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CALIFORNIA BUSINESS ASSOCIATIONS OUTLINE

I. Corporations

A corporation is a legal entity distinct from its owners and may be created only by filing certain documents with the state.

A. General Considerations
   i. Ownership
      1. usually freely transferrable
   ii. Taxation
      1. C Corporation
         a. Taxed as an entity distinct from its owners
         b. Therefore, distributions to shareholders are taxed a second time as income to the shareholder
      2. S Corporation
         a. Taxed like a partnership, but retain other partnership advantages (profits flow through)
         b. Restrictions on S Corp
            i. Stock held by no more than 100 persons
            ii. Shareholders are individuals
            iii. One class of stock
            iv. No foreign shareholders

B. Promoters
   i. Promoters are *joint venturers* who occupy a fiduciary relationship to each other
      1. they breach the fiduciary duty by pursuing secret personal gain at expense of fellow promoters
   ii. Promoters seek capital and other instrumentalities that will be used by the corporation <u>after its formation</u>
   iii. Promoters' Relationship with the Corporation
      1. Promoter has *duty of fair disclosure and good faith*.
      2. Breach of Fiduciary Duty arising from Sales to Corp
         a. Must disclose all material facts if profits from sale of material to corp
         b. If approved by ind board, then duty met
         c. If approved by non-ind board, not liable if subscribers to corp knew the facts
      3. Fraud
      4. State or Federal securities law violations

iv. Promoters' Relationship with 3d parties – PreIncorp agreements
    1. personal and joint and several liability for all obligations incurred knowing the corp was not yet in existence
        a. liability continues after corp formed, even if corp *adopts* the contract
        b. however, an express or implied **novation** will cut off contract liability
    2. NB: if contract *relieves* promoter of liability upon formation of corp, this is not a contract, but rather an *offer* to a corp that was not yet in existence

C. Formation
    i. All corporations are created under state statute
    ii. Corporations may be *de jure* or *de facto*
    iii. De jure corporation
        1. Def: a corporation formed in accordance with the law
        2. The incorporators of the corp must comply with all statutory requirements:
            a. File *articles of incorporation* with the sec of state
            b. The *article of incorporation* must include:
                i. Name of corp
                ii. Number of shares authorized to issue
                iii. Name and address of registered agent
                iv. Name and address of each incorporator
            c. Corporate <u>existence</u> begins upon filing; filing is conclusive proof of corporate existence
        3. By default, de jure corporations are organized for "any lawful business" and may undertake "any act" necessary or convenient for that purpose
        4. *Ultra Vires* Acts
            a. If a corp has narrowed its business purpose in its *articles*, it may not undertake any unrelated acts.
            b. At CL, ultra vires acts were void and unenforceable
            c. Modernly, under RMBCA[1], such acts are enforceable except in three potential situations:
                i. A *shareholder* may sue to *enjoin* a corp's proposed ultra vires act;
                ii. The *corp* may sue an officer or director for *damages* for approving an ultra vires act; and
                iii. The *state* may bring an action to *dissolve* a corp for committing an ultra vires act.
        5. After filing articles of incorp, corp should have an organizational meeting to:
            a. Elect directors
            b. Appoint officers
            c. Adopt bylaws

[1] Revised model business corporation act

            i. Adopted by directors
            ii. Modified/repealed by majority vote of directors OR shareholders
    iv. De facto corporation
        1. when a corp is not properly incorporated, it becomes a de facto corp or a corporation by estoppel
        2. Common law de facto corp:
            a. A statute under which the entity could have been validly incorporated;
            b. Colorable compliance with the statute and a good faith attempt to comply; and
            c. The conduct of business in the corporate name and the exercise of corporate privileges
        3. RMBCA
            a. Anyone acting on behalf of a corp *knowing* that there has been no incorporation is liable for all liabilities created while so acting
        4. CL estoppel corporation:
            a. Persons who dealth with the entity as if it were a corp will be estopped from denying the corp's existence
            b. Doesn't apply to TORT victims
    v. Neither de jure, de facto, nor estoppel
        1. courts will generally only hold ACTIVE business members personally and jointly and severally liable

D. Piercing the Veil
    i. Doctrine whereby courts disregard the corporate entity and hold individuals liable for corporate obligations
    ii. Elements justifying piercing:
        1. alter ego;
            a. either ignoring corporate formalities or
            b. shareholders treat corporate assets as their own; AND
            c. some basic injustice occurs
        2. inadequate capitalization at time of formation; and
        3. avoidance of existing obligations, fraud, or evasion of statutory provisions
    iii. Liability once pierced
        1. only shareholders who were active in the operation of the business
            a. liability is personal and joint and several
        2. generally easier to pierce in tort cases, rarely in contract cases
    iv. Who may pierce
        1. generally only creditors (including tort claimants)
        2. shareholder rarely win a piercing action

E. Corporate powers
    i. Share re-purchase
    ii. Gifts and loans
    iii. Asset transfer

iv. Ultra vires acts

F. Directors

i. Election, Resignation, Removal

1. directors are responsible for the management of the business and affairs of the corporation
2. need not be shareholders, unless req'd by articles/bylaws
3. Elections
    a. There need only be one director.
        i. Articles/bylaw may require more
    b. Elected at each annual shareholders' meeting
    c. 9 or more directors may be divided into equal groups with staggered terms of 1 to 3 years.
4. Removal
    a. May be removed by shareholders with or without cause

ii. Transactions involving

iii. Compensation

1. may set own compensation, unless articles/bylaws prohibit
2. unreasonable compensation will be a breach of fiduciary duty

