

## CHAPTER 8

### LIABILITY BASED ON AGENCY AND RESPONDEAT SUPERIOR

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## A. DEFINITIONS

### 8:1 AGENCY RELATIONSHIP — DEFINED

**An agency relationship is created when an agreement, written or oral, express or implied, between two persons establishes that one of them is to act on behalf of and subject to the control of the other. The person who agrees to act on behalf of another is called the agent, and the other is called the principal.**

#### Notes on Use

Whether an agency relationship exists is ordinarily a question of fact. **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶ 14; **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 81, 440 P.3d 1200; **Christoph v. Colo. Commc’ns Corp.**, 946 P.2d 519 (Colo. App. 1997); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) (whether relationship is characterized as agency in agreement between parties or in context of industry or popular usage is not controlling). However, if evidence as to an agent’s authority is undisputed, or if only one reasonable and logical inference could be drawn from the evidence, the question of the existence of the agency relationship is one of law to be determined by the trial court. **Olsen v. Vail Assocs. Real Estate, Inc.**, 935 P.2d 975 (Colo. 1997); **Fresquez**, ¶ 14; **Johnson Realty v. Bender**, 39 P.3d 1215 (Colo. App. 2001); **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); **Victorio Realty Grp., Inc. v. Ironwood IX**, 713 P.2d 424 (Colo. App. 1985).

#### Source and Authority

1. This instruction is supported by **City of Aurora v. Colorado State Engineer**, 105 P.3d 595 (Colo. 2005) (agency is a consensual relationship); **City & County of Denver v. Fey Concert Co.**, 960 P.2d 657 (Colo. 1998) (agency results from consensual arrangement in which one person consents to act on behalf of another and be subject to other’s control); and **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391, 395 (Colo. 1987) (“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”). *See also* **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987) (in a multiple listing real estate transaction involving residential property, the selling broker or salesperson is an agent of the listing broker and consequently stands in an agency relationship with the seller, but the selling broker is not an agent of the buyer); **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007); **Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe**, 107 P.3d 402 (Colo. App. 2004); **Filho**, 36 P.3d at 200; **In re Marriage of Robbins**, 8 P.3d 625 (Colo. App. 2000); **Gorsich v. Double B Trading Co.**, 893 P.2d 1357 (Colo. App. 1994); **Winston Fin. Grp., Inc. v. Fults Mgmt., Inc.**, 872 P.2d 1356 (Colo. App. 1994) (cooperating broker was sub-agent of lessor in commercial leasing context); **Cole v. Jennings**, 847 P.2d 200 (Colo. App. 1992); **Governor’s Ranch Prof’l Ctr., Ltd. v. Mercy of Colorado, Inc.**, 793 P.2d 648 (Colo. App. 1990) (agent is one who has the authority to act for or in place of another, or one who is entrusted with the business of another); **Montano v. Land Title Guar. Co.**, 778 P.2d 328, 331 (Colo. App. 1989) (“Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other

to so act.”); **Real Equity Diversification, Inc. v. Coville**, 744 P.2d 756 (Colo. App. 1987) (mere existence of an agreement between a seller’s broker and a buyer’s broker to share a real estate commission does not make the buyer’s broker an agent of the seller); **Victorio Realty Grp.**, 713 P.2d at 425 (agency’s existence may be established by the conduct of the parties); **Hart v. Colo. Real Estate Comm’n**, 702 P.2d 763 (Colo. App. 1985); **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (citing former version of this instruction); **Shriver v. Carter**, 651 P.2d 436 (Colo. App. 1982); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency).

2. Three types of agency relationships exist. The first is a principal-agent relationship, where the agent has contractually agreed to work for the principal’s benefit. The second is an employer-employee relationship (formerly referred to as master and servant), where the employer has the right to direct the manner in which the work is performed and the employee has a correlative duty to perform the work in the manner directed. The third is an employer-independent contractor, where the employer does not control the physical activities of the contractor and is concerned only with the result achieved. *See Grease Monkey Int’l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995).

3. In determining whether an agency relationship exists, the most important factor is the right to control, not the fact of control. **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); **W. Fire Truck, Inc. v. Emergency One, Inc.**, 134 P.3d 570, 575 (Colo. App. 2006) (“The control a principal exercises over the agent’s work performance is evidence that an agency relationship exists.”); **Gorsich**, 893 P.2d at 1361.

