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Agency -- Attorney and Client -- Attorney's Liability to Third Parties On Contracts Made in Behalf of Client

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NOTES AND COMMENTS

Agency—Attorney and Client—Attorney's Liability to Third Parties On Contracts Made in Behalf of Client

Within the realm of agency it is recognized that where an agent for a disclosed principal deals with a third party, in a manner which would usually accompany or would be incidental or necessary to the accomplishment of the main authorized purpose of the agency, the principal becomes directly liable to the third party for the agent's acts.[1] But the application of this seemingly inviolate principle has been questioned in a few cases involving the liability of an attorney for contracts entered into on behalf of his client. This is somewhat surprising in light of the fact that the courts have been almost unanimous in holding that the nature of the attorney-client relationship recognizes the attorney's authority to bind his client and his duty to protect and promote his client's interest. They extend the scope of this implied authority and duty beyond the mere prosecution of the suit to all things necessary and incidental to this end.[2] Of course, there are limits beyond which this relationship will not extend but it has been the predominant practice for the courts to hold that "where the relationship of attorney and client exists, the law of principal and agent is generally applied, and the client is bound, according to the ordinary rule of agency, by the acts of the attorney within the scope of his authority."[3] The courts in recognizing the attorney-client relationship as basically controlled by the law of agency[4] have well defined standards by which to measure the actions of an attorney in the management of his client's cause.

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[1] See Runkle v. Burnham, 153 U.S. 216 (1894); Edgewood Knoll Apartments, Inc. v. Braswell, 239 N.C. 560, 80 S.E.2d 653 (1954); Stephens v. John L. Roper Lumber Co., 160 N.C. 107, 75 S.E. 933 (1912); RESTATEMENT (SECOND), AGENCY § 161 (1958). It is recognized that an agent even though acting within his actual or apparent authority may substitute his liability for that of his principal if he expressly assumes liability, as was the case in Betz v. Bank of Miami Beach, 95 So. 2d 891 (Fla. 1957), or fails to disclose his principal, as illustrated in Senor v. Bangor Mills, 211 F.2d 685 (3rd Cir. 1954).

[2] Bank of Glade Spring v. McEwen, 160 N.C. 414, 76 S.E. 222 (1912).

[3] *Id.* at 421, 76 S.E. at 225; *accord,* Jacobsen v. Overseas Tankship Corp., 11 F.R.D. 97 (E.D.N.Y. 1950); Middleton v. Stavely, 124 Colo. 28, 235 P.2d 596 (1951); State v. Barley, 240 N.C. 253, 81 S.E.2d 772 (1954).

[4] Generally, a stricter standard of care is imposed upon the attorney

In a recent Massachusetts case the plaintiffs, a partnership of court reporters, were engaged by the defendant, an attorney-at-law, to take shorthand notes of a hearing in which defendant's client was a litigant. There was no explicit agreement between the parties as to whom plaintiffs would look for the costs of their services. Three bills were submitted by plaintiffs to defendant. The first two during the course of the hearing, for work done to date, and the third, at its conclusion, for the final installment. The earlier bills, having been sent to defendant, were at defendant's request redirected to his client and were paid by check drawn on the client under cover-letter of the defendant. It is the last bill for the final installment that represents the principal sum on which plaintiffs sued both the attorney and his client. This suit resulted in a finding for the plaintiffs solely against the attorney and this result was affirmed on appeal by the Supreme Court of Massachusetts in *Burt v. Gahan.*[5]

There is not a wealth of modern case law involving this situation in relation to attorney-client and third party dealings,[6] but a few recent cases are available[7] and from them it becomes apparent that the current treatment by the courts of situations similar to *Burt*

than is normally applied to the general agent. This standard of care is recognized in Hodges v. Carter, 239 N.C. 517, 8 S.E.2d 144 (1954).

[5] — Mass. —, 220 N.E.2d 817 (1966).

[6] The import of this case on the practicing attorney is significant and should not be confined to the narrow fact situation presented in this case, that of an attorney contracting for stenographic services, but should be applied to all situations in which an attorney finds it beneficial or necessary to his client's cause to obtain the services of a third person. A few of the more common examples being the fees or costs of printers, stenographers, appraisers, accountants, investigators, witnesses, arbitrators, officers, etc.

