mention of Irene.

Henry sold an Instant Potato to Betty's Bistro. The contract with Betty's Bistro was signed by Henry and indicated that Henry was acting on Irene's behalf.

The Instant Potato had a design defect that caused the units sold to Dave's Diner and Betty's Bistro to explode.

### QUESTION:

Discuss the legal relationships among Irene, Sal, and Henry and who, if anyone, may be liable to Dave's Diner and Betty's Bistro for any damages due to the explosions.

## DISCUSSION FOR QUESTION 7

Irene and Sal have entered into a principal-agent relationship. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Stortroen v. Beneficial Fin. Co. of Colo., 736 P.2d 391, 395 (Colo. 1987) (citing Restatement (Second) of Agency § 1(1) (1957)). Creation of the agency relationship requires the consent of both parties to have the agent, Sal, act for the benefit of the principal, Irene. City of Aurora ex rel. Utility Enterprise v. Colorado State Engineer, 105 P.3d 595 (Colo. 2005). A principal is bound by acts of its agent that are within the agent's actual or apparent scope of authority. Commercial Standard Ins. Co. v. Rinn, 65 P.2d 705, 707 (Colo.1937)

Henry is an agent of Sal, and is a subagent to Irene. A subagent is "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Restatement (Second) of Agency § 5 (1957); Stortroen v. Beneficial Fin. Co. of Colo. *supra* at 395.

Here, although Irene did not give Sal express authority to hire a subagent, the authority to appoint subagents is inferred where the principal knows or has reason to know the agent employs subagents. Bloom v. Wolfe, 37 Colo. App. 407, 547 P.2d 934 (1976). Here, since Irene has worked with Sal before, knows Sal has used subagents in the past, and knows Sal is trying to promote the product nationally, Sal has implied authority to hire a subagent.

A principal is undisclosed if, when an agent and a third party interact, the third party has no notice that the agent is acting for a principal. The duty to disclose the identity as well as the existence of the principal lies with the agent. Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997, 1001 (Colo. 1998). A principal is liable to third-parties for contracts entered into by its agent. Beneficial Finance Co. of Colorado v. Bach, 665 P.2d 1034, 1036 (Colo. App. 1983). An undisclosed principal is liable upon a contract, even if it purports to be the contract of the agent, unless the terms of the contract exclude the liability of the principal. Restatement (Second) of Agency § 190 (1958).

An agent or a subagent acting within his or her actual authority is not personally liable to third-parties unless acting on behalf of an *undisclosed* principal. Leonard v. McMorris, 63 P.3d 323, 330 (Colo. 2003). "[U]nless otherwise agreed, a person making or purporting to make a contract with another as agent for a *disclosed* [emphasis added] principal does not become a party to the contract." Restatement (Second) of Agency § 320 (1958).

Here, Sal did not disclose to Dave's Diner that he was acting on behalf of Irene, and there is nothing in the facts to suggest that Dave's Diner was on notice that Sal was acting on behalf of Irene. Therefore, Irene is liable to Dave's Diner since the contract was entered into on her behalf and in the scope of Sal's agency, and Sal is also liable because he had a duty to disclose he was acting on behalf of a principal and did not.

Irene is also liable to Betty's Bistro since Henry was a subagent. Henry and Sal are relieved of liability because the contract disclosed that Henry was acting on behalf of his principal, Irene.

ESSAY Q7

SEAT

--	--	--	--

ISSUE

POINTS  
AWARDED

1. An agency relationship is created when the parties mutually consent to have the agent act on behalf of the principal. 1. ○
2. A principal is bound by acts of its agent/subagent that are within the scope of the agent's authority. 2. ○

**Dave's Diner**

3. Sal is agent of Irene. 3. ○
4. Irene is undisclosed principal of Sal. 4. ○
5. Agents are liable for contracts entered into on behalf of their principals if they fail to disclose they are acting on behalf of a principal. 5. ○
6. Sal is therefore liable to Dave's Diner. 6. ○
7. Irene is also liable to Dave's Diner because Sal was her agent. 7. ○

**Betty's Bistro**

8. Sal had implied authority to hire Henry because Irene knew that Sal employed subagents in the past. 8. ○
9. Henry is agent of Sal. 9. ○
10. Henry is a subagent of Irene. 10. ○
11. Agents are not liable for contracts entered into on behalf of their principals if they disclose they are acting on behalf of a principal. 11. ○
12. Henry is not liable to Betty's Bistro because he disclosed he was acting on behalf of Irene. 12. ○
13. Sal is not liable to Betty's Bistro because Henry disclosed he was acting on behalf of Irene. 13. ○
14. Irene is liable to Betty's Bistro because Henry is a subagent. 14. ○

## QUESTION 5

Sally owns and operates a corporation called ACME SALES. ACME actually is incorporated under the name WIDGET SALES CORPORATION, but only the name ACME SALES appears on the corporation's letterhead and all other materials.

Molly is employed by ACME as its chief financial officer (CFO). She is responsible for all of ACME's financial and tax related matters, and prepares weekly financial reports for Sally.

Molly wanted to explore whether ACME could reduce its state tax liability by enacting some accounting changes. She met with Consultant who stated that he could implement accounting changes which would do just that. Therefore, Molly entered into a service agreement with Consultant. She signed the contract "ACME SALES by Molly, CFO." Molly had no express authority to act for ACME.

Consultant and Molly know each other only as fellow members of the local Lions Club. Consultant assumed Molly had authority to enter into the contract on behalf of ACME. Prior to the signing of the contract, Consultant had no actual knowledge of any aspect of ACME SALES or its business. Several months after the contract was entered into a dispute arose.

### QUESTION:

Discuss whether the consultant, ACME, and Molly are bound by the contract.