4. An agency relationship can exist even where the parties “do not subjectively intend that legal consequences flow from their relation. The critical determination is whether the parties materially agreed to enter into a particular relation to which the law of agency attached.” **W. Fire Truck, Inc.**, 134 P.3d at 576; *see Stortroen*, 736 P.2d at 395; **Cole**, 847 P.2d at 203 (“An agency relationship may exist absent a contract and absent acknowledgment by the parties that an agency is intended if there is evidence that the parties did materially agree to enter into a relation to which the law attaches the legal consequences of agency.”).

5. Generally, an agent is entitled to indemnification from the principal for losses incurred because of the agency relationship if such losses should fairly be borne by the principal. **Johnson Realty**, 39 P.3d at 1218.

6. In most circumstances, an agent owes a fiduciary duty to the principal. *See Digital Landscape*, 2018 COA 142, ¶ 76, 440 P.3d at 1212 (duty of loyalty to not compete with the principal concerning the agency’s subject matter); **DA Mountain Rentals, LLC v. Lodge at Lionshead Phase III Condo. Ass’n**, 2016 COA 141, ¶ 43, 409 P.3d 564 (in context of homeowner’s association and homeowners); **Smith v. Mehaffy**, 30 P.3d 727 (Colo. App. 2000) (in context of attorney-client relationship). For breach of fiduciary duty jury instructions, see Chapter 26.

7. “An independent contractor is not an agent if ‘he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.’” **Digital Landscape**, 2018 COA 142, ¶ 79, 440 P.3d at 1212 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(3) cmt. b (1958)).

## 8:2 DISCLOSED OR UNIDENTIFIED PRINCIPAL — DEFINED

When a person knows or has notice that (he) (she) (it) is dealing with the agent of a principal and knows or has notice of who the principal is, the principal is a “disclosed principal.”

When a person knows or has notice that (he) (she) (it) is dealing with the agent of a principal, but does not know who the principal is, the principal is an “unidentified principal.”

A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.

### Notes on Use

1. Either one or both paragraphs of this instruction may be used as necessary.
2. As a result of the publication of the RESTATEMENT (THIRD) OF AGENCY, the phrase “unidentified principal” replaces the phrase “partially disclosed principal” formerly appearing in the second paragraph.
3. Whether a principal is partially or completely disclosed is a question of fact. **Water, Waste & Land, Inc. v. Lanham**, 955 P.2d 997 (Colo. 1998).

### Source and Authority

1. This instruction is supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 30, 420 P.3d 223, 230 (applying RESTATEMENT (THIRD) OF AGENCY § 1.04(2) (2006), and stating principal is disclosed “if a third party has notice that the agent with whom it is interacting is acting for a principal and if the third party has notice of the principal’s identity” and is unidentified “if the third party has notice that the agent is acting for a principal but does not have notice of the principal’s identity” (citing RESTATEMENT § 1.04(2) and applying RESTATEMENT (THIRD) OF AGENCY § 1.04(4) (notice definition))). *See* RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(a), (c) (2006) (defining disclosed and unidentified principals); RESTATEMENT (SECOND) OF AGENCY § 4 (1958) (defining disclosed, partially disclosed, and undisclosed principals); *see also* **Beneficial Fin. Co. v. Bach**, 665 P.2d 1034 (Colo. App. 1983) (agent is not liable on contract signed on behalf of disclosed principal); **Bidwell v. Jolly**, 716 P.2d 481 (Colo. App. 1986) (same); **Flatiron Paving Co. v. Wilkin**, 725 P.2d 103 (Colo. App. 1986) (agent is individually liable on a contract if acting for an undisclosed principal). For historical discussion of definitions, see *W. SEAVEY, AGENCY* § 4 (1964).

2. An officer of a corporation is not individually liable for debts of the corporation unless the corporate principal is undisclosed. **Mountain States Commercial Collections, Inc. v. 99¢ Liquidators, Inc.**, 940 P.2d 934 (Colo. App. 1996).