iv. Inspection rights

v. Meetings and actions

1. may act at regular or special meetings
2. Notice
    a. Regular meetings: none
    b. Special meetings: 2 days' written notice
3. Quorum
    a. A majority of directors constitutes a quorum, unless articles/bylaws provide otherwise
    b. Unlike shareholders, a director can *break* the quorum by withdrawing from the meeting
4. Approval of Action
    a. If quorum, then resolution approved by a majority of directors present
    b. Unanimous written consent also works

vi. Fiduciary obligations

1. Duty of Care
    a. Directors have a duty to manage to the best of their ability. They must discharge their duties:
        i. In *good faith*;
        ii. With the care that an *ordinarily prudent person* in a like position would exercise under similar circumstances; and
        iii. In a manner the directors reasonably believe to be in the *best interests of the corporation*.
    b. This is known as the **business judgment rule** at CL
        i. If directors follow it, no liability for corporate decisions

c. Burden on challenger to show directors didn't meet the standard
d. Directors' reliance
    i. In making their judgment, directors may rely on:
        1. corporate officers or employees whom the direc reasonably believes to be reliable and competent;
        2. legal counsel, accounts, etc as to matters the direc believes within such person's professional competence; or
        3. a committee of the board of which direc is not a member if direc reasonably believes the committee merits confidence

2. Duty of Loyalty
    a. <u>Conflicting Interest Transactions</u> exist where Director or a related person is either:
        i. A party to the transaction;
        ii. Has a beneficial interest in, or closely linked to, the transaction that the interest would reasonably be expected to influence the director's judgment if she were to vote on the action; or
        iii. Is a director/general partner/agent/employee of another entity with whom corp is transacting business <u>and</u> the transaction is of such importance that it would in the normal course of business be brought before the board
    b. Upholding the Transaction:
        i. Transaction was approved by a majority of disinterested directors after *all material facts* have been disclosed to the board;
        ii. Transaction approved by a majority of the votes entitled to be cast by disinterested shareholders after *all material facts* disclosed; or
        iii. Transaction, judged according to circumstances at the time of commitment, was *fair to the corporation*
            1. Fairness factors:
                a. Adequacy of consideration
                b. Corporate need to enter into the transaction
                c. Financial position of the corporation
                d. Available alternatives
    c. <u>Corporate Opportunity Doctrine</u>
        i. Directors' fiduciary duties prohibit them from diverting a business opportunity from their corporation to themselves without first giving their corporation an opportunity to act.

ii. Elements:
1. corporation must have an interest or expectancy in such opportunity
2. should be in the corp's "line of business"

iii. Corp's lack of financial ability is not a defense

iv. Remedy
1. turn over profits to corp; or
2. force director to turn over opportunity, under constructive trust doctrine, to corp for amount director paid for it

3. Delegation of authority
a. Board may create one or more committees with 2 or more members of board
i. The committee acts for board
ii. Board remains responsible for supervision
b. Board may also delegate authority to officers

4. Shareholder relations

vii. Director Liability
1. personal liability may be limited or eliminated by articles, EXCEPT, cannot limit:
a. liability for financial benefits received by director to which he was not entitled;
b. harm intentionally inflicted on corp or shareholders;
c. for unlawful corporate distributions; or
d. intentional violation of criminal law

viii. De facto officers and directors

G. Officers
i. Number of and duties of are determined by bylaws
ii. Powers
1. ordinary rules of agency determine powers
iii. Standard of conduct
1. Officers must carry out their duties
a. in good faith,
b. with the care an ordinarily prudent person would exercise in similar circumstances; and
c. in a manner they reasonably believe to be in the best interests of the corporation
iv. Resignation/Removal
1. may resign at any time
2. corp may remove with or without cause
3. Breach of K
a. If removal or resignation is a breach, non-breaching party may be entitled to damages

H. Indemnification of Directors, Officers, and Employees
i. Mandatory Indemnification

1. unless limited by article, corp must indemnify a director or officer who *prevailed* defending a proceeding against the dir/off

ii. Discretionary Indemnification

1. corp *may* indemnify a director for reasonable expenses incurred in *unsuccessfully defending* a suit brought against the director on account of the director's position if:
    a. director acted in good faith
    b. believed his conduct was:
        i. in the corp's best interests
        ii. not opposed to the corp's best interests; or
        iii. not unlawful
2. EXCEPTIONS
    a. No indemnification in actions where director is found liable to the corp; or
    b. In an action charging that the director received an improper benefit
3. Who determines indemnification?
    a. Disinterested majority of board; or
    b. Disinterested shareholders
4. Officers
    a. May be indemnified to the same extent as a director
5. Employees
    a. No limit on corp's power to indemnify agents and employees

I. Shareholders

i. Rights

1. Meetings and elections
    a. Convening meetings
        i. Annual meetings
        ii. Special meetings
            1. called by
                a. board of directors;
                b. holders of 1/10 or more of voting shares; or
                c. other persons so authorized by articles or bylaws
    b. Notice
        i. Shareholders must be notified not less than 10 or more than 60 days before a meeting
        ii. Notice can be waived in writing or by attendance
    c. Action without Meeting
        i. Possible by <u>unanimous written consent</u> of all shareholders entitled to vote
2. Voting
    a. Shareholders of record (ie, not more than 70 days before meeting) may vote

b. Proxies
    i. Valid for 11 months unless they otherwise provide
    ii. Revocable by shareholder UNLESS
        1. state that it is irrevocable; **and**
        2. is coupled with an interest or given as a security
    iii. Rules for soliciting proxies:
        1. full and fair disclosure re: management-submitted proposals;
        2. material misstatements, omissions, or fraud prohibited in solicitation materials; and
        3. management must include proponents explanation of proposals
c. Quorum
    i. A majority of outstanding shares entitled to vote UNLESS articles or bylaws require a greater number
d. Percent of vote needed to succeed:
    i. Director elections
        1. Directors are elected by a *plurality* of the votes cast
    ii. Ordinary matter
        1. Must be approved by a *majority* of all votes cast *at the meeting*
    iii. Fundamental change
        1. Must be approved by a *majority of all outstanding* shares
e. Voting Trust
    i. A written agreement of shareholders under which all of the shares owned by the parties to the agreement are transferred to a ttee who votes the shares and distributes the dividends in accordance with provisions of the agreement
    ii. A copy of the trust and names and addresses of all beneficial owners must be given to corp
    iii. Valid for a max of 10 years, unless extended by new agreement
f. Voting agreement
    i. No trust, mere written and signed agreement to vote a certain way
    ii. Unless provided otherwise, it is specifically enforceable
    iii. No need to file with corp and not subject to time limit