## DISCUSSION FOR QUESTION 5

The contract was entered into between Consultant and ACME SALES. However, it was executed by Molly on behalf of ACME SALES. Therefore, Consultant is bound on the contract, but whether WIDGET SALES CORPORATION is bound on the contract depends upon whether Molly executed the contract as an agent of WIDGET SALES CORPORATION and with her authority to enter such a contract on behalf of WIDGET SALES CORPORATION. See Restatement (Second) of Agency section 140. In this case it is stated that Molly does not have express authority to execute contracts for Widget Sales Corporation. Therefore, did Molly have any authority to enter into the contract?

An agent shall have implied authority if the agent reasonably believes he/she has authority as a result of the actions of the principal. Molly is employed by ACME/WIDGET SALES as its chief financial officer (CFO) with responsibility for all financial and tax aspects of the business. Therefore, she is an agent of the corporation at least with regard to her employment responsibilities. See Restatement (Second) of Agency sections 1 & 15; H. Reuschlein & W. Gregory, Agency and partnership, section 12, at 31 (2d ed. 1990). Additionally, Molly prepares weekly reports for ACME/WIDGET SALES which summarize all financial, tax and accounting affairs of the business. A reasonable person in Molly's position would believe she had authority to enter into the contract with Consultant to minimize state tax liabilities, since such actions would be within the general scope of her responsibilities of employment. Therefore, it can be argued that Molly had implied authority to enter the contract with Consultant on behalf of ACME/ WIDGET SALES. See Restatement (second) of Agency sections 26 & 35; H. Reuschlein & W. Gregory, Agency and Partnership section 15, at 41-44 (2d ed. 1990)).

A principal can become bound on a contract if the principal subsequently ratifies the agent's act. In this case, Molly prepared weekly reports for Sally which described financial, tax and accounting matters relating to the corporation. Presumably, Sally was aware of the contract from these reports, and since the dispute arose several months after execution of the contract, she must have believed Molly had authority to enter the contract since Sally never objected to the contract. Alternatively, even if Molly acted without authority by entering the contract, it can be argued that the contract was ratified by ACME/WIDGET SALES since there was never any objection to the contract by Sally despite her knowledge about it for several months. See generally H. Reuschlein & W. Gregory, Agency and Partnership sections 27-33, at 72-77 (2d ed. 1990)). Therefore, ACME/WIDGET SALES is bound by the contract with Consultant because it was entered into on behalf of ACME/WIDGET SALES by a duly authorized agent (Molly) of the corporation acting pursuant to implied authority. Alternatively, even if Molly lacked authority, failure of ACME/WIDGET SALES to object to the contract for several months means the corporation acquiesced in or ratified the contract and is now bound by the contract.

Generally, when an agent enters a contract with a third party both the third party and the principal (on whose behalf the agent is acting) are bound by the contract. The agent who actually enters the contract is normally not bound by, nor is she a party to, the contract, provided the agent acts pursuant to authority. Nevertheless, the agent will be bound by the contract along with the principal and the third party if the agent acts on behalf of a partially disclosed or undisclosed

**DISCUSSION FOR QUESTION 5**  
**Page Two**

principal. See Restatement (Second) of Agency sections 320-322. A partially disclosed principal is one whose existence, but not identity, is known to the third party.

The contract was entered into between Consultant and ACME SALES. However, ACME SALES is not the actual name of the business since the business is a corporation that is incorporated under the name WIDGET SALES CORPORATION. The facts state that Consultant is unaware of any aspect of the business. Therefore, Consultant is unaware that ACME SALES is actually only a D/b/a for WIDGET SALES CORPORATION. Consequently, Molly is acting on behalf of a partially disclosed principal (WIDGET SALES CORPORATION) since by signing the contract "ACME SALES by Molly, CFO", she clearly disclosed she was acting on behalf of another entity but she didn't disclose that the entity was WIDGET SALES CORPORATION. She only disclosed she was acting on behalf of ACME SALES but there is no legal entity that exists under that name. Consequently, Molly is an agent executing a contract on behalf of a partially disclosed principal, and she also is bound by the contract.

ESSAY Q5

SEAT

--	--	--	--

ISSUE

POINTS  
AWARDED

- |   |       |
|---|-------|
| 1. Molly is an agent of Widget Sale Corporation but does not have express authority to enter into contracts for Widget.   | 1. ○  |
| 2. Molly has <u>implied</u> authority to enter into Contracts as an agent of Widget Sales Corporation (but not express authority).  | 2. ○  |
| 3. Implied authority is authority that the agent (not the third party) reasonably believes she has as a result of the actions of the principal.   | 3. ○  |
| 4. It is reasonable for Molly to believe she has authority to enter into financial/tax contracts with third parties due to her employment status and in light of her job duties.                          | 4. ○  |
| 5. Alternately, Widget Sales Corporation ratified the contract by not objecting to the contract despite knowledge of contract and accepting the benefits of the contract.                                 | 5. ○  |
| 6. When a principal ratifies an unauthorized transaction by an "agent" the principal becomes bound on the contract.   | 6. ○  |
| 7. An agent is generally not bound by the contract and is not a party to the contract provided the agent acts pursuant to authority (even with implied authority) and the principal is <u>disclosed</u> . | 7. ○  |
| 8. An agent will be bound by the contract along with the principal and third party if the agent acts on behalf of a partially disclosed or undisclosed principal.   | 8. ○  |
| 9. In this case, Molly acted on behalf of a partially disclosed principal (Widget Sales Corporation) since Consultant was unaware of the business relationship.   | 9. ○  |
| 10. Molly, acted as an agent for a partially disclosed principal, and therefore she is also bound on the contract.  | 10. ○ |
| 11. Consultant is bound on the contract.  | 11. ○ |