3. A person who contracts with an agent acting with authority from a disclosed or partially disclosed principal (now referred to as unidentified) is liable to the principal on the contract unless the principal is excluded by the contract. **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); *see also* **Rocky Mountain Expl., Inc.**, ¶ 33, 420 P.3d at 230-31 (stating that narrow exception set forth in RESTATEMENT (THIRD) OF AGENCY § 6.11(4) for false representations made concerning undisclosed principals does not apply to unidentified principals).

## 8:3 UNDISCLOSED PRINCIPAL — DEFINED

When a person does not know or have notice that (he) (she) (it) is dealing with an agent for a principal, the principal is an “undisclosed principal.”

A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.

### Notes on Use

None.

### Source and Authority

1. This instruction is supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 30, 420 P.3d 223, 230 (“A principal is undisclosed if the third party has no notice that the agent is acting for a principal.” (citing RESTATEMENT (THIRD) OF AGENCY § 1.04(2) (2006) and applying RESTATEMENT (THIRD) OF AGENCY § 1.04(4) (notice definition)); and RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(b) (2006) (defining undisclosed principal). *See also* **Mackey v. Briggs**, 16 Colo. 143, 26 P. 131 (1891); **Flatiron Paving Co. v. Wilkin**, 725 P.2d 103 (Colo. App. 1986); **Hott v. Tillotson-Lewis Constr. Co.**, 682 P.2d 1220 (Colo. App. 1983) (agent who enters into a contract for an undisclosed principal may be held personally liable on the contract); **Conner v. Steel, Inc.**, 28 Colo. App. 1, 470 P.2d 71 (1970); RESTATEMENT (SECOND) OF AGENCY § 4(3) (1958). For historical discussion of definitions, see W. SEAVEY, AGENCY § 4 (1964).

2. Agents routinely act on behalf of undisclosed principals, and an agent’s purchase on behalf of an undisclosed principal is a legal method of dealing with a hold-out seller. **Rocky Mountain Expl., Inc.**, ¶¶ 31-33, 420 P.3d at 230.

3. A third party who contracts with an agent acting with authority from an undisclosed principal is liable to the principal on the contract unless the principal is excluded by the contract, the principal’s existence is fraudulently concealed, or there is a setoff or similar defense against the agent. **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); *see also* RESTATEMENT (THIRD) OF AGENCY § 6.03 (2006) (setting forth parties to contract where agent acting with actual authority makes contract on behalf of undisclosed principal).

4. A narrow exception to the rule set forth in paragraph 3 applies where (1) the agent falsely represents to the third party that it does not act on behalf of a principal and (2) the principal or agent had notice that the third party would not have dealt with the principal. **Rocky Mountain Expl., Inc.**, ¶ 33, 420 P.3d at 230 (citing RESTATEMENT (THIRD) OF AGENCY § 6.11(4) (2006)). Under these circumstances, the third party may avoid, or rescind, the contract. *Id.*

## 8:4 EMPLOYER AND EMPLOYEE — DEFINED

The terms “employer” and “employee” refer to the relationship that exists when one (person) (*insert appropriate description of entity*), the employer, employs another, the employee, to do certain work.

In determining whether the relationship exists you should consider whether (*name of alleged employer*) selected or employed (*name of alleged employee*); whether (*name of alleged employer*) was to pay (*name of alleged employee*) or paid (*name of alleged employee*) wages or other consideration; whether (*name of alleged employer*) had the power or right to dismiss and the right to control (*name of alleged employee*).

The central element is the right to control the details of performance. It does not matter whether (*name of alleged employer*) actually exercised any right to control (*name of alleged employee*) (he) (she) (it) may have had.

### Notes on Use

1. When an employee of one person has been loaned to another and the issue is whose employee that employee was at a particular time, Instructions 8:6 and 8:7 should also be given.

2. When the issue is whether the person employed is an employee or independent contractor, Instruction 8:5 should also be given.

3. These definitions of employee and employer differ from those used in the Colorado Revised Statutes. *See, e.g.*, Colorado Wage Act, §§ 8-4-101 to -123, C.R.S.; Colorado Wage Equality Regardless of Sex Act, §§ 8-5-101 to -105, C.R.S.; Workers’ Compensation Act of Colorado, §§ 8-40-101 to -302, C.R.S.; Colorado Employment Security Act, §§ 8-70-101 to -143, C.R.S.; Colorado Anti-Discrimination Act, §§ 24-34-401 to -403, C.R.S.