[7] In one such case, the court held that where a stenographer knew the attorney was acting in behalf of a client the attorney was not liable even though the attorney did not specifically describe himself as an attorney. Zengerle v. Weiss, 48 Misc. 2d 271, 264 N.Y.S.2d 747 (1965); *accord,* Rayvid v. Burgh, 37 Misc. 2d 963, 234 N.Y.S.2d 868 (1962); Sanders v. Riddick, 127 Tenn. 701, 156 S.W. 464 (1913). Another court found the attorney not liable for the printing of briefs and abstracts where the attorney's representative capacity was disclosed to the printer on the printed material, even though the attorney was personally billed. Petrando v. Barry, 4 Ill. App. 2d 319, 124 N.E.2d 85 (1955); *accord,* Loder Appeal Press, Inc. v. Peerless Sugar Co., 277 App. Div. 737, 102 N.Y.S.2d 820 (1951). Where an attorney appointed an appraiser for an estate without arrangements being made regarding payment of fees to the appraiser, the court held the attorney not liable because he was an agent for a known principal. Epstein v. Sichel, 107 N.Y.S.2d 248 (Sup. Ct. 1951).

has been to apply the standards established by the law of agency.[8] It is equally apparent that the court in *Burt* chose to depart from this standard in its treatment of the principal case. In doing so the Massachusetts court recognized that where an attorney contracts in behalf of his client with a third party, the law of agency is generally applicable, but then rejected this as the controlling principle in the following passage:

> While in a broad sense counsel may be an agent and his client a principal, there is much more involved than mere agency. The relationship of attorney and client is paramount, and is subject to established professional standards. In short, the attorney, and not his client, is in charge of litigation, and is so recognized by the court.[9]

The *Burt* case supported this departure from the normally applicable rule of agency by their reliance on *Judd & Detweiler, Inc. v. Gittings*[10] which summarized its holding by stating that "in the absence of express notice to the contrary, court officials and persons connected . . . may safely regard themselves as dealing with the attorney, instead of with his client."[11]

The import of the opinion in the *Burt* case, and its supporting authority, seems to be that the attorney has such absolute and complete control over the client's cause that the status of the attorney is actually elevated to the level of a principal and his client is either placed on a parity or subordinated to a lesser role. This concept is subject to attack in that it fails to recognize that the attorney is bound by a more rigid standard of care than is the ordinary agent[12] and that this more stringent duty coupled with the narrow single-purposeness of the scope of his authority actually limits the attorney's authority[13] to enter into contracts as compared to the broad authority usually conferred upon the average business agent.

The *Burt* case's reliance on *Judd* also seems to be somewhat

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[8] The scope of this comment does not include the legal treatment of the taxible costs of litigation.

[9] — Mass. at —, 220 N.E.2d at 818.

[10] 43 App. D.C. 304 (1915). The principal case cited the following cases as to similar effect: Monick v. Melnicoff, 144 A.2d 381 (D.C. Mun. App. 1958); Trimmier v. Thomson, 41 S.C. 125, 19 S.E. 291 (1894); Heath v. Bates, 49 Conn. 342, 44 Am. Rep. 234 (1881); Cocks v. Searl, 21 L.T.R. (n.s.) 62 (K.B. 1905).

[11] 43 App. D.C. at 310-11.

[12] See note 4 *supra* and accompanying text.