3. Inspection
    a. Qualified Right (under RMBCA)

            i. Shareholder may inspect corporate records upon *5 days' notice* and stating a *proper purpose*
        b. Unqualified Right for Certain Records
            i. A shareholder may inspect the following records *regardless of purpose*:
                1. articles of inc and bylaws
                2. board resolutions re: classification of shares
                3. minutes of shareholder meetings for past 3 years
                4. communications sent by corp to shareholders during last 3 years
                5. list of names and business addresses of the corp's current directors and officers
                6. copy of corps most recent annual report
    4. Dividends/Distributions/Share Redemption
        a. Rights to distributions
            i. At least one class of shares must have right to the corp's net assets upon dissolution
            ii. Decision to declare a distribution
                1. *solely within the directors' discretion*
                2. UNLESS, either
                    a. The corp would be unable to pay its debts as they become due in the usual course of business; or
                    b. The corp's total assets would be less than the sum of its total liabilities
                3. NB: articles may restrict right to declare dividends
            iii. Contractual Rights re: Distributions
                1. some share classes may not have right to distributions
                    a. preferred shares have right to receive distributions before common shares
                        i. cumulative vs. noncumulative shares
            iv. Who may receive distributions
                1. shareholders on recod date
        b. Liability for Unlawful Distributions
            i. Director assenting to a distribution in violation of these rules is personally liable for distribution in excess of what could have been lawfully distributed
            ii. Not liable if good faith reliance on financial statements OR info from employees/attys, etc
ii. Shareholder Suits
    1. Direct Actions

a. For breach of fiduciary duty owed to shareholder by officer or director
b. Must ask:
i. Who suffered damage (shareholder/corp)?
ii. To whom was duty owed (shareholder/corp)?

2. Derivative Actions
a. Shareholder asserts the corp's rights rather than his own rights
b. Recovery goes to corporation, even though corporation named as a defendant
c. Requirements:
i. Standing: own shares at time of wrong (or have shares transferred to him by operation of law that were owned by transferor at time of wrong)
ii. Demand
1. written demand on corp to take action
2. 90 days must elapse between demand and derivative action UNLESS
a. shareholder has been earlier notified that corp rejects demand; or
b. irreparable injury to corp would result in waiting for 90 days to pass
d. Dismissal
i. A court may dismiss the suit if a majority of directors with no personal interest in the controversy find
1. in good faith
2. after reasonable inquiry
3. that the suit is not in the corp's best interests
ii. BOP to avoid dismissal
1. shareholder must show not made in good faith after reasonable inquiry; or
2. corp must show if directors had a personal interest in controversy
iii. Settlement/discontinuance
1. of a derivative action requires court approval

iii. Fiduciary obligations
1. General RULE: no fiduciary duty to the corp or two fellow shareholders

iv. Shareholder liability
1. Pierced corporate veil
2. absence of de facto corp
3. if shareholders enter into a management agreement, then shareholders have liabilities that a director has
4. Close corporation

            a. Shareholders generally held to have duty of loyalty and utmost good faith as partners owe to each other
        5. Controlling shareholder
            a. Must refrain from using his control to cause the corp to take action that unfairly prejudices *minority shareholders*
    v. Restrictions on share transfer
        1. such restrictions must be *reasonable*
        2. a 3d party purchaser of stock if bound by the restriction if:
            a. restriction's existence is *conspicuously noted* on the certificate; or
            b. had knowledge of restriction at time of purchase

J. Fundamental Changes in Corporate Structure
    i. General procedure for fundamental changes
        1. board adopts a resolution;
        2. written notice given to shareholders;
        3. shareholders approve changes by a majority of votes entitled to be cast; and
        4. changes in the form of articles are filed with the state
    ii. Amendments to Articles of Incorporation
        1. can insert any provision that would have been lawful in original articles
        2. "housekeeping" changes: can be made without shareholder approval
    iii. Merger, Share exchange, and Conversion
        1. merger
            a. def: two corps blend, and one survives and the other ceases to exist
            b. Types
                i. No significant change to surviving corp; and
                1. shareholders of *surviving corp* need not approve merger if:
                a. articles will not differ after merger;
                b. each shareholder will hold the same number and type of shares; and
                c. voting power of shares issued due to merger will not be more than 20% of voting power
                ii. Short form merger of a subsidiary
                1. if parent corp owns 90% or more of subsidiary corp, then it may merge *without* approval of shareholders of either corp
        2. share exchange
            a. def: corp purchases all outstanding shares in one or more classes of shares of a corp
            b. only shareholders of corp whose shares will be acquired need vote

