AGENCY & PARTNERSHIP

RULE-STATEMENT CHECKLIST

I. AGENCY RELATIONSHIPS

A. CREATION

GENERAL RULE Agency is the fiduciary relationship that arises when a principal manifests assent that an agent act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

- ☐ **Formation by consent.** An agency relationship is formed by the mutual manifestation of assent of principal and agent; no writing, formal agreement, or consideration is required, and the parties' subjective intent to create an agency is irrelevant so long as their conduct meets the legal definition.
- ☐ **Capacity.** The principal must have contractual capacity to be bound, but the agent need only have minimal capacity, so a minor or other person lacking full capacity may serve as an agent.
- ☐ **Writing not required.** An agency generally may be created orally, though the equal dignities rule requires the agent's authority to be in writing when the underlying transaction the agent is to complete must itself be in writing under the statute of frauds.

B. TYPES

- ☐ **Principal classifications.** A principal is disclosed when the third party knows the agent acts for a principal and knows the principal's identity, unidentified (partially disclosed) when the third party knows an agency exists but not the principal's identity, and undisclosed when the third party has no notice the agent acts for anyone.
- ☐ **Employee versus independent contractor.** An employee (servant) is an agent whose physical conduct in performing services is controlled or subject to the right of control by the principal, whereas an independent contractor is not subject to such control over the manner and means of performance.
- ☐ **Gratuitous agency.** A gratuitous agent who acts without compensation owes the same fiduciary duties as a paid agent but generally may terminate the relationship at will and is held to a standard of care measured by the circumstances.

C. TERMINATION

- ☐ **By act of the parties.** An agency terminates upon the occurrence of an agreed event or lapse of a specified or reasonable time, by mutual agreement, or by either party's manifestation to the other of a desire to end it, since each party ordinarily retains the power to terminate even if doing so breaches the contract.
- ☐ **By operation of law.** An agency terminates by operation of law upon the death, loss of capacity, or in many cases the bankruptcy of the principal or agent, or upon a change in circumstances such as destruction of the subject matter or supervening illegality that should cause the agent to realize the principal would not want the agent to continue.
- ☐ **Irrevocable agency (power coupled with an interest).** An agency coupled with an interest or given as security is irrevocable and is not terminated by the principal's attempted revocation or loss of capacity; it ends only when the interest or obligation it secures is discharged.

II. POWER OF AGENT TO BIND PRINCIPAL

A. AUTHORITY (ACTUAL)

GENERAL RULE A principal is bound on a contract made by an agent when the agent acted with actual authority, apparent authority, or the principal ratified the act; actual authority arises from the principal's manifestations to the agent.

- ☐ **Actual express authority.** Actual express authority exists where the principal, through written or spoken words or other conduct, directly tells the agent to act, and the agent reasonably understands from the principal's manifestations that the principal wishes the agent to act.
- ☐ **Actual implied authority.** Actual implied authority is authority the agent reasonably believes it has based on the principal's manifestations, including authority to take acts necessary or incidental to achieving the principal's objectives, and authority arising from custom or prior dealings between the parties.

B. APPARENT AUTHORITY

- ☐ **Apparent authority.** Apparent authority arises when a third party reasonably believes the actor has authority to act for the principal and that belief is traceable to manifestations of the principal, so the principal is bound even where the agent lacked actual authority.
- ☐ **Lingering apparent authority.** After actual authority terminates, apparent authority may continue as to third parties who dealt with the agent and were not given notice of the termination, so the principal remains bound until such notice is given.
- ☐ **Ratification.** A principal is bound as if the act had been authorized when the principal, with knowledge of the material facts, affirms a prior act done by another purporting to act on the principal's behalf, either expressly or by accepting the benefits; ratification relates back to the time of the act but cannot alter intervening rights of third parties.