[13] See notes 2-3 *supra* and accompanying text.

misplaced in that the *Judd* court was faced with a situation not presented to the court in the principal case. The *Judd* case showed the presence of local custom and also a course of dealing extending over a long period of time between an officer of the law and the attorney which the court expressly recognized as a controlling factor in that case. The court in *Judd* found that where a course of conduct is present the "law may imply a promise on the part of a lawyer to pay fees for the services of client's writs; as where the officer had been in the constant practice of charging his fees for such services to the lawyer, who from time to time had settled such charges without questioning their legality."[14]

It should also be noted that the decision in the *Burt* case relied on the early Massachusetts case of *Tarbell v. Dickinson*[15] where an attorney was held liable to a sheriff for his fees in serving a writ at the attorney's request. Thus, both the decisions relied upon by the Massachusetts court were cases involving a public officer rather than a private contracting individual. The propriety of applying such cases to a fact situation involving a private business man in his dealings with an attorney should not be left unquestioned. The nature of a public ministerial officer is in itself uniquely different from that of a private contractor. The most important difference is that the public ministerial officer has a duty to perform the services requested and the duty is one which has been imposed by law with the general manner of its performance specifically designated. There is usually little or no discretion or bargaining power allowed the officer.[16] Consequently, the courts have generally recognized that the legally imposed duties and responsibilities upon public ministerial officers have demanded protection for the officer in order to encourage him to perform his duties without fear of personal loss.[17] This trend to protect the public ministerial officer in his obligatory contracts makes these cases[18] less persuasive in their application to similar situations where the parties to the contract are private

[14] 43 App. D.C. at 309.

[15] 57 Mass. (3 Cush.) 345 (1849).

[16] See Mississippi v. Johnson, 71 U.S. (4 Wall) 475 (1866); MECHEM, THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 657-8 (2d ed. 1890).

[17] See Erskine v. Hohnbach, 81 U.S. (14 Wall) 613 (1871); State v Lutz, 65 N.C. 503 (1871); Gore v. Mastin, 66 N.C. 371 (1871).

[18] See Murphy v. Shinberg, 304 Mass. 1, 22 N.E.2d 597 (1939); McCloskey v. Bril, 286 App. Div. 143, 142 N.Y.S.2d 5 (1955); Annot., 100 A.L.R. 533 (1936).

individuals who are completely free to contract on any terms and conditions that they desire.

The North Carolina court has held that where the attorney-client relationship exists the law of agency applies.[19] It also recognized that the scope of the attorney's authority to act for and bind his client extends to all things necessary and incidental to the proper management of the client's cause.[20] The North Carolina court has not expressly given public ministerial officers a remedy against attorneys acting in behalf of their clients or imposed a duty on the attorney to expressly disclaim his liability for such fees in this situation. Quite the contrary, the court has stated that the fees of a sheriff "are paid or tendered by the creditor, for whose benefit the services are to be rendered."[21] Similarly, the court has said that the right of a witness to recover his compensation is against the party for whom he is summoned.[22] These pronouncements would seem to indicate that the North Carolina courts would apply the law of agency to the situation presented in *Burt*.[23]

An opinion which questions the application of agency principles to attorney-client and third party contracts in North Carolina is found in *Ethics Opinion No. 445*[24] of the North Carolina State Bar Council which states:

> It is perfectly proper for an attorney to agree with a physician as to how much he shall be paid to testify in a court action, it being understood that this agreement reached between the attorney and physician is by the attorney in his representative capacity for his client and that the amount is to be paid by the client and the client agreeing to the fee charged by the expert witness.[25]

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[19] See note 3 *supra* and accompanying text.

[20] See notes 1-2 *supra* and accompanying text.

[21] Taylor & Duncan v. Rhyne, 65 N.C. 530, 531 (1871); *accord*, Farmers' Bank, Inc. v. Merchants' & Farmers' Bank, Inc., 204 N.C. 378, 168 S.E. 221 (1933); Dunn v. Clerk's Office, 176 N.C. 50, 96 S.E. 738 (1918); Vannoy v. Haymore, 71 N.C. 128 (1874)

[22] See McClure v. Fulbright, 196 N.C. 450, 146 S.E. 74 (1929); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890); State v. Massey, 104 N.C. 877, 10 S.E. 608 (1890).

[23] There is nothing expressly in the opinions to indicate that the attorney procured these services for his client but it is unlikely that the contracts arose otherwise.

[24] N.C. State Bar Council, Ethics Opinion No. 445, 11 N.C. BAR 15 (1964).