### Source and Authority

1. This instruction is supported by **Norton v. Gilman**, 949 P.2d 565 (Colo. 1997) (most important factor in determining whether employment relationship exists is whether alleged employer had right to control details of performance); **Moses v. Diocese of Colorado**, 863 P.2d 310, 325 (Colo. 1993) (Bishop and Diocese “had and exercised the right of control over the manner of work performed by a priest as well as the hiring, compensation, counseling performed by the priest and discipline of the priest.”); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Colorado Compensation Insurance Authority v. Jones**, 131 P.3d 1074 (Colo. App. 2005) (unpaid person can be an employee where there is a right to control); **Tunget v. Board of County Commissioners**, 992 P.2d 650 (Colo. App. 1999) (right to control is determinative factor in deciding whether employer-employee relationship exists); **Veintimilla v. Dobyanski**, 975 P.2d 1122 (Colo. App. 1997) (in determining whether employer-employee relationship exists, which party furnishes necessary tools is relevant); **Perkins v. Regional Transportation District**, 907 P.2d 672 (Colo. App. 1995); and **Koontz v. Rosener**, 787 P.2d 192 (Colo. App. 1989) (dismissing the lost compensation claims of employees of a licensed real estate brokerage



against the majority shareholder of the brokerage because the employees' claims lay against the brokerage as the employer). *See Mulberger v. People*, 2016 CO 10, ¶ 15, 366 P.3d 143 (using definition of employee to interpret section 16-10-103(1)(k), C.R.S. (requiring court to sustain challenge for cause where potential juror is "compensated employee of a public law enforcement agency or public defender's office")); RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining employee).

2. Because of the control the statute requires a licensed real estate broker to retain over the broker's licensed real estate salespersons, such persons are, as a matter of law, the employees of the broker for whom they work. *Olsen v. Bondurant & Co.*, 759 P.2d 861 (Colo. App. 1988).

## 8:5 INDEPENDENT CONTRACTOR — DEFINITION

**An independent contractor is (a person who) (*insert appropriate description of entity that*) contracts with another to accomplish a result using (his) (her) (its) own, rather than the other's, methods with respect to the physical conduct involved in the performance of the work, and, except as to the result of the work, is not subject to the control of the (person who) (*insert appropriate description of entity that*) engaged (him) (her) (it).**

**In determining whether (*alleged contractor name*) was an independent contractor or an employee, you should consider whether or not (*contracting party name*), in engaging (*alleged contractor name*), had the right to control not only the result of the work, but also the manner in which it was to be performed.**

**You may consider: the terms of the contract between the parties; the nature of the parties' business or occupation; which party furnished the instrumentality or tools for the work; the place of the work; the length of time of the engagement; the method of payment; the right, if any, of (*contracting party name*) to summarily discharge (*alleged contractor name*); the extent to which (*contracting party name*) exercised supervision over the work, if any; and any and all of the circumstances surrounding the relationship.**

### Notes on Use

1. The factors listed in the second and third paragraphs should be omitted where the evidence does not support including them in the instruction.
2. When this instruction is given, Instruction 8:4 should also be given.

### Source and Authority

1. This instruction is supported by **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 78, 440 P.3d 1200 (an independent contractor engages to perform services for another utilizing his or her own methods and free from direction and control of the employer, and is accountable only for the result to be accomplished); **Dumont v. Teets**, 128 Colo. 395, 262 P.2d 734 (1953); **Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co.**, 81 Colo. 69, 255 P. 449 (1927); **Arnold v. Lawrence**, 72 Colo. 528, 213 P. 129 (1923); **Dana's Housekeeping v. Butterfield**, 807 P.2d 1218 (Colo. App. 1990); RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). *See also* **Brush Hay & Mill Co. v. Small**, 154 Colo. 11, 388 P.2d 84 (1963); RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining employee).