C. INHERENT AGENCY POWER

- ☐ **Inherent agency power.** Inherent agency power binds a principal for acts of a general agent that usually accompany or are incidental to the transactions the agent is authorized to conduct, even absent actual or apparent authority, in order to protect third parties who deal with the agent.
- ☐ **Undisclosed principal liability.** An undisclosed principal is bound by an agent's act done on the principal's account if it is usual for such an agent to have the power to do the act, protecting third parties who reasonably deal with the agent as if the agent were acting for itself.

III. VICARIOUS LIABILITY OF PRINCIPAL FOR ACTS OF AGENT

A. RESPONDEAT SUPERIOR AND SCOPE OF EMPLOYMENT

GENERAL RULE Under respondeat superior an employer is vicariously liable for the tortious conduct of an employee committed within the scope of employment, even though the employer itself was not at fault.

- ☐ **Scope of employment.** Conduct is within the scope of employment when it is of the kind the employee is employed to perform, occurs substantially within authorized time and space limits, and is actuated at least in part by a purpose to serve the employer.
- ☐ **Frolic versus detour.** A minor deviation from the employer's business, called a detour, remains within the scope of employment, whereas a substantial departure to pursue the employee's own purposes, called a frolic, falls outside the scope and relieves the employer of vicarious liability until the employee returns to the employer's business.
- ☐ **Intentional torts.** An employer is generally not liable for an employee's intentional torts, but liability attaches where force is inherent in the work, the tort furthers the employer's business, or friction is generated by the nature of the employment.
- ☐ **Independent contractors.** A principal is ordinarily not vicariously liable for the torts of an independent contractor, except where the activity is inherently dangerous, the duty is nondelegable, or apparent authority or estoppel causes a third party reasonably to believe the contractor is an employee.
- ☐ **Direct liability.** Apart from vicarious liability, a principal is directly liable for its own negligence in hiring, training, supervising, or retaining an agent, or where the principal authorized or ratified the agent's tortious conduct.

IV. FIDUCIARY DUTIES BETWEEN PRINCIPAL AND AGENT

A. DUTY OF CARE

GENERAL RULE An agent is a fiduciary who owes the principal duties of care, loyalty, and obedience, while the principal owes the agent duties to compensate, reimburse, indemnify, and cooperate as agreed.

- ☐ **Duty of care.** An agent owes the principal a duty to act with the care, competence, and diligence normally exercised by agents in similar circumstances, and a paid agent is held to a higher standard than a gratuitous agent.

B. DUTY OF LOYALTY

- ☐ **Duty of loyalty.** An agent owes the principal a duty of loyalty to act solely for the principal's benefit in matters connected with the agency, forbidding self-dealing, competing with the principal, usurping the principal's business opportunities, and using the principal's property or confidential information for the agent's own purposes.
- ☐ **Duty to account and disgorge.** An agent must not secretly profit from the agency and must account to the principal for any material benefit received in connection with the agency, and a breaching agent may be required to disgorge such profits to the principal.

C. DUTY OF OBEDIENCE

- ☐ **Duty of obedience.** An agent owes a duty to obey all reasonable and lawful instructions of the principal within the scope of the agency, and an agent who acts contrary to such instructions is liable to the principal for resulting losses.

V. CREATION OF PARTNERSHIPS

A. GENERAL PARTNERSHIPS

GENERAL RULE A partnership is an association of two or more persons to carry on as co-owners a business for profit, whether or not the persons intend to form a partnership.

- ☐ **Formation without formalities.** A general partnership is formed when two or more persons associate to carry on as co-owners a business for profit, and it may arise without any writing, filing, or subjective intent to be partners.
- ☐ **Sharing of profits presumption.** A person who receives a share of the business's profits is presumed to be a partner, unless the profits were received as payment of a debt, wages, rent, an annuity, interest on a loan, or for the sale of goodwill.
- ☐ **Partnership by estoppel.** A person who by words or conduct represents themselves, or consents to being represented, as a partner is liable as a partner to a third party who reasonably relies on that representation and extends credit to the purported partnership.