[25] *Ibid.*

This opinion recognizes the attorney's authority to contract as an agent for a disclosed principal but seems to go further and require that the attorney and the third party reach an understanding that the client has expressly agreed to the expenses to be charged. This interpretation supports the presumption raised in the principal case that an agent acting for a disclosed principal within the scope of his authority is presumed to act for himself unless he expressly disclaims his own liability. Another possible interpretation in conformity with the application of the law of agency to the attorney's dealings with a third party is that it is proper, within the scope of an attorney's general authority, for an attorney to hire an expert witness in behalf of his client's cause; the result, then, is a presumption that the attorney was acting as an agent for his client, that the client is liable on the contract as a principal, and that the client has agreed to the terms of the contract. Whatever the proper interpretation of *Ethics Opinion No. 445* or its standing in a court of law, it raises serious doubts as to the accuracy of any prediction as to the possible outcome of litigation similar to the *Burt* case in North Carolina.

Since the *Burt* case requires the attorney to expressly disclaim personal liability and destroys the old presumption that an agent for a disclosed principal is presumed to be dealing in behalf of his principal when nothing is said to the contrary, the case establishes a pitfall in the path of the unwary attorney. He may no longer contract as an agent for a disclosed principal with the normal resulting consequences for there is now an added presumption that he intends to contract for himself and an added burden of expressly disclaiming his personal liability for his normal actions in behalf of his client. This decision may also establish an inherent conflict between the attorney's duty to freely operate within the scope of his authority to provide all that is necessary and incidental to the best management of his client's cause and his personal interest in his own economic and personal freedom from liability.[26] In North Carolina, the attorney should be wary in his reliance on the agency principle in this area for the *Burt* case illustrates there is room for variance. A voluntary assumption of the burden of specifically dis-

[26] Quaere: Will this conflict create any reluctance on the part of an attorney to represent a client of little means?

claiming personal liability and seeking the clients express authority in this situation may be the stitch in time that saved nine.

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Bankruptcy—Exemptions—Life Insurance Policies With Reserved Right to Change Beneficiary

The issue in *In Matter of Wolfe*[1] was whether cash surrender values of insurance policies on the life of the bankrupt were exempt from the claims of a trustee in bankruptcy. Both policies named the wife as beneficiary, but reserved to the bankrupt husband the absolute right to change the beneficiary. In claiming that the cash surrender values of the policies were exempt, the bankrupt relied on both statutory[2] and constitutional[3] provisions. The court held that the statute was a void attempt to extend the insurance exemption fixed in the constitution and that "the cash surrender values of . . . [the] policies are not exempt property under the Constitution . . . of North Carolina . . . ."[4]

As of the date of the filing of a bankruptcy petition, the trustee acquires title to all propery of the bankrupt[5] except that which is held to be exempt.[6] An insurance policy is property that would

[1] 249 F. Supp. 784 (M.D.N.C. 1966).

[2] The relevant portion of the statutory provision reads as follows:

> If a policy of insurance is effected by any person on his own life . . . in favor of a person other than himself . . . the lawful beneficiary . . . thereof, other than the insured or the executor or administrator of such insured . . . shall be entitled to its proceeds and avails against creditors and representatives of the insured . . . whether or not the right to change the beneficiary is reserved or permitted . . . .

N.C. GEN. STAT. § 58-206 (1965).

[3] The relevant portion of the constitution provides as follows:

> The husband may insure his own life for the sole use and benefit of his wife . . . and in case of the death of the husband the amount thus insured shall be paid over to the wife . . . for her . . . own use, free from all the claims of the representatives of her husband, or any of his creditors. And the policy shall not be subject to claims of creditors of the insured during the life of the insured, if the insurance issued is for the sole use and benefit of the wife . . . .

N.C. CONST. art. X, § 7.

[4] 249 F. Supp. at 786.

[5] Bankruptcy Act § 70(a), 52 Stat. 879(a) (1938), 11 U.S.C. § 110(a) (1964).

[6] "This title shall not affect the allowance to bankrupts of the exemptions which are prescribed . . . by the State laws . . . ." Bankruptcy Act § 6, 52 Stat. 847 (1938), 11 U.S.C. § 24 (1964).