I. Agency raises legal issues
   A. between agent and principal
   B. between agent, principals and third parties

II. Creation of Agency Relationship
   A. Agency arises when agent agrees to act on behalf of principal and principal is willing to enter this relationship. The characteristics are
      1. a principal
      2. an agent
      3. mutual consent
      4. principal controls agent
      5. a fiduciary relationship
   B. Consent
      1. Both agent and principal must consent to existence of relationship
   C. Control – A principal is liable because he or she exercises control over the agent. If no control exists, the principal should not be liable for the agent’s acts.
   D. Fiduciary relationship
   E. What is not required for an agency
      1. In most cases, no writing is necessary unless the equal dignities rule applies.
      2. In general, a formal agreement is not necessary. If the parties act as agent and principal they will be treated as such under the law.
      3. A gratuitous agency is possible.

III. Duties of Agents to Principals
    Note that agents are fiduciaries but principals are not. That means that different duties are owed by an agent to a principal as compared to the duties owed a principal by an agent.
    A. Duty of Loyalty
1. An agent must act solely for the benefit of the principal in all matters connected to the agency.

2. This means the agent must put the principal first.

3. The duty of loyalty arises automatically, but the parties can agree to change it. Ex – real estate agent representing several owners trying to sell homes.

4. Outside benefits - An agent may not receive profits unless the principal approves. An agent cannot accept a gift or compensation from someone other than the principal.

5. An agent must maintain confidentiality as to all information received in the course of the agency. Likewise, the agent cannot use confidential information for his or her own benefit. This duty continues even after agency terminates.

   Note: An agent is allowed to use information based on general business knowledge or business experience acquired while in an agency relationship.

6. An agent may not compete with his principal on matters within the scope of the agency relationship. This duty ends when the agency terminates.

7. No conflicts of interest. An agent cannot serve two principals whose interests conflict unless both agree to waive the conflict.

   This is an issue when an attorney is advising two principals starting a business.

8. No secret dealing with the P. Where a principal hires an agent to arrange a transaction, the agent may not become involved in the transaction without the principal’s consent. For example, an agent hired to find investment real estate for the principal cannot sell the principal land the agent owns without disclosing that ownership.

9. An agent may not engage in inappropriate behavior that reflects badly on the principal, even when off-duty.

B. Duty to obey – an agent must obey a principal’s reasonable instructions unless those directions require the agent to act illegally or unethically.

C. Duty of care

   1. An agent has a duty to act as a reasonable person when performing agency duties.

   2. Where an agent is a professional or has special skills, a higher standard of care is required.
3. Gratuitous agents are liable only for gross negligence, not ordinary carelessness.

D. Duty to provide information

1. An agent has a duty to supply all information she has that she has reason to believe the principal would want to know. The information must be accurate.

2. In general, a principal is treated as knowing what the agent knows relevant to the agency.

E. Principal’s remedies when an agent breaches his or her duties

1. The principal can sue for damages.

2. A principal can recover profits an agent receives because of a breach of the duty of loyalty. For example, an agent who buys an investment property in violation of the duty of loyalty will be treated as holding the land for the benefit of the principal in a constructive trust.

3. The principal may rescind transactions with the agent where a duty was breached.

IV. Duties of Principals to Agents

A. Since a principal is not a fiduciary, fewer duties are owed.

B. Duty to reimburse and indemnify

1. A principal must reimburse an agent for any expenses or damages reasonably incurred in carrying out agency duties.

2. A principal must reimburse an agent for tort claims brought by third parties where the principal authorized the agent’s behavior and the agent did not realize he was committing a tort.

3. A principal must indemnify the agent for liability incurred to third parties as a result of entering a contract on the principal’s behalf. This includes attorney fees and reasonable settlements.

C. Duty to cooperate

1. A principal must furnish the agent with the opportunity to work. Where access to a location is required, the principal must allow the agent to get to the work site.

2. The principal cannot unreasonably interfere with the agent’s ability to accomplish his or her assignment.
3. The principal must honor his or her part of the contract. For example, a principal must pay an agent who has performed his or her part of the agency arrangement.

V. Terminating an Agency

Either side can end the relationship at any time for any reason. An agency terminates automatically under some circumstances.

A. Termination by acts of the parties
   1. Agency for a term.
   2. Achievement of purpose
   3. Mutual agreement
   4. Agency at will
   5. Although agency law gives either side the power to terminate at any time for any reason, contract law may provide for damages in cases other than gratuitous agency. (In a gratuitous agency, there is no contract between principal and agent, meaning no breach of contract suit is possible.)