B. LIMITED PARTNERSHIPS

- ☐ **Formation by filing.** A limited partnership is a statutory entity formed only by filing a certificate of limited partnership with the state, and it must have at least one general partner and at least one limited partner.
- ☐ **General and limited partners.** In a limited partnership the general partner manages the business and is personally liable for partnership obligations, while a limited partner is a passive investor whose liability is generally limited to the amount of the partner's contribution.

C. LIMITED LIABILITY PARTNERSHIPS

- ☐ **Formation by statement of qualification.** A limited liability partnership is created when a general partnership files a statement of qualification with the state, and the partnership must maintain a name that includes an LLP or similar designation.
- ☐ **Liability shield.** In an LLP no partner is personally liable for the partnership's obligations, whether arising in contract or tort, solely by reason of being a partner, so each partner remains liable only for the partner's own wrongful conduct and partnership assets remain available to creditors.

VI. POWER AND LIABILITY OF PARTNERS

A. AUTHORITY AND LIABILITY TO THIRD PARTIES

GENERAL RULE Each partner is an agent of the partnership for the purpose of its business, and the partnership and its partners are bound by, and liable for, acts within that agency.

- ☐ **Partner as agent.** Every partner is an agent of the partnership, and a partner's act for apparently carrying on the partnership business in the ordinary course binds the partnership unless the partner lacked authority and the third party knew or had notice of that lack of authority.
- ☐ **Joint and several liability.** In a general partnership all partners are jointly and severally liable for all obligations of the partnership, whether arising in contract or tort, though a creditor generally must first exhaust partnership assets before reaching a partner's personal assets.
- ☐ **Incoming partner liability.** A person admitted as a partner into an existing partnership is not personally liable for partnership obligations incurred before the person's admission, so an incoming partner's exposure for prior debts is limited to the person's capital contribution.
- ☐ **Outgoing (dissociated) partner liability.** A dissociated partner remains liable for partnership obligations incurred before dissociation and may remain liable for obligations incurred within two years after dissociation to creditors who reasonably believed the partner was still a partner, unless proper notice of dissociation was given.
- ☐ **Liability by estoppel.** A person who is not a partner may nonetheless be liable to a third party who reasonably relies on a representation that the person is a partner, and the actual partnership is liable where it consented to the representation.

VII. RIGHTS OF PARTNERS AMONG THEMSELVES

A. PROFITS AND LOSSES

GENERAL RULE The partnership agreement governs relations among partners, and RUPA's default rules apply only where the agreement is silent.

- ☐ **Equal profit sharing default.** Absent agreement, partners share profits equally regardless of differences in capital contributed or services performed, and losses are shared in the same proportion as profits are shared.
- ☐ **Compensation and remuneration.** Absent an agreement to the contrary, a partner is not entitled to compensation for services rendered to the partnership, except reasonable compensation for services rendered in winding up the partnership's business.

B. MANAGEMENT AND CONTROL

- ☐ **Equal management default.** Each partner has equal rights in the management and conduct of the partnership business, and absent agreement a difference arising in the ordinary course of business is decided by a majority of the partners.
- ☐ **Extraordinary matters and unanimity.** An act outside the ordinary course of business, and any amendment of the partnership agreement, requires the consent of all partners.
- ☐ **Partnership property.** Property acquired by the partnership is owned by the entity and not by the partners individually, and a partner has no transferable interest in specific partnership property; a partner's transferable interest is only the partner's share of profits, losses, and distributions.

C. DUTY OF CARE

- ☐ **Duty of care.** A partner's duty of care to the partnership and the other partners is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.
- ☐ **Duty of information and good faith.** A partner must furnish, on demand and without demand as reasonable, complete and accurate information about the partnership's business, and must discharge duties and exercise rights consistently with the obligation of good faith and fair dealing.

D. DUTY OF LOYALTY

- ☐ **Duty of loyalty.** A partner owes the partnership and the other partners a duty of loyalty to account for any benefit derived from the partnership's business or property, to refrain from dealing with the partnership as one having an adverse interest, and to refrain from competing with the partnership before dissolution.