3. conversion
    a. def: entity changes form to another type of biz entity
    b. same procedure as merger where corp doesn't survive

iv. Dispostion of property outside usual and regular course of business
1. sale, lease, exchange, or other disposition of
    a. all or substantially all of a corp's property
    b. outside usual and regular course of business
    c. is a fundamental corporate change
2. Therefore, corp must follow the fundamental change procedure

v. Protection against and Limitations on fundamental changes
1. Dissenting shareholder's appraisal remedy
    a. Certain shareholders have right to dissent and have shares appraised and purchased by corp
2. Who has the right?
    a. Any shareholder entitled to vote on a plan of merger;
    b. Any shareholder of the subsidiary in a short form merger;
    c. Shareholders of corp whose shares are being acquired in a share exchange;
    d. Shareholder entitled to vote on disposition of all or substantially all corporate property;
    e. Shareholder whose rights will be materially and adversely affected by an amendment to the corp's articles
3. Procedure
    a. Corp gives notice to shareholders that proposal creates dissenters' rights
    b. Shareholder must give written notice of intent to demand payment before a vote is taken
    c. If action approved, corp must notify all dissenters within 10 days
    d. Shareholders then demand payment
    e. Corp must pay what it estimates is the FMV of shares plus interest
    f. Shareholder may file notice of dissatisfaction within 30 days and file his own estimate of value
    g. If corp doesn't want to pay, it must file a court action within 60 days for a judicial determination of value

vi. Tender Offers
1. Def: offers by a bidder to purchase shares from shareholders of a target corporation
2. Federal Regs: the Williams Act
    a. <u>Regulation of the bidder</u>: If bidder will own more than 5% of corps shares, but file a 14D disclosing:
        i. Identity, source of funds, past dealings with target, and plans concerning target
        ii. Bidder's financial statements if bidder is not an individual; and

iii. Any arrangements with persons holding important positions in the target

b. <u>Regulation of the offer</u>

i. Must be held open for 20 days

ii. To all members of the class of securities sought

iii. Shareholders have right to withdraw tendered shares while offer remains open;

iv. If offer over subscribed, bidder must purchase shares on a pro rata basins from among shares deposited during first 10 days of offer;

v. If offer price increased, must pay it to all tendering shareholders

c. <u>Regulation of the target</u>

i. Must either give shareholders a recommendation; or

ii. Explain why it can't make a recommendation

3. State Regs: Control Share Acquisition Statutes

a. Where a designated stock ownership threshold is crossed, the purchased shares have NO voting rights, UNLESS

b. Holders of a majority of disinterested shares voted to grant such rights

K. Federal securities laws

i. Rule 10b-5: no fraud in connection with sale/purchase of security and no insider trading

1. Elements permitting recovery for fraud:

a. Fraudulent conduct

i. Must be material to investment decision

ii. Intent to deceive, manipulate, or defraud

b. In connection with purchase or sale of security by plaintiff

i. (limits potential plaintiffs; passive investors can't sue)

c. interstate commerce

i. virtually a given

d. reliance by P on D's statement

e. Damages

i. Avg share price 90 days after corrective info *less* Price paid/received

2. Insider trading

a. A person violates 10b-5 if

i. By trading

ii. He breaches a duty of trust and confidence owed to

1. the issuer;

2. shareholders of the issuer; or

3. in the case of misappropriators, another person who is the source of the material nonpublic information

b. Who can be liable?

            i. Insiders
            ii. Tippers/Tippees
                1. tipper: improper purpose
                2. tippee: tipper breached duty and tippee knows it
            iii. Misappropriators
    ii. Section 16(b)
        1. applies only to publicly traded corps
            a. those with $10 million in assets and 500 or more shareholders in any class; or
            b. whose shares are traded on a national exchange
        2. Requires director, officer, or shareholder **owning more than 10%**[2] of a class of stock to
            a. Surrender profits earned by
            b. Purchase and sale or sale and purchase
            c. Of any equity security
            d. Within a 6 month period
        3. Strict liability
            a. To discourage insider trading
    iii. Sarbanes-Oxley Act of 2002
        1.
L. Dissolution
    i. Voluntary Dissolution
        1. dissolution by Incorporators or Initial Directors
            a. may dissolve by majority vote and delivering articles of dissolution to state if
                i. shares have not yet been issued; or
                ii. business has not yet been commenced
            b. all corporate debts must be paid before dissolution
            c. if shares have been issued,
                i. any assets remaining after winding up must be distributed to shareholders
        2. dissolution by corporate act
            a. follow fundamental change procedure
        3. Effect of Dissolution
            a. Corp continues its corporate existence but is not allowed to carry on any business other than winding up and liquidating
            b. Claims against corp
                i. May be asserted after dissolution to the extent of:
                1. undistributed assets; or
                2. shareholder's pro rata share of assets that have been distributed to him
                ii. Cut short time for bringing claims
                1. notify claimants;

[2] must own 10% AT THE TIME OF the purchase/sale being investigated

2. give them deadline to bring claim of at least 120 days

ii. Administrative Dissolution
1. state brings action for failure to pay fees or file proper papwerwork
a. state must alert corp to problem;
b. give them at least 60 days to fix; then
c. dissolve by signing certificate
2. corp may apply for reinstatement within 3 years of dissolution

iii. Judicial dissolution
1. action by Atty General
a. on the ground that
i. corp fraudulently obtained its articles; or
ii. corp is exceeding or abusing its authority
2. action by Shareholders
a. on the ground that
i. directors are deadlocked on management; shareholders are unable to break deadlock; and irreparable injury is threatened to corp or corporate affairs cannot be conducted to advantage of shareholders
ii. directors have or will act in a manner that is illegal, oppressive, or fraudulent
iii. shareholders are deadlocked and failed to elect director for period of 2 annual meetings
iv. corporate assets are being wasted, misapplied, or diverted for noncorporate purposes
b. NB: if corp not listed on stock exchange, corp was act to purchase shares owned by petitioning shareholder at FMV in lieu of dissolution
3. action by Creditors
a. on the ground that:
i. creditor's claim has been reduced to a judgment, the judgment is unpaid, *and* the corp is insolvent; or
ii. corporation admitted in writing that claim is due and owing *and* the corp is insolvent