2. The key fact in determining whether a person engaged to do work for another is an independent contractor or an employee depends on the control over the work to be done. If the power to control, whether exercised or not, includes controlling the details of how the work will be done, that is, the “means as well as the end,” then the person engaged is an employee. **Perkins v. Reg'l Transp. Dist.**, 907 P.2d 672, 675 (Colo. App. 1995) (“control over the means and methods of accomplishing the contracted-for result is inconsistent with ‘independent contractor’ status”). On the other hand, if the person engaged has the right to control the manner in which the work will be done and is subject to the control of the other essentially only in terms of being

responsible for a certain end product or result, then the person engaged is an independent contractor. **Dumont**, 128 Colo. at 397, 262 P.2d at 735; **Farmers' Reservoir & Irrigation Co.**, 81 Colo. at 71-72, 255 P. at 449-50; **Dana's Housekeeping**, 807 P.2d at 1220 (while no one factor is determinative as to whether a person is an employee as opposed to an independent contractor, the most important factor to consider is the right to control, not the fact of control); RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (defining master, servant, and independent contractor); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmt. c & 7.07(3) (2006).

3. The factors for determining the nature of the relationship listed in the third paragraph are based on RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). *See also* **Arnold**, 72 Colo. at 530, 213 P. at 130.

4. An employer is generally not liable for the torts of a non-agent independent contractor, except in limited circumstances. *See* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000) (nondelegable duty under Premises Liability Act); **Huddleston v. Union Rural Elec. Ass'n**, 841 P.2d 282 (Colo. 1992) (inherently dangerous activities); **Garden of the Gods Vill., Inc. v. Hellman**, 133 Colo. 286, 294 P.2d 597 (1956) (ultrahazardous activities).

5. An employer may also be liable for negligence if it fails to follow the recommendations of its independent contractors. **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010).

6. One may be personally liable for negligence for failing to use due care when selecting an independent contractor. **W. Stock Ctr., Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

7. An independent contractor may also be an agent, and the person engaging such agent may be held vicariously liable for torts committed by the agent within the scope of the agency. **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (“Because an agency relationship existed, [the principal] was vicariously liable whether or not [the agent] was in fact an independent contractor.”); *see* RESTATEMENT (SECOND) OF AGENCY § 14N (1958). “An independent contractor is not an agent if ‘he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.’” **Digital Landscape**, ¶ 79, 440 P.3d at 1212 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(3) cmt. b (1958)).

## 8:6 LOANED EMPLOYEE

**When an employee is loaned out by (his) (her) (its) employer to another person for some special service or project and the other person has the exclusive right to control the employee, the employee becomes the employee of that other person.**

### Notes on Use

1. This instruction is to be used in appropriate cases as an introductory instruction to Instruction 8:7.
2. When necessary, Instruction 8:4 (defining employer and employee) should be given with this instruction.
3. When appropriate to the evidence, a more suitable word, for example, “corporation,” may be substituted for the word “person.”

### Source and Authority

This instruction is supported by **Bernardi v. Community Hospital Ass’n**, 166 Colo. 280, 443 P.2d 708 (1968); **Chartier v. Winslow Crane Service Co.**, 142 Colo. 294, 350 P.2d 1044 (1960); **Landis v. McGowan**, 114 Colo. 355, 165 P.2d 180 (1946); **Thayer v. Kirchhof**, 83 Colo. 480, 266 P. 225 (1928); and **Settle v. Basinger**, 2013 COA 18, ¶ 33, 411 P.3d 717. *See also* **Kiefer Concrete, Inc. v. Hoffman**, 193 Colo. 15, 562 P.2d 745 (1977); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Morphew v. Ridge Crane Serv.**, 902 P.2d 848 (Colo. App. 1995); **Colwell v. Oatman**, 32 Colo. App. 171, 510 P.2d 464 (1973); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (addressing “lent employees” or “borrowed servants”); RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

## 8:7 LOANED EMPLOYEE — DETERMINATION

**If you find that** *(name of general employer)* **loaned out** *(name of employee)* **to** *(name of alleged special employer)* **for a special service or project and that** *(name of alleged special employer)* **had the exclusive right to control** *(name of employee)* **with respect to that (work) (service) (job), then you must find that** *(name of employee)* **was the employee of** *(name of alleged special employer)*.