VIII. DISSOLUTION

A. DISTINGUISHED FROM WINDING UP AND TERMINATION

GENERAL RULE Dissociation is the change in relationship caused by a partner's ceasing to be associated in the carrying on of the business, and it may or may not trigger dissolution; dissolution begins the winding up process that ultimately ends in termination.

- ☐ **Three-stage process.** Dissolution is the point at which the partnership commits to winding up its business; winding up is the process of liquidating assets and settling accounts; and termination is the end of the partnership's existence once winding up is complete.
- ☐ **Dissociation without dissolution.** Under RUPA a partner's dissociation does not necessarily cause dissolution, and where the partnership continues, it must purchase the dissociated partner's interest at buyout price rather than wind up the business.

B. RIGHTFUL VERSUS WRONGFUL

- ☐ **Wrongful dissociation.** A dissociation is wrongful if it breaches an express provision of the partnership agreement or, in a partnership for a definite term or undertaking, occurs before its expiration; a partner who wrongfully dissociates is liable to the partnership for damages caused by the dissociation.
- ☐ **Priority of distributions on winding up.** On winding up, partnership assets are first applied to pay creditors, including partners who are creditors, and any surplus is distributed to partners in settlement of their accounts; a partner whose account is in deficit must contribute the amount needed to satisfy partnership obligations.

C. GENERAL PARTNERSHIPS, LIMITED PARTNERSHIPS, OR LIMITED LIABILITY PARTNERSHIPS

- ☐ **Events causing dissolution of a general partnership.** A general partnership at will is dissolved when any partner gives notice of express will to withdraw, and a partnership for a definite term or undertaking is dissolved on expiration of the term, completion of the undertaking, unanimous consent, or an event making it unlawful to continue the business.
- ☐ **Continuation of the business.** Even after an event triggering dissolution, the partners may by unanimous vote of those who have not wrongfully dissociated waive the winding up and continue the partnership business.
- ☐ **Dissolution of limited partnerships and LLPs.** A limited partnership dissolves on the happening of events specified in its agreement, the consent of all general partners and a majority in interest of limited partners, or judicial decree; an LLP dissolves under the same rules governing general partnerships because LLP status affects only liability, not the events of dissolution.

IX. SPECIAL RULES CONCERNING LIMITED PARTNERSHIPS

A. DISCLOSURE REQUIREMENTS

GENERAL RULE Limited partnerships are creatures of statute whose formation, disclosure, and internal relations are governed by the certificate of limited partnership and the limited partnership agreement.

- ☐ **Certificate and records.** A limited partnership must file a certificate of limited partnership stating its name, the address of its office, and the name and address of its agent for service and each general partner, and must maintain required records at its designated office.
- ☐ **Name and designation.** The name of a limited partnership must contain the phrase limited partnership or an accepted abbreviation so that third parties are on notice of the entity's limited liability status.

B. THE CONTROL LIMITATION

- ☐ **Control rule under older law.** Under older limited partnership law a limited partner who participated in the control of the business could lose the liability shield and become liable as a general partner to third parties who reasonably believed the limited partner was a general partner.
- ☐ **Control rule under the revised act.** Under the revised act the control limitation is eliminated, so a limited partner is not personally liable for the limited partnership's obligations even if the partner participates in management or control of the business.

C. ECONOMIC RIGHTS OF LIMITED PARTNERS

- ☐ **Distributions and profit sharing.** Absent agreement, distributions from a limited partnership are allocated on the basis of the value of each partner's contributions, and a limited partner has no right to demand a distribution except as provided in the agreement or on dissolution.
- ☐ **Information and transfer rights.** A limited partner has the right to inspect and copy required partnership records and to obtain information regarding the partnership's affairs, and may assign the partner's transferable economic interest, though the assignee becomes a limited partner only with the consent of the other partners as provided by the agreement.