



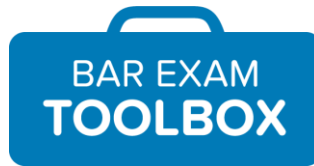
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're going to be discussing an issue in our "Listen and Learn" series. We're going to be talking about the authority of agents. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to be talking about authority of agents. You are most likely to encounter agency in combination with another business associations topic, such as partnership. If you're taking the California bar exam, you may also encounter it in combination with professional responsibility. In either case, this is one of the most heavily-tested issues on the bar exam, appearing in approximately 21% of UBE essays and 16% of California bar exam essays. That means you'll want to make sure you have an excellent command of the relevant rules going into the exam. Today's episode is meant to help you do just that.

Lee Burgess: Just one caveat before we move on. Those of you taking the UBE might notice that today's episode does not address unidentified, partially identified, or undisclosed principals. That's only because we want to focus on the rules that apply to both the UBE and the California bar exams. It in no way means that you do not need to know those rules for the UBE.

Lee Burgess: Alright, with that caveat out of the way, let's get started. Agent authority comes up when someone tries to hold a principal accountable for an agent's conduct. In general, a principal is only bound to contracts entered into by its agent if the agent has actual or apparent authority to act on behalf of the principal.

Lee Burgess: There are two kinds of actual authority: express and implied. Express authority occurs when the principal has explicitly told the agent (either orally or in writing) that he is entitled to act. Implied authority occurs when either, (a) the agent believes he is entitled to act because the action is necessary to carry out his express authorized duties; (b) the agent has acted similarly in prior dealings



between the principal and agent; or (c) it is customary for agents in that position to act in that way.

Lee Burgess: Note that both of these types of authority involve the agent actually being authorized to act on behalf of the principal. But what happens if the agent is not actually entitled to act, but the principal has made it appear to others as though the agent is entitled to act? That's where apparent authority comes in.

Lee Burgess: Apparent authority arises where, one, the principal holds out another as having authority; and two, the third-party reasonably relies on that authority. Let's look at each of these elements more closely. First, what does it mean for a principal to hold out another as having authority?

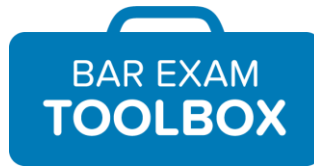
Lee Burgess: A principal holds an agent out as having authority when he, (a) gives the agent a position or title indicating certain authority; (b) has previously held the agent out as having authority and has not published a revocation of said authority; or (c) has cloaked the agent with the appearance of such authority.

Lee Burgess: Note that what we care about here is the principal's actions, not the agent's. In other words, the principal must give a third-party reason to believe that the agent has actual authority. But that's not enough by itself to create apparent authority. The third party also must reasonably rely on that authority. That means that apparent authority is not applicable if the third-party has actual knowledge that the agent did not have authority. Additionally, a third-party has a duty to make further inquiry when the situation suggests that it may be unreasonable to believe that the agent has authority.

Lee Burgess: Okay, that's it for our main rules, so let's get to our first hypo. This one was adapted from the [February 2020 California bar exam](#):

Lee Burgess: "Andrew, Bob, and Christine are attorneys who formed a law firm as a general partnership. Andrew, Bob, and Christine agreed to bestow the title nonequity partner on senior attorneys even though senior attorneys have no management authority. The firm website and business cards for senior attorneys list their title as partner.

Lee Burgess: Martha, a senior attorney, met Nancy at a social function. Nancy told Martha about her business's legal problems. Martha gave Nancy her business card. After looking at the card, Nancy asked Martha if as a partner she can agree to the firm handling her legal problems at a reduced hourly rate in return for a promise of future business. Martha was aware that the firm has a strict policy of



not reducing hourly rates, but signed a written agreement for it to handle Nancy's legal matters at a reduced hourly rate.

