



## Restat 3d of Agency, § 1.01

**Restatement of the Law, Agency 3d - Official Text > Chapter 1- Introductory Matters > Topic 1- Definitions and Terminology**

### § 1.01 Agency Defined

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**Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.**

#### COMMENTS & ILLUSTRATIONS

##### Comment:

*a. Scope and cross-references.* Comment *b* discusses various usages of agency terminology. Comment *c* is a general discussion of the defining elements of agency. Comment *d* discusses how a relationship of agency is formed. It is not necessary that the agent manifest assent to the principal. See Comment *c* and § 3.01, Comment *b*. Comments *e-h* discuss the elements of agency in more detail. Section 1.02 states the principle that it is a legal conclusion whether a particular relationship is one of agency. Section 1.03 defines manifestation. Section 1.04 defines and distinguishes among some common types of agents and principals.

*b. Usage.* This definition states the elements of the relationship widely referred to as "common-law agency" or "true agency." The definition excludes cognate relationships in which, although the legal consequences of one person's actions are attributed to another person, one or more of the defining elements of agency are not present. See §§ 3.12-3.13, dealing with powers given as security and irrevocable proxies, and § 8.09, Comment *d*, discussing the duties of an escrow holder. Nonetheless, such cognate relationships are often grouped with relationships of common-law agency. More generally, legal usage varies. Some statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.

Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, "agency" often means an actor's capacity to assert control over the actor's own intentions, desires, and decisions. In economics, definitions of principal-agent relations encompass relationships in which one person's effort will benefit another or in which collaborative effort is required. In commercial settings, the term "principal" is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another. It is also common usage to refer without distinction to parties who serve any intermediary function as "agents." Not all such situations, however, meet the legal definition of an agency relationship. Moreover, the legal consequences of agency may attach to only a portion of the relationship between two persons, a fact that dictates care in using the term "agency relationship." Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not. It is also possible for the same person to be a principal as well as an agent in an interaction with a third party. The Introduction states the coverage of this Restatement.

*c. Elements of agency.* As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person's consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process. See Comment *d* for further discussion of consent.

## Restat 3d of Agency, § 1.01

The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation. The terminology of "power" is neutral in that it states a result but not the justification for the result. An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power. Actual authority is defined in § 2.01. Actual authority does not exhaust the circumstances under which the legal consequences of one person's actions may be attributed to another person. An agent also has power to affect the principal's legal relations through the operation of apparent authority, as stated in § 2.03. Additionally, a person may be estopped to deny the existence of an agency relationship, as stated in § 2.05. Separately, a person may, through ratification, create the consequences of actual authority with respect to an actor's prior act. See Chapter 4.

Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties. Some industries make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. Some common forms of agency have a personal and noncommercial flavor, exemplified by the relationship created by a power of attorney that confers authority to make decisions regarding an individual's health care, place of residence, or other personal matters. See Comment *d*. On durable powers of attorney, see § 3.08(2).

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties--the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 27 (2d ed. 1914). It is important to define the concept of "dealing" broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not "deal" in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent. The adviser may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an agent. The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer's organization. In contrast, the common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. This Restatement does not use the term "independent contractor," except in discussing other material that uses the term. Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal. The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts. The metaphor of identification, which merges an agent's distinct identity with the principal's, is potentially misleading and not helpful as a starting point for analysis.

A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. A principal's manifestation may be such that an agency relationship will exist without any communication from the agent to the principal explicitly stating the agent's consent. If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent

## Restat 3d of Agency, § 1.01

A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal. For further discussion of control, see Comment *f*. The common-law definition of agency presupposes a principal who exists and who has legal capacity throughout the duration of the relationship; otherwise the principal will not be able on an ongoing basis to assess the agent's performance in relationship to the principal's interests. See § 3.04. The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. Comments *d* and *f* discuss, inter alia, the tension between these elements of the common-law definition and durable powers of attorney. The chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf.

*d. Creation of agency.* Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other. In contrast to the formulation in Restatement Second, Agency § 1, the definition in this section refers to a principal's manifestation of "assent," not "consent." The different terminology is intended to emphasize that unexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent. See *Restatement Second, Contracts* § 17, Comment c. If an agent is otherwise on notice of the meaning the principal ascribes to a particular expression, that meaning is operative as between principal and agent. See § 1.03, Comment e. A principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific. See § 1.03, which defines manifestation.