M. Close corporations
i. Formation
ii. Officers and directors rights and liabilities
iii. Shareholders rights and liabilities
iv. Creditors rights
v. Dissolution

N. Professional corporations
i. Formation
1. special statute enabling professionals to gain tax advantages of a corporation and certain limited liability, but not for malpractice
ii. Operation

iii. Creditor rights
    1. Each shareholder is personally liable for his own malpractice
iv. Dissolution

II. Partnerships and Unincorporated associations
    A. Agency principles
        i. Def: the legal relationship by whereby an agent is authorized to represent a principal in business dealings with third parties.
        ii. Formation of the agency
            1. Capacity
                a. Principal must have contractual capacity
                    i. Minor's appt of agent is voidable
                    ii. Incompetents can't be principals
                b. Agent needs only minimal capacity
                    i. NB: agent can be disqualified for representing both parties or failing to have required liscense
            2. Formalities
                a. Consent
                    i. Both parties must consent
                b. Consideration NOT required
                c. No writing req'd
                    i. UNLESS agent is to enter into a deal with 3d party that is within SF (land sale); "*equal dignities rule*"
            3. Modes of Creating the Agency relationship
                a. By act of parties
                    i. Agreement (ie, actual authority)
                    ii. Holding out by P (ie, apparent authority)
                    iii. Ratification
                b. By operation of law
                    i. Estoppel
                        1. 3d party reliance on P's communication
                    ii. Statute
        iii. Agent's duties
            1. Fiduciary duties of:
                a. duty of loyalty
                b. duty of obedience to reasonable directions
                c. duty of reasonable care under the circumstances
            2. P's remedies for breach:
                a. Contract, tort, accounting, withholding compensation for A's intentional torts
            3. Subagents
                a. An agent has *absolute liability* to P for breaches by subagent
                b. Subagent's duties to P:
                    i. Properly appointed: same as A's duties

ii. Unauthorized: owes no duties to P

iv. Principal's duties
    1. Owes to A:
        a. Duties imposed by contract
        b. Duty of reasonable compensation
        c. Reimbursement for expenses
        d. No unreasonable interference with A's performance
    2. Agent's remedies
        a. Contractual remedies (w/duty to mitigate loss)
        b. Lien for money due
    3. Real Estate Brokers
        a. Nonexclusive contracts
            i. Broker gets compensated if *produces* a ready, willing, and able buyer; sale not req'd
        b. Exclusive contracts
            i. Broker gets commission if *anyone* produces a ready, willing, and able buyer

v. Principal's liability for contracts of the agent
    1. Actual Authority
        a. Def: Authority the A reasonably believes he possesses based on the P's dealings with him. It may be express or implied.
        b. <u>Express</u>: authority contained within the four corners of the agency agreement
        c. <u>Implied</u>: authority that the A reasonably believes he has as a result of the P's action, including authority:
            i. Incidental to express authority;
            ii. Arising out of custom know to A;
            iii. Resulting from prior acquiescence of P;
            iv. To take emergency measures;
            v. To delegate authority in cases of:
                1. ministerial acts;
                2. where circumstances requires;
                3. where performance is impossible without delegation; or
                4. where delegation is customary;
            vi. To pay for and accept delivery of goods where there is authority to purchase;
            vii. To give general warranties as to fitness and quality and grant customary covenants in land sales, collect payment, and deliver where there is authority to sell; and
            viii. To manage investments under the "prudent investor" standard
    2. Termination of Actual Authority
        a. Termination may occur by:

i. Lapse of time (specified or reasonable);
ii. Occurrence of a specific event;
iii. Change in circumstances;
iv. A's breach of fiduciary duty;
v. One party's unilateral termination[3]; or
vi. Operation of law (by death or loss of capacity of one party, except where durable pwr of atty exists)

b. Irrevocable agencies
   i. Cannot terminate either:
      1. An agency coupled with an interest; or
      2. A power given as a security
   ii. If:
      1. given to protect an A's or 3d party's rights; and
      2. supported by consideration

3. Apparent authority
   a. Def: arises from the *reasonable beliefs* of *3d parties*, occurring where P directly or indirectly holds out another as possessing certain authority
   b. Types of apparent authority:
      i. Where A has no actual authority
         1. Imposters
            a. P bound if he *negligently* permits imposter to be in position to appear to have agency authority
         2. Lingering apparent authority
            a. P fails to notify (constructive or actual) 3d parties that a former A no longer has authority
            b. 3d parties rely on a written authority of A
            c. NB: death or incompetency terminates all authority without notice (except to banks until notice)
      ii. Where A exceeds actual authority
         1. Prior Act: P has allowed A to exceed authority before, and 3d party knows this
         2. Position: A acts within the customary limits of his position
      iii. Inherent Authority
         1. courts use to protect innocent 3d parties rather than a P who gave some actual authority to A:
            a. respondeat superior
            b. conduct similar to that authorized