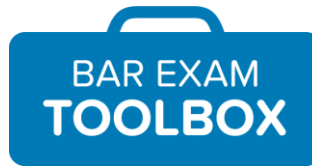
Lee Burgess: Is the firm bound by the agreement that Martha signed with Nancy? Discuss.”

Lee Burgess: Alright, the question is specifically asking us if a business is bound by an agreement entered into by someone associated with the business. That should immediately tell us that we're dealing with a question about agent authority. Anytime you're dealing with an authority question, you should take each possible type of authority in order, starting with express actual authority, then implied actual authority, and then apparent authority. You should do this whether or not you conclude that a particular type of authority exists. By asking generally about agent authority, the examiners are putting each type of authority at issue.

Lee Burgess: So let's go through it together. First, we need to address whether Martha had express authority to enter into the agreement with Nancy. We know that express authority would require the firm to have explicitly told Martha that she was authorized to enter into agreements with reduced hourly rates. Here, the question tells us that the firm has a strict policy of not reducing hourly rates, and that Martha was aware of that policy. So, Martha clearly did not have express authority.

Lee Burgess: Next, we need to address whether Martha had implied authority. We know that Martha would have implied authority if, (a) she believed she was entitled to act because entering into the agreement was necessary to carry out her express authorized duties; (b) Martha had acted similarly in prior dealings between herself and the firm; or (c) it is customary for senior associates to enter into agreements of this type. Here, the question provides no facts suggesting that Martha could reasonably believe she had the authority to enter into this agreement, and there was a strict policy expressly prohibiting her from doing so. So, Martha did not have implied authority either.

Lee Burgess: Finally, we need to address whether Martha had apparent authority. Martha would have apparent authority if, one, the firm held her out as having authority; and two, Nancy reasonably relied on that authority. In determining whether the firm held Martha out as having authority, we need to consider whether the firm, (a) gave Martha a position or title indicating certain authority; (b) has previously held her out as having authority and has not published a revocation of said authority; or (c) has cloaked her with the appearance of such authority.



- Lee Burgess: Here, the question tells us that the firm gave Martha the title of “partner”, which was listed on both the firm’s website and on Martha’s business cards. Nancy saw the title of partner on Martha’s business card, and asked Martha if she could agree to the reduced hourly rate in her capacity as a partner of the firm. Based on these facts, when Martha entered into the agreement, it was reasonable for Nancy to believe that she was authorized to do so by the firm. Accordingly, a court could likely find that Martha had apparent authority, and therefore, the firm is bound by the agreement.
- Lee Burgess: Okay, that was a pretty good example of a straightforward agent authority question. Let’s do another one that’s slightly more complicated. This one is adapted from the [February 2015 California bar exam](#):
- Lee Burgess: “Andy, Ruth, and Molly decided to launch a general partnership called The Batting Average (TBA), which would publish a monthly newsletter with stories about major league baseball players. Andy, Ruth, and Molly agreed that Andy would be responsible for writing the stories, Ruth would be responsible for buying all necessary equipment for TBA, and Molly would have exclusive authority to sell subscriptions to the newsletter.
- Lee Burgess: Subsequently, without the knowledge or consent of Andy or Molly, Ruth entered into a written contract with Homerun, Inc. to sell 1,000 annual subscriptions at a 50% discount to Homerun. Homerun was owned and operated by Ruth’s best friend. Unable to profitably sell subscriptions at such a steep discount, TBA refused to deliver the newsletters. Homerun sued TBA for breach of contract.
- Lee Burgess: A few months later, Andy’s computer failed while he was writing a story. Without telling Ruth or Molly, he bought a new one for TBA for \$300 from The Computer Store. The Computer Store sent a bill to Ruth, but she refused to pay it. The Computer Store sued TBA for breach of contract.
- Lee Burgess: Are Homerun and The Computer Store likely to succeed in their lawsuits against TBA? Discuss.”
- Lee Burgess: Okay, in this question we have two issues involving agent authority: Ruth’s contract with Homerun and Andy’s contract with The Computer Store. Let’s go through them one at a time, starting with Ruth. Did she have express authority? Well, the question tells us that she was a general partner of TBA. That means that absent an agreement to the contrary, she had an equal right to manage the partnership and act as an agent of the partnership in the usual course of



business, including by entering into contracts that bind the partnership. But we also know that the partners agreed that Molly would have exclusive authority to sell subscriptions. Given that the agreement with Homerun was for annual subscriptions, Ruth likely did not have express authority to enter into the agreement.

