Agency

Agency exists where: (1) one person (the principal) consents that another (the agent) shall act on P’s behalf and subject to P’s control and (2) A consents so to act.
Agency Defined: *Gorton v. Doty*
Idaho (1937)

*Soda Springs H.S. Cardinals*

*Coach Garst*

*Teacher Doty*
Facts of the case:

- The defendant/appellant (Ms. Doty) was a teacher at Soda Springs High School. The school’s football team was going to another school to play a game, and was to be transported in private cars.

- Ms. Doty asked the team’s coach Garst if he had enough cars; he said he needed one more. She stated that he could use her car, provided he drove it.
Issue?

- What was the issue in this case?
  - Whether an agency relationship existed between Doty and Garst

- Why did it matter?
  - As principal, Doty would be liable for the actions of her agent, Garst undertaking in the scope of the agency
The PAT Triangle

(1) Agency relationship between P and A
(2) A’s dealings with T
(3) Create legal liability of P to T (and vice-versa)
Legal standard?

- Restatement § 1: Agency is a relationship that results from:
  - The manifestation of consent by P to A that A shall act
    - on P’s behalf
    - Subject to P’s control
  - A’s consent to so act
Legal standard applied

- Agency exists if:
  1. A manifestation of consent by Doty to Garst that Garst shall act
     - on Doty’s behalf
     - Subject to Doty’s control
  2. Garst’s consent to so act

- Evidence?
  1. Doty made Garst’s driving the car a condition precedent to its use
  2. Implied from the fact that he drove car
Equal dignities rule

- Does an agency agreement have to be in writing?
- Not necessarily – depends on the **equal dignities rule**: an agency agreement only has to be in writing to be enforceable if the contracts the agent is authorized to sign thereunder must be in writing under the SOF.
By the way

They had lost 14-0

*Soda Springs H.S. Cardinals*
The agency relationship: common issues

- Does an agency relationship exist between P & A?
- If so, what consequences follow to P from interaction between A and T?
Restatement § 144: P is subject to liability upon contracts made by A acting within his authority if made in proper form and with the understanding that P is a party.
Agents acting with authority may bind principals

- Authority is the starting point for analysis of contract actions
- Authority also is an element in vicarious liability-based tort actions against the principal (esp. the “scope of employment” requirement)
Types of authority

- Actual express authority; actual implied authority; apparent authority
- **Basic categories of agency**: agency by agreement; agency by ratification or agency by estoppel.

We have cases on each, but let’s do a broad overview to get the vocabulary and concepts down.
“Actual Authority”

- Actual authority requires a “manifestation of consent” from the principal to the agent
Walmart wants Kevin Federline to be its new spokesperson for sleeveless undershirts and flip flops - they feel he will appeal to their target audience. The board of Walmart authorizes its president Lee Scott to sign Kevin to a million dollar contract and he does so. P, A, TP?

Walmart Inc. [P] authorizes its president Lee Scott [A] to negotiate the contract with Kevin Federline [TP].
**AEA: Actual express authority** is the most straightforward – it is authority that P intentionally confers on A; P **tells** A to do X, and A does X. P is bound as per §144.
When Lee Scott signs up Kevin, as per the board’s instructions, what kind of authority is created?

AEA.
**AIA: Actual implied authority [aka incidental authority]** – this seems confusing at first glance, but the basic intuition is simple. P can’t always think of everything that it would authorize A to do. If, in order to carry out P’s explicit instructions to A, A takes some other steps necessary to carry out those instructions, P is bound.
Okay, so when Lee Scott has to meet with Kevin to negotiate the contract, he has to fly to Vegas to meet him, and rent a car. Is Walmart obligated to pay for these expenses?

Sure, AIA- he can charge his plane ticket and car rental to Walmart [P] who is liable.

The line between AEA and AIA can be fuzzy. But it doesn’t really matter—the company is bound in either case.
**POLICY:** AIA carefully places the incentive to draft good instructions on the right party. If P wants A to do X, but to do it only in a certain idiosyncratic manner, AIA gives it the incentive to draft its authorization carefully. In a sense, all AIA says is that “if you don’t bother telling your agent *how* to carry out your instructions, we’ll let him or her carry them out in the usual manner—and you’ll be bound by the consequences.”

**REMEMBER:** AEA and AIA depend on communication between P and A
Apparent Authority

Manifestation by P to T
Restatement § 8: “the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other’s manifestations to such third persons.”
Restatement § 8 makes the issue of apparent authority turn on P’s “manifestations.” What does that even mean?