[3] Though unilateral termination may constitute breach of contract

4. Ratification
    a. Def: A purports to act on behalf of P, even though A has no authority at all, but the P subsequently validates the act and becomes bound
    b. Prerequisites:
        i. P must know or have reason to know all material facts;
        ii. P accepts entire transaction; and
        iii. Has capacity
    c. Ratification may be express or implied
5. Liabilities of the Parties
    a. 3d party v. P
        i. P liable on K entered into by A if A had valid authority to act
    b. 3d party v. A
        i. Disclosed P
            1. if existence *and* identity known to 3d party, A generally not liable
        ii. Partially disclosed and undisclosed P
            1. Both P and A liable to 3d party
    c. 3d party liability to P and A
        i. Disclosed P
            1. only the P may enforce the K and hold 3d party liable
        ii. Partially or undisclosed P
            1. Either P or A may enforce the K and hold 3d party liable
            2. NB: P can't enforce K where:
                a. Affirmative fraudulent misrep as to P's identity; or
                b. Unforeseen burden on 3d party due to fact performance is due to P and not A

vi. Principal's liability for torts of the agent – *Respondeat Superior*
1. RS imputes joint and several liability to the employer-P for torts committed by the employee-A within the scope of the employee's employment.
2. **Employer-Employee Relationship**
    a. Must be employee for R liability
        i. P's not liable for torts of independent contractor agents
    b. <u>Right to Control</u> manner and method of job
        i. Yes: employee
        ii. No: independent K
    c. Right to control test factors:
        i. Characterization by the parties;

ii. Whether the biz is distinct;
iii. Customs of the locality regarding supervision of work;
iv. Degree of skill required on the job;
v. Whose tools or facilities are used;
vi. What the period of employment is (short: ind K; long, indefinite: employee);
vii. Basis of compensation (per job: ind K; time spent: employee);
viii. What the understanding of the parties is; and
ix. Whether person hired to further P's business purpose (yes: employee; no: ind K)

3. RS liability for:
   a. Subservants: yes if authorized
   b. Estoppel:
      i. If P creates appearance of E-R relationship, then bound
   c. Borrowed employees:
      i. Which R has primary right to control at time of tort
4. <u>EXCEPTION: RS liability for torts of Ind Ks where</u>:
   a. Inherently dangerous activities involved;
   b. Nondelegable duties have been delegated; or
   c. P *knowingly*[4] selected an incompetent ind K
5. **Scope of Employement**
   a. Conduct must be "similar or incidental" to that which was authorized
      i. NB: serious criminal acts generally outside scope
   b. Frolic and Detour
      i. Small deviation within scope
      ii. Major deviation outside scope
   c. Motivation to serve R?
      i. Passengers outside scope unless expressly authorized
      ii. R not liable for use of unauthorized instrumentalities
      iii. R liable for trips with 2 purposes if any substantial purpose of R is being served
   d. *Intentional torts*
      i. Not normally within scope, UNLESS
         1. a natural incident to E's duties;
            a. eg, E is a bouncer authorized to use force
         2. E is promoting R's business; or
         3. nature of work gives rise to hostilities

[4] if negligent selecation, then P only liable for negligence in selection, not the Ind K's negligence on the job

ii. P normally liable for A's misrepresentations if authority to make statements on that subject matter

e. Ratification

i. R may ratify torts under normal ratification principles

1. NB: be sure R has knowledge of *all material facts*

B. General partnerships

i. Def: An association of two or more persons to carry on as co-owners a business for profit.

ii. Formation

1. No formal agreement req'd; parties' intent to form a partnership may be implied from conduct
2. Writing
   a. Generally not required, but needed under SF if partners want to have an enforceable agreement lasting more than 1 year
3. Capacity
   a. Anyone capable of contracting may be a partner
4. Must have a legal purpose
5. Consent of partners (express of implied)

iii. Proof of partnership existence

1. Courts look to the *intent* of the parties to determine if a partnership exists. If intent unclear, courts consider the following rules:
   a. Sharing of profits
      i. Raises presumption of partnership, unless received for preexisting liability
   b. Evidence indicative of partnership
      i. Property held in JT or TIC;
      ii. Parties designate their relationship as a partnership;
      iii. Venture undertaken by parties requires *extensive activity*; and
      iv. Sharing of gross returns

iv. Purported Partners

1. person holds himself out by words or conduct as a partner or consents to being repd by another as a partner, then
   a. he will be liable to 3d parties who extend credit to the actual or apparent partnership in reliance on the rep
2. if hold out another as a partner,
   a. that person become your agent

v. Partnership Assets

1. classifications
   a. <u>partnership capital</u>
      i. property or money *contributed* by each partner for the purpose of carrying on the partnership's business
   b. <u>partnership property</u>

i. everything the partnership owns, including capital and subsequently acquired property

2. What is partnership property?
    a. **Titled property** – RUPA[5] provisions
        i. <u>Deemed</u> to be partnership property
            1. titled in partnership name; or
            2. titled in name of one or more partners, and instrument transferring title notes this or the partnership name
        ii. <u>Presumed</u> partnership property
            1. purchased with partnership funds
        iii. Presumed to be <u>separate</u> property
            1. held in name of one or more partners;
            2. no indication of partner/partnership on transferring instrument; and
            3. no partnership funds used to purchase
    b. **Untitled Property** – CL criteria
        i. Acquired with partnership funds
        ii. Use of property by partnership for business
        iii. Entry of property in partnership books
        iv. Close relationship b/twn property and partnership business
        v. Improvement of property with partnership funds
        vi. Maintenance of property with partnership funds
3. Rights of partner to partnership property
    a. None. He is not a co-owner, and thus has no transferable interest.
    b. However, partner has a transferable interest in the partnership itself, consisting of his share of profits, losses, and distributions.
        i. This interest is:
            1. treated as *personal property*;
            2. is *assignable* w/out dissolving partnership; and
            3. is *attachable*

vi. Powers of partners to bind the partnership
1. RUPA provides that each partner is an agent of the partnership for the purpose of its business
2. Apparent Authority
    a. RUPA states that
        i. The act of any partner;
        ii. For apparently carrying on in the *ordinary course the partnership business* or *business of the kind* carried out by the partnership;
        iii. *Binds* the partnership, UNLESS

[5] Revised Uniform Partnership Act

1. the partner *had no authority* to act for the partnership in the particular matter; **and**
2. the person with whom the partner was dealing *knew or had received notification*[6] that the partner lacked authority.