As to the agent, a relationship of agency as defined in this section requires that the agent "manifests assent or otherwise consents so to act," in contrast to the requirement in Restatement Second, Agency § 1 that the agent "consent." The formulation in this section, consistent with Restatement Second, recognizes that it is not necessary to the formation of a relationship of agency that the agent manifest assent to the principal, as when the agent performs the service requested by the principal following the principal's manifestation, or when the agent agrees to perform the service but does not so inform the principal and does not perform. It is a question of fact whether the agent has agreed.

Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract. See *Restatement Second, Contracts* § 71.

In some instances, however, relationships that are less than fully consensual and, therefore, not common-law agency relations trigger legal consequences equivalent to those of agency. A notable instance is a durable power of attorney. The basic presupposition that agency is a consensual relationship that vests in the principal the right of interim control over the agent is at odds with the relationship between principal and agent created by a durable power of attorney, a relationship in which the agent's power survives or is triggered by the principal's loss of mental competence. Once the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though in creating the power the principal consented initially to the mechanism that led to the later and less consensual relationship with the agent. Although no res exists, the relationship then resembles a trust. Durable powers are treated in § 3.08(2) and in Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *l*.

Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties' consent is subject to constraints imposed by law or by legal or regulatory institutions. As a consequence of such constraints, the decision to appoint a particular agent or to continue the agency relation is not within the parties' exclusive control. For example, the law implies a principal-agency relationship between the owner of a lost item and government officials who recover it. Additionally, court-appointed counsel represents the client, notwithstanding the client's objection, and counsel's withdrawal from representation in

## Restat 3d of Agency, § 1.01

litigation requires the court's assent. All attorneys are subject to ethical responsibilities that constrain the authority of their clients as principals.

Likewise, the legal consequences resemble those of common-law agency when an "agent's" powers are specified by operation of law, not by the parties. A statutory designation of the Secretary of State as agent to receive service of process is not a consensual choice of agent on the part of the principal or specification of the agent's powers but follows a choice to carry on activity in a particular state. In maritime law, under the 1989 International Convention on Salvage, a ship's master has authority to contract for salvage operations on behalf of the vessel's owner, and the master and the owner have authority to conclude such contracts on behalf of the owner of property on board the vessel. Additionally, the law may mandate that an agent be used to perform a particular function, such as the federal statutory requirement that stock in an employee ownership plan be held and voted by trustees.

*e. Fiduciary character of relationship.* The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word "fiduciary" appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.

As a general matter, the term "fiduciary" signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. See Comment *g* for a discussion of "acting on behalf of." See § 8.01 for an agent's basic duty of loyal action. Any agent has power over the principal's interests to a greater or lesser degree. This determines the scope in which fiduciary duty operates. An agent has such power even when the principal holds a superior economic position or possesses greater expertise or acumen.

To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element. The obligations that a principal owes an agent, specified in §§ 8.13-8.15, are not fiduciary. In addition to an agent's fiduciary duties, the agent has a duty to fulfill specific contractual undertakings that the agent has made to the principal and to third parties, as well as to fulfill any duties imposed on the agent by law. Correlatively, a principal can owe duties created by contractual undertakings to the agent. Chapter 8 states the specific duties owed by the agent and the principal. Section 8.06 governs consent by the principal to conduct that would otherwise breach the agent's duties of loyalty.

Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship. Fiduciary duty does not operate in a monolithic fashion. Most questions concerning agents' fiduciary duty involve the agent's relationship to property owned by the principal or confidential information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity. It is open to question whether an agent's unconflicted exercise of discretion as to how to best carry out the agent's undertaking implicates fiduciary doctrines.

Three types of consequences result from an agent's fiduciary duties to the principal. First, if an agent breaches a fiduciary duty of loyalty, distinctive remedies are available to the principal. Moreover, burdens of proof are often allocated differently in cases alleging breach of fiduciary obligation than in civil litigation generally. A different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty. These points are elaborated in §§ 8.01-8.06.

Second, the content of an agent's duties to the principal is distinctive. Unless the principal consents as stated in § 8.06, an agent may not use the principal's property, the agent's position, or nonpublic information the agent acquires while acting within the scope of the relationship, for the agent's own purposes or for the benefit of another. Similarly, unless the principal consents as stated in § 8.06, an agent may not bind the principal to transactions in which the agent deals with the principal on the agent's own account without disclosing the agent's interest to the principal. Without the principal's consent, an agent may not compete with the principal as to the subject matter of the agency, nor may the agent act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed. See §§ 8.01-8.06 for a detailed treatment of these duties.

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