B. Principal or Agent can no longer perform required duties.
   1. Either the principal or agent fails to obtain or keep necessary license.
   2. Bankruptcy of either party may terminate if it affects the party’s ability to perform.
      a. Bankruptcy of principal likely to terminate because it affects his or her ability to honor any contracts the agent enters and also to pay the agent.
      b. Bankruptcy of agent where partially disclosed or undisclosed principal.
   3. Death or incapacity of either party
   4. Where the agent violates the duty of loyalty.

C. Change of circumstances
   1. Change in circumstances
   2. Change of law
   3. Loss or destruction of subject matter

D. Effect of termination
1. Upon termination, agent no longer has authority to act. An agent who nonetheless continues to act is liable to the principal for damages arising as a result.

2. Principal continues to have a duty to indemnify as to expenses incurred before agency terminated.

3. An agent continues to have a duty of confidentiality.

VI. Liability (to third parties)

A. Contract liability

1. A principal is bound
   a. if the agent had authority
   b. if the principal ratifies the agent’s acts.
   c. Bound means principal liable as though he had performed the acts personally. Principal also liable for statements the agent makes to third parties, even where the agent lied.

2. Authority – A principal is bound where authority exists.
   a. Actual authority
      1. Express
      2. Implied – authority to conduct a transaction includes authority to do what is reasonably necessary to accomplish specified task. Implied authority can also exist where a principal fails to object to an action the agent repeatedly takes.
   b. Apparent authority- focus on reasonable beliefs of third party, based on acts or words of principal. (Note that where action is unauthorized, principal has right to recover from agent.)

3. Ratification
   a. Where a principal accepts the benefits of an unauthorized transaction or fails to repudiate it, the principal is bound as though the act were authorized from the beginning.
   b. Requirements for ratification.
      1. the “agent” discloses that he or she is acting as an agent.
      2. the “principal” knows all material facts.
3. the “principal” ratifies all or nothing.

4. the third party does not withdraw before the ratification.

4. Subagents
   a. An intermediary agent hires subagents for the principal.
   b. When an agent is authorized to hire subagents, the principal is liable for the subagent’s contracts just as though the sub were a regular agent.

5. Agent liability
   a. No liability where authority exists and the principal is fully disclosed.
      1. Full disclosure
      2. Be careful when signing contracts on behalf of another. (“Principal, by A, as agent”)
   b. Where a principal is partially disclosed, a third party can recover from either.
      1. Partial disclosure- book uses term “unidentified principal”
      2. The principal and agent have joint and several liability.
      3. Where agent has authority and is sued, agent can recover from principal based on the principal’s duty to reimburse and indemnify.
   c. Where a principal is undisclosed, the third party can recover from either.
      1. Undisclosed principal
      2. Joint and several liability.
      3. A third party is not bound where the principal is undisclosed if
         a. the contract specifically excludes the possibility of an undisclosed principal.
         b. the agent lies about the principal because she knows the third party would refuse to deal with him.
   d. Where an agent has no authority, the agent is liable but not the principal.

B. Tort Liability
1. A principal is liable for his or her own torts in the agency relationship.
   a. Negligence in hiring, supervision, etc.
   b. Intentional torts

2. A principal is also liable for torts committed by employees within the scope of employment or acting with apparent authority. This applies even where the principal forbade the employee from acting in the way that caused injury.

2. Respondeat superior
   a. Rationale
   b. Master/servant relationship
      i. P is liable for the torts of an employee
      ii. In general, a principal is not liable for the torts of an independent contractor. However, a principal can be liable where he or she was negligent in hiring or supervising the contractor
      iii. In determining whether someone is a servant(employee) or independent contractor, various factors are considered, the most important being control.
         (a) who controls the details of the work
         (b) who supplies the tools and place of work
         (c) length of service
         (d) method of compensation (by time or by the job)
         (e) are the parties in different lines of business
         (f) does the agent work full-time for the principal
         (g) is the principal in business?
         (h) do the parties believe they have an employer-employee relationship?
   c. Scope of employment – Principals are liable only for torts committed by a servant within the scope of employment.
      i. A servant is acting within the scope of employment if the act
         (a) is one servants generally are responsible for
(b) takes place during hours the servant generally is employed.

(c) is part of the principal’s business

(d) is similar to what was authorized

(e) is one for which the principal supplied the tools.

(f) is not seriously criminal

ii. In general authorization is irrelevant. An act is within the scope of employment even if forbidden, provided it is of the same general nature as what was authorized or is incidental thereto.

iii. Frolic v. detour

d. A principal is not liable for intentional torts of the servant unless the servant was motivated, at least in part, by a desire to serve the master or the employer was negligent in hiring or supervising the employee.

e. Nonphysical injury is generally treated more like a contract claim, meaning the principal is liable if express, implied or apparent authority existed.

3. Agents are liable always for their own torts.

a. Where both are responsible, liability is joint and several.

b. A principal who suffers a loss because of an agent’s tort may recover from the agent. (Recall discussions of duties owed by agent.)