In practice all that is required is that the principal allow the agent to represent his or her own authority, which is a peculiar notion of “manifestation.”
AA: Apparent authority [aka ostensible authority] AA depends on the communication between P and TP (though this may be accomplished through an agent, by authorizing the agent to make any statement to TP, creating apparent authority, that the principal might have made directly).
Comment c to the Restatement (Second) of Agency § 8 states: “Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Further, the third person must believe the agent to be authorized.”
Quick test to determine actual v. apparent authority: did P communicate his consent for A to act for him to A or to TP? If to A, AEA; if to TP, AA. Typically, both AEA and AA are present.

A requirement for AA is that TP justifiably relies on P’s communication of consent for A to act on his behalf.
Example: waitress at the diner – where is the AEA?
P told her she can take orders, collect money etc.
Where is the AA?
By having her in the restaurant, with her order pad, P is telling TPs that she has AA to sell waffles.
Where is the justifiable reliance?
TP gives her the money when she gives TP the check
Suppose Kevin wants his assistant, the lovely and innocent Jamie, to negotiate and sign a contract for him with Walmart.

Now Kevin becomes P, and his assistant becomes A and Walmart becomes TP

What if Kevin faxes a letter to the assistant and a copy to Walmart stating that the assistant is authorized to contract on his behalf. What authority is created?

The letter to the assistant creates AEA, and the letter to Walmart creates AA.
What if, at the bottom of the copy of the letter faxed to the assistant only, he scrawls, “But call me first babe to get my permission.”

He has created AA with respect to Walmart through the fax with no limitation, but has *not* granted the assistant AEA to sign the contract.
What if Kevin’s assistant goes ahead and signs the contract without calling him. Is Kevin bound?

Kevin is bound by the contract through AA but the assistant has breached his fiduciary duty to Kevin, who can sue him for damages.
What if, at the bottom of his letter he faxes to Jamie and Walmart, he scrawls, “But call me first babe to get my permission.”

He has now put TP on notice that there is a limitation on the authority, so now Walmart has a duty to make sure Jamie called first.
POLICY: AA places the incentive to draft careful authorizations on the right people. If P doesn’t want to be bound by A, then P tell other people he will be bound.
If there is AA, can TP enforce the contract against P?

Sure, that’s the whole idea. There are obvious reasons why Walmart should be able to enforce its contract against Kevin (he wrote Walmart and promised he would be bound, after all).
Now let’s change the facts to remove Walmart’s copy of the letter. Now can Kevin [P] enforce it against TP?

Yes. But it’s more complicated. Kevin expressly told the assistant he would not be bound—how then can he seek to enforce the contract? In seeking to enforce the contract, he can ratify it.

*Ratification*: if P decides to adopt a contract negotiated by an unauthorized person purporting to act as an agent, then P is bound, as is the third person.
Suppose Paris Hilton (whom Kevin has never met) negotiates a contract on his behalf with Walmart. Paris sends the contract to Kevin. Kevin then contacts either Paris or Walmart, and says that he likes the contract.

There is no AA, nor AEA; but he is bound on this otherwise unauthorized act because he agreed to be bound after the fact.

If Kevin complains as soon as he hears about an unauthorized contract, he should be able to get out of it.

If he goes along with the contract, either he or Walmart should be able to enforce it—though the doctrine of ratification does in effect give Kevin an election.
Is ratification fair to the TP?

They shouldn’t even care- they are now in the contract with the P they thought they were in the whole time.
One more example

- Pam owns Whiteacre. Al is her real estate broker, her agent. Ted is an outsider who claims that Al entered into a contract on Pam’s behalf to sell Whiteacre to Ted. Suppose Ted seeks to prove the existence of authority by evidence relating to communications between Pam and Al; maybe a letter from Pam to Allen in which Pam directed Al to sell Whiteacre. What type of authority is Ted trying to establish?
  - Actual authority.
But suppose Ted seeks to establish authority by evidence relating to communications from Pam to Ted. Suppose Pam sent Ted a letter in which she said that she had ordered AI to sell Whiteacre. In this case, what type of authority would Ted be trying to establish by introducing the letter into evidence?

Apparent authority.
The difference between actual and apparent authority arises out of the way in which Ted seeks to prove that Al empowered to enter into the contract. In other words, the different categories of authority really are ways of classifying the proof the plaintiff must offer to bind the principal to the contract.
CRITICAL POINT:

- Apparent authority exists only where there is some connection between the third party and the principal.
- You must always look at how TP learned of the A’s alleged authority and ask whether P reasonably can be said to have been the source of that knowledge.
- It’s insufficient for A to make an unauthorized assertion of his authority.
- We need words or conduct by P or some business custom which leads TP to believe that A has the requisite authority.
So, for example, suppose Al tells Ted that he is Pam’s agent. Does Al have apparent authority?

Nope – it has to come from P to TP. So unless Pam told Al that he could or should tell Ted that he (Al) had authority, no apparent authority.

Could Al have actual authority?

