

LAW OF AGENCY

I. OVERVIEW

- A. In a few states, including California, the law of Agency is codified by statute. In the majority of states, Agency is a common law development, though statutes supersede parts of the common law of Agency. The common law continues to fill in all gaps not covered by statute. The American Law Institute's Restatement 2d of Agency, published in 1958, is an influential source of legal rules for Agency. A third Restatement of Agency is currently in the drafting process, and should be adopted within the next few years.
- B. **Testable Issue:** Agency law is "in play" whenever a corporation acts through its officers with third persons, or partners conduct business for the partnership. Agency may occur as an "implied issue" in both professional responsibility and community property.

II. AGENCY DEFINED; TYPES OF AGENCY

A. Agency Defined

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." (Restatement of Agency 2d § 1) (Emphasis added)
 - a. 3 elements required for any agency relationship:
 - 1) Consent;
 - 2) On behalf of; and
 - 3) Control
2. An agency relationship may be created although neither of the parties understand the nature of an agency or subjectively consider themselves to be a principal and an agent.
3. All of a corporation's acts—and many of the acts of other business associations—are done through agents.

B. Types Of Agency: Actual Agency, Apparent Agency and Inherent Agency

1. An actual agency relationship exists when there has been express or implied **consent** by principal and agent that agent will act on **behalf** of principal and under principal's **control**.
2. An apparent agency relationship exists when a principal has allowed a third party reasonably to believe that a non-agent has actual agency authority.
 - a. Apparent authority is also known as "ostensible" authority.
3. "Inherent agency power is a term used to indicate the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." (Restatement of Agency 2d § 8A)