**If you find that** *(name of general employer)* **did not loan out** *(name of employee)* **to** *(name of alleged special employer)* **for a special service or project or if** *(name of alleged special employer)* **did not have the exclusive right to control** *(name of employee)*, **then you must find that** *(name of employee)* **was not the employee of** *(name of alleged special employer)*.

### Notes on Use

1. In appropriate cases, Instruction 8:6 should be given as an introduction to this instruction.
2. When necessary, Instruction 8:4 (defining employer and employee) should be given with this instruction.
3. In the first paragraph, use whichever word, “work,” “service,” or “job,” is most appropriate.

### Source and Authority

1. This instruction is supported by **Kiefer Concrete, Inc. v. Hoffman**, 193 Colo. 15, 562 P.2d 745 (1977); **Bernardi v. Community Hospital Ass’n**, 166 Colo. 280, 443 P.2d 708 (1968); **Chartier v. Winslow Crane Service Co.**, 142 Colo. 294, 350 P.2d 1044 (1960); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Landis v. McGowan**, 114 Colo. 355, 165 P.2d 180 (1946); **Thayer v. Kirchof**, 83 Colo. 480, 266 P. 225 (1928); and **Settle v. Basinger**, 2013 COA 18, ¶ 33, 411 P.3d 717. *See also* **Morphew v. Ridge Crane Serv.**, 902 P.2d 848 (Colo. App. 1995); **Colwell v. Oatman**, 32 Colo. App. 171, 510 P.2d 464 (1973); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (addressing “lent employees” or “borrowed servants”). Control was found to exist in some, but not all, of the above cases.

2. “Courts have traditionally considered several criteria to be relevant in the determination whether a loaned employment relationship exists. These include: (1) whether the borrowing employer has the right to control the employee’s conduct; (2) whether the employee is performing the employer’s work; (3) whether there was an agreement between the original and borrowing employer; (4) whether the employee had acquiesced in the arrangement; (5) whether the borrowing employer had the right to terminate the employee; (6) whether the borrowing employer furnished the tools and place for performance; (7) whether the new employment was to be for a considerable length of time; (8) whether the borrowing employer had the obligation to pay the employee; and (9) whether the original employer terminated its relationship with the employee.” **Morphew**, 902 P.2d at 850.

3. “The element of control necessary to establish a borrowed employment relationship need not extend to directing the technical details of a skilled employee’s activity. What is essential is the right to control the time and place of services, the person for whom rendered, and the degree and amount of services.” *Id.* at 851.

4. An employer’s liability for a loaned employee depends on the claim asserted. *See Kiefer Concrete, Inc.*, 193 Colo. at 18, 562 P.2d at 746 (“The employer under whose exclusive control the loaned employee operates may then be held vicariously liable for the acts of the employee under ordinary principles of Respondeat superior.”); *Morphew*, 902 P.2d at 850 (holding, in workers’ compensation claim, that because a loaned employee is considered a co-employee of the employer’s employees, both the loaned employee and the general employer are immune from tort liability where the conditions of loaned employment are met).

## 8:8 SCOPE OF EMPLOYMENT OF EMPLOYEE — DEFINED

An employee is acting within the scope of (his) (her) (its) employment when the employee is doing work that is:

1. Assigned by (his) (her) (its) employer; or
2. Proper, usual, and necessary to accomplish the assigned work; or
3. Customary in the particular trade or business to accomplish the assigned work.

### Notes on Use

This instruction is to be used in tort cases in which the plaintiff is seeking to hold the defendant liable as an employer under the doctrine of respondeat superior. *See* Instruction 8:18.

### Source and Authority

1. This instruction is supported by **Lytle v. Kite**, 728 P.2d 305 (Colo. 1986); **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964); and **Cooley v. Eskridge**, 125 Colo. 102, 241 P.2d 851 (1952). *See also* **Moses v. Diocese of Colo.** 863 P.2d 310 (Colo. 1993) (clergyman was acting outside scope of his employment when he engaged in sex with parishioner); **Connes v. Molalla Transp. Sys., Inc.**, 831 P.2d 1316 (Colo. 1992) (intentional tort against customer outside scope of employment); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988); **Spencer v. United Mortg. Co.**, 857 P.2d 1342 (Colo. App. 1993) (theft by employee outside scope of employment); **Goettman v. North Fork Valley Rest**, 176 P.3d 60, 70 (Colo. 2007) (“a traveling employee need not be engaged in the actual performance of work to be considered engaged in the course of his employment”). *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) (defining when employee acts outside of scope).