b. Transfers of partnership property by a partner

i. If transferring partner lacked authority, then partnership can recover from initial transferee, but not subsequent BFP

3. Actual Authority

a. Def: the authority a partner reasonably believes he has based on the communications between the partnership and the partner

i. Eg, from partnership agreement, vote of partners

vii. Enforcement of partnership rights and obligations

viii. Relations between partners

1. Participation in management

a. Absent an agreement to the contrary, all partners have *equal rights* in management of partnership business

b. Ordinary business: majority vote

c. Outside ordinary course of business: unanimous vote

2. Obligations under the terms of a partnership agreement

a. Can change management rights

b. Can change remuneration rights

3. Obligations in the absence of terms in a partnership agreement

a. Each partner has a capital account

i. Upon dissolution, the account must be settled

b. Remuneration

i. No right to payment for services, absent an agreement to the contrary

c. Profits and Losses

i. Right to share *equally*[7], absent an agreement to the contrary

d. Indemnification

i. A partnership must indemnify every partner with regard to payments made and obligations reasonably incurred in carrying on the partnership business

e. Right to inspect and copy partnership books

f. Legal actions

i. Partnership may sue in its own name

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[6] NB; this is subjective knowledge; what the person should have known from surrounding circumstances is IRRELEVANT

[7] unlike Revised Uniform Limited Partnership Act, where *share in proportion* to contributions unless an agreement to the contrary

            ii. To reach assets of individual partner, there must be a judgment against the individual partner
    4. Fiduciary obligations
        a. Duty of Loyalty
            i. Account for all profits an other benefits derived in connection with partnership business
            ii. Not deal with partnership as one with adverse interest
            iii. Not compete with the partnership
        b. Duty of Care
            i. Refrain from negligent, reckless, or unlawful conduct of intentional misconduct
    5. Notice
        a. Under RUPA, a partner has notice of a fact when the partner:
            i. Has actual knowledge;
            ii. Is notified of the fact; or
            iii. Has reason to know of the fact based on the surrounding circumstances

ix. Dissociation
    1. Def: one partner ceases to be associated in the carrying on of the partnership business
    2. Events of dissociation:
        a. Notice of express will to withdraw
        b. Happening of an agreed event
        c. Expulsion of partner pursuant to:
            i. Agreement
            ii. Unanimous vote
            iii. Judicial decree
        d. Death or incapacity
        e. Appointment of a receiver
        f. Termination of a business entity that is a partner
    3. Consequences of Dissociation
        a. Partner's right to participate in management ceases
        b. Partnership must:
            i. Buy out interest (liquidation or going-concern value)
            ii. Indemnify him against know predissociation liabilities *and* postdissociation liabilities not caused by dissociating partner's acts
        c. Wrongful dissociation:
            i. Partner who violates agreement is liable to partnership for damages caused by the wrongful act
            ii. Partner not entitled to buyout price if wrongful dissociation occurs
                1. before expiration of partnership term or

2. completion of specified event
3. UNLESS he can establish no undue hardship
    a. NB: partnership will owe interest from date of dissociation

d. Dissociated partner's power to bind partnership
    i. Can be bound by act undertaken within 2 years of dissociation if:
        1. act would have bound partnership before dissociation; and
        2. other party to transaction
            a. reasonably believed the dissociated partner was still a partner; and
            b. did not have notice of the dissociation

e. Dissociated partner's liability to other parties
    i. He can be liable for obligations incurred by partnership within 2 years after partner dissociates if:
        1. other party reasonably believed dissociated partner was still a partner; and
        2. did not have notice of partner's dissociation
    ii. dissociated partner can cut short this liability by filing a **Notice of Dissociation** with sec of state
        1. all persons deemed to have notice 90 days after filing.

x. Dissolution
    1. Dissolution generally requires that the partnership business be wound up.
    2. Events triggering dissolution under RUPA:
        a. In a partnership at will, notification by any partner of an intent to withdraw;
        b. In a partnership for a definite term or particular undertaking:
            i. Expiration of the term or completion of the undertaking;
            ii. Consent of all partners; or
            iii. Within 90 days of a partner's death, bkpty, or wrongful dissociation, at least 1/2 of remaining partners wish to dissolve;
            iv. Happening of an event agreed to in the partnership agreement;
            v. Issuance of a judicial decree on application by a partner that
                1. economic purpose of partnership is likely to be frustrated;

2. a partner engaged in conduct making it not reasonably practicable to carry on the business; or
3. business cannot be practicably carried on in conformity with partnership agreement

vi. issuance of judicial decree on application by a transferee of the partner's interest the it is equitable to wind up the partnership
1. after term or undertaking complete; or
2. at any time if partnership at will

3. Partner's power to bind partnership after dissolution
a. Can be bound by any act appropriate for winding up
b. Partnership liable for acts if party with whom partner dealt did not have notice of dissolution
i. Can be limited by filing **Statement of Dissolution** with sec of state; effective 90 days after filing
c. Partnership continues to exist after dissolution until completely wound up

4. Distribution of Assets upon Winding Up
a. Reduce all assets to cash, then pay partnership liabilities as follows:
i. <u>First</u> to creditors, including partners who are creditors;
ii. <u>Second</u> to partners' account
b. Partner who pays more than his fair share is entitle to contribution

xi. Personal liability of partners for partnership obligations
1. Civil liability
a. Contract
i. Partners are liable for all contracts entered into by a partner
1. in the scope of partnership business; or
2. with authority of the partnership
b. Tort
i. Partners liable for all torts committed by any partner or employee within
1. the ordinary course of partnership business; or
2. with authority of the partnership