Sure- again, it depends what Pam told Al.
Suppose Pam had been present when Al made his statement to Ted. She was silent. Now does Al have apparent authority?

Yes. By virtue of Pam’s inaction. If Pam doesn’t speak up to deny that assertion, Al has apparent authority.
Termination of authority- former Employees

- Al was Pam’s general agent (see Restatement § 3(1) and 161); Al negotiated many contracts of various sorts for Pam. Pam fires Al, terminating his actual authority.

- What should Pam do to ensure that Al no longer has apparent authority?
- Actual notice to all TP who dealt with the agent as agent;
- Constructive notice to all other TPs
Paula the Producer hypos

- Paula is a movie producer who has hired an assistant, Amy. Paula says to Amy, “Go out and hire a camera person.” How would you characterize Amy’s authority to hire?

- Amy has actual express authority to hire. She also has actual implied authority to set the terms of the employment, the compensation, etc.—as long as she acts reasonably, in accordance with customary practices.
Tom, a camera person who is desperately looking for work, calls Paula. He says, “I hear you’re going to be making another one of your fantastic movies, darling. I would just love to work for you if I can fit it into my schedule.”

Paula, who detests Tom but doesn’t like to be the one to say no to anyone, replies, “Tom darling, I would just love to be able to work with you some time, but I have turned over to Amy the job of hiring our camera person. Let’s do lunch some day. Bye now.”

Amy happens to be in Paula’s office during this conversation. Upon hanging up the phone, Paula turns to Amy and says, “Do not, under any circumstances, hire Tom. I can’t stand him.”
A week passes. Amy is having great difficulty finding a camera person. She has lunch with Tom, who convinces her that he would be perfect for the job and that he and Paula will get along just fine. He also says that he needs a decision in a hurry because of other opportunities. Amy cannot reach Paula. She offers the job to Tom, who accepts.

When Paula hears of this, she fires Amy and refuses to honor the commitment to Tom. Tom sues. Who will win?
Tom- Amy plainly did not have actual express authority to hire Tom, but equally plainly she had apparent authority. The manifestation by Paula is easy to see.
Let’s change the facts: Tom calls Paula and leaves a message saying that he would like to talk to Paula about working on her movie.

Paula tells her secretary to call Tom and tell Tom that Amy is responsible for hiring and that Tom should speak to Amy.

Paula tells Amy not to hire Tom but Amy does so anyway.
Any actual authority here?
No; Paula told Amy not to hire Tom.
How about apparent authority?

Yes; Paula did not make the manifestation of consent that Amy act as her agent herself, but her secretary, acting with authority, did so. The manifestation by the secretary is treated as a manifestation by Paula.
Let’s change the facts. Paula tells Amy to hire a camera person. Paula also tells Amy to be nice to Tom, if she should meet him, and not to mention any conversation between the two of them about him, but not to hire Tom.

Tom speaks only with Amy. Amy tells Tom that she has authority to hire a camera person; in fact Tom had already heard this. Amy hires Tom.

Apparent authority?
This one is tougher; AA comes from P to TP, but under certain circumstances, can do so via A. I think there is apparent authority. Amy, like the secretary in the immediately preceding example, had authority to establish her own apparent authority.

Restatement § 8, Comment b may help…
Restatement § 8, Comment b: “The manifestation of the principal may be made directly to a third person, or may be made to the community by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent.”
The difficulty is that the manifestation comes from Amy and it might be argued that she was obligated to convey the entire manifestation, including the direction not to hire Tom (but to be nice to him).
Okay, now let’s say Paula is an experienced movie producer, with a good reputation for producing family films. She decides that she wants to back the production of an R-rated movie, from which she thinks she can make a great deal of money.
She approaches a sleazy producer-director, Alice, who is best known for her soft core pornographic “art” films, and says, “Make this movie for me. I’ll pay you a salary and 10 percent of the gross. Do whatever you would do if you were the sole producer. Don’t let anyone know that I am involved in any way. And, by the way, do not hire Tom to do the camera work. He worked for me on a movie last year and did a terrible job.”
Alice accepts and then hires Tom. Then Paula decides not to make the movie. She pays off Alice, who leaves town. Tom finds out about the contract between Paula and Alice and sues Paula.

Who will win?
There is no actual authority to hire Tom because Paula expressly told Alice that Tom should not be hired.

There is no apparent authority because Tom was not aware of Paula’s involvement at the time he made the deal with Alice; he thought Alice was the principal and had no reason even to suspect that this was not so.
Now suppose Alice hires Tom and then tells Paula. Paula reminds Alice of her instruction not to hire Tom. Alice admits error and begs forgiveness. Paula says, “O.k., I’ll go along with your choice.”

If she then won’t pay Tom, and Tom sues, is Paula liable?
Sure – Paula has ratified the contract with Tom and becomes a party to it.