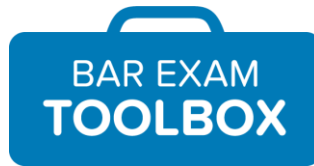
Lee Burgess: What about implied authority? There is no indication that selling subscriptions was necessary for Ruth to carry out her equipment purchasing responsibilities, or that she had previously sold subscriptions without objection from the other partners. And while it could be customary for a general partner in her position to sell subscriptions, she expressly agreed that she did not have the authority to do so. Therefore, she likely did not have implied authority.

Lee Burgess: Okay, so we know that Ruth did not have actual authority, whether express or implied. But what about apparent authority? There is no indication that TBA specifically held Ruth out as a sales representative of the partnership, but given that she was a general partner, it would likely be reasonable for Homerun to rely on her authority as a partner. Remember, however, that apparent authority is not applicable if the third-party has actual knowledge that the agent did not have authority. Here, we're told that Ruth's best friend owned Homerun. If her best friend knew that Ruth was not authorized to enter into the contract, apparent authority would not apply.

Lee Burgess: That's it for Ruth, so let's move on to Andy's contract with The Computer Store, starting with express authority. We know that the partners agreed that Ruth would be responsible for purchasing all necessary equipment, but unlike Molly's sales responsibilities, there is no indication that Ruth had exclusive responsibility for purchasing. You could go either way on this one, but given that Andy was a general partner and absent a clear limitation on his authority, he likely had express authority to enter into the agreement with The Computer Store.

Lee Burgess: Now, you might be tempted to stop here because you already established that Andy had express authority. But that would be a big mistake. It's important to remember that exam-writing is not about getting to the right answer in the fewest number of steps, but rather making sure that you address every single issue that's triggered by the facts.

Lee Burgess: With that in mind, let's address implied authority. There is no indication that TBA or Molly acquiesced in the past to Andy purchasing a computer or other equipment on behalf of TBA. Nevertheless, purchasing a computer was likely



necessary for Andy to carry out his expressly-authorized writing responsibilities. It could also be customary for a writer to purchase their own writing equipment, although this is a weaker argument. In any case, because purchasing a computer was incidental to Andy's expressly-authorized duties, Andy likely had implied authority to purchase the computer.

Lee Burgess: We're almost done at this point; we just need to address whether Andy had apparent authority. There is no indication that TBA specifically held Andy out as a purchasing representative of the partnership. But as was the case with Ruth, Andy was a general partner, and it would likely be reasonable for The Computer Store to rely on his authority as a partner, unless the partnership subsequently published a revocation of that authority. There is no indication here that TBA published any such revocation.

Lee Burgess: We are told, however, that following Andy's purchase, The Computer Store sent the bill to Ruth. As a result, TBA could argue that The Computer Store had actual knowledge that Andy did not have purchasing authority. At the very least, sending the bill to Ruth indicates that The Computer Store may have had reason to question Andy's authority, which should have caused it to make further inquiry before entering into the agreement with Andy. There's no obvious answer on this one, but whichever way you come out, make sure you come to a clear conclusion.

Lee Burgess: That's all we have for today. We hope you found these hypos to be helpful examples of how to work through agent authority issues. If you liked this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](https://www.barexamtoolbox.com/contact) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

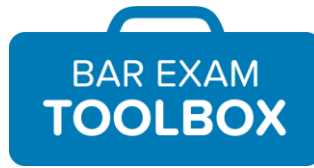
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