2. Nature of liability
a. Joint and several for all obligations
i. Personal and individual liability for entire amount of partnership obligations
ii. Partner can get contribution and indemnification
b. Judgment binding on partner when served
c. Incoming partners

            i. Not liable for any obligations incurred before he became a partner
        d. Outgoing partners
            i. Remains liable for obligations arising while he was a partner
            ii. Potential liability for acts done after dissociation

C. Limited partnerships
    i. Definition: consists of one or more general partners and one or more limited partners
    ii. Formation
        1. Certificate of Limited Partnership
            a. Signed by all general partners
            b. Name of partnership
            c. Agent for service for all GPs
            d. Latest date on which it will dissolve
            e. *Filed* with sec of state
        2. Records office
            a. LP must maintain certificate, agreements, and most recent 3 years' tax returns
            b. Listing of each partner's capital contribution
        3. Agent for service of process
            a. Must be within the state
    iii. Name
        1. can't contain name of limited partner, unless business carried on under that name prior to LP election
        2. must contain words "Limited Partnership"
    iv. Admission of additional partners
        1. Either as provided in the partnership agreement; or
        2. written consent of all partners
    v. Partnership assets
        1. Contributions
            a. May be cash, property, services renders, or a promise to contribute in the future
                i. A limited partner's promise to contribute in future is not enforceable unless in a *writing signed* by the limited partner
    vi. Liabilities of Partners
        1. General partner
            a. Same liability as a regular partnership
        2. Limited partner
            a. Not liable for partnership obligations beyond their contributions
            b. EXCEPT
                i. LP is also a GP;

ii. LP <u>participates in control of business</u> and person dealing with the ltd partnership reasonably believed LP is a GP; or
iii. Knowingly permits name to be improperly used in the name of the partnership

vii. Rights of Partners
1. Rights of Both GPs and LPs
a. To share in profits and losses in proportions stated in partnership agreement OR in proportion to contributions;
b. To assign their interest in partnership (but assignee can't exercise rights of a partner);
c. To transact business with the partnership;
d. To withdraw from partnership;
i. GP – anytime by written notice
ii. LP – in accordance with patnership agreement; or on 6 months' written notice to GPs
e. To apply for dissolution when not reasonably practicable to carry on the business
2. Rights of GPs only
a. Same as a partner in a normal partnership, including right to management
3. Rights of LPs only
a. Vote on specific matters,
i. But not to participate in control of the business
b. To obtain partnership information (eg, books)
c. To bring a derivative action

viii. Fiduciary obligations

ix. Dissolution
1. A limited partnership may be dissolved by:
a. Occurrence of time stated in cert of LP;
b. Occurrence of time or event provided for in the partnership agreement;
c. Consent of all partners;
d. Withdrawal of GP (unless in agreement or by consent);
e. Judicial dissolution
2. Distribution of assets
a. First, to creditors, including partners who are ordinary creditors;
b. Second, to general, limited, and former partners in satisfaction of liabilities for interim distributions
c. Third, return all partners' contributions
d. Fourth, distribute partnership profits and property in the proportion in which partners chare in distributions

D. Joint ventures

III. Limited Liability Companies (“LLC”)

A. Nature of the entity
    i. Hybrid Entity that is
        1. taxed like a partnership;
        2. offers its owners (ie, members) limited liability like shareholders of a corporation; and
        3. can be run either like a corporation or a partnership
    ii. No limit on number of members
    iii. No one has to accept full personal liability for organization's debts as with a partnership
B. Formation requirements
    i. Formed by filing *articles of organization* with sec of state
    ii. Articles must contain:
        1. a statement that the entity is an LLC;
        2. the name of the LLC, including "LLC";
        3. street address of the LLC's registered office;
        4. Name of the LLC's registered agent; and
        5. names of all the members
C. Financial rights and obligations of members
    i. Internal allocation of financial interests
        1. profits and losses are split evenly unless an agreement provides otherwise
    ii. Member contributions
    iii. Liability of members for LLC obligations
        1. Members are NOT personally liable for the LLC's obligations
    iv. Creditors' rights
    v. Transfer of Membership Interest
        1. may assign a member's right to receive profits and losses
            a. no management rights transferred
        2. an outsider can become a member and receive management rights only with the consent of all members
D. Management
    i. presumed to be by all members, but articles can provide otherwise
        1. If management by all members, then
            a. A majority vote req'd to approve most decisions; and
            b. Each member is an *agent* of the LLC
    ii. Members and manager
    iii. Liability of managers and officers
    iv. Indemnification
    v. Failure to comply with organization formalities
E. Fiduciary obligations of managers, managing members and members
F. Dissolution
    i. Dissociation of an LLC member generally causes dissolution
    ii. Dissociation occurs at
        1. death
        2. retirement
        3. resignation

4. bankruptcy
5. incompetence, etc

IV. Limited Liability Partnerships ("LLP")

A. Nature of the entity

B. Formation requirements

i. Voting

1. existing partnership must vote (under terms of a written agreement, or else unanimous) to approve becoming an LLP

ii. Filing

1. Must file a statement with sec of state
2. Statement must be executed by at least 2 partners
3. should contain:
   a. name and address of partnership
   b. statement of LLP election
   c. deferred effective date of election, if any
4. Effective on date of filing unless otherwise specified

iii. Name of partnership

1. must end with RLLP or LLP

C. Financial rights and obligations of partners

i. Agreements for partner compensation and profit shares

ii. Distributions to partners

iii. Indemnification and loss-sharing provisions

D. Liability of partners

i. Creditor rights

ii. Extent of liability

1. Partners not personally liable for *any* of the partnership's obligations
2. But, a partner remains liable for her own *wrongful acts*

iii. Indemnification

E. Fiduciary Obligations

F. Dissolution

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