2. In determining whether a negligent act or omission of an employee was within the scope of his or her employment, the test is whether the act or omission was done in furtherance of the employer’s business and not whether the manner of performance was authorized by the employer. **Pham v. OSP Consultants, Inc.**, 992 P.2d 657 (Colo. App. 1999) (employee on out-of-town work assignment was not acting within scope of employment when involved in automobile collision after leaving bar, where purpose of trip to bar was personal entertainment).

3. “The question of whether an employee is acting within the scope of the employment is a question of fact.” **Raleigh v. Performance Plumbing & Heating**, 130 P.3d 1011, 1019 (Colo. 2006).

4. The “going-and-coming rule” defines the scope of the employment relationship when the employee was commuting between work and home or another personal destination at the time of the plaintiff’s injury. **Suydam v. LFI Fort Pierce, Inc.**, 2020 COA 144M, ¶¶ 17, 26, 490 P.3d 930 (approving this instruction). Colorado’s version of that rule provides that “an employee traveling from . . . work to his home or another personal destination, after completing his day’s work, cannot ordinarily be regarded as acting in the scope of his employment so as to charge the

employer for the employee's negligence in the operation of the [employee's] car." *Id.* at ¶ 18 (quoting **Beeson v. Kelran Constructors, Inc.**, 43 Colo. App. 505, 507, 608 P.2d 369, 371 (1979)). The rule has several exceptions. These include when the employee was engaged in an act connected to his work or was furthering the employer's interests at the time of the conduct that caused the injury. *Id.* at ¶ 19; *see also* **Stokes v. Denver Newspaper Agency, LLP**, 159 P.3d 691, 693 (Colo. App. 2006).



## 8:9 SCOPE OF AUTHORITY OF AGENT — DEFINED

**An agent is acting within the scope of (his) (her) (its) authority when the agent is carrying (on business) (out a business transaction) for (his) (her) (its) principal which the principal has expressly authorized [and] [or][which is within the (incidental) (implied) (apparent) authority of the agent].**

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate.
2. For the definitions of “incidental,” “implied,” and “apparent” authority, see Instructions 8:10, 8:11, and 8:12, respectively.
3. This instruction is for use in contract cases involving a principal and agent (rather than an employer and employee). When the plaintiff is seeking to hold a defendant-employer liable in tort under the doctrine of respondeat superior, Instruction 8:8 should be used.

### Source and Authority

1. This instruction is supported by **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); **Independence Indemnity Co. v. International Trust Co.**, 96 Colo. 92, 39 P.2d 780 (1934); **Montoya v. Grease Monkey Holding Corp.**, 883 P.2d 486 (Colo. App. 1994), *aff'd on other grounds sub nom. Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); and **Savage v. Pelton**, 1 Colo. App. 148, 27 P. 948 (1891). For additional cases, see the Source and Authority to Instruction 8:18. For historical discussion of these principles, see H. REUSCHLEIN & W. GREGORY, *AGENCY AND PARTNERSHIP* §§14, 15 (1979); W. SEAVEY, *AGENCY* § 8 (1964).

2. The scope of an agent’s authority depends upon the intent of the parties, and may be general or specific, involving a broad or narrow delegation of authority from principal to agent. **Fey Concert Co. v. City & Cty. of Denver**, 940 P.2d 972 (Colo. App. 1996), *rev'd on other grounds*, 960 P.2d 657 (Colo. 1998). An attorney does not have the authority to settle a case without his client’s knowledge and consent. **Siener v. Zeff**, 194 P.3d 467 (Colo. App. 2008).

3. Under Colorado law, the use and interpretation of a “power of attorney,” by which a principal confers express authority on an agent, is governed by sections 15-14-500.3 to -509, C.R.S. See **In re Trust of Franzen**, 955 P.2d 1018 (Colo. 1998); *see also* §§ 15-14-503 to -509, C.R.S. (Colorado Patient Autonomy Act); §§ 15-18.5-101 to -105, C.R.S. (health care proxy); §§ 15-18-101 to -112, C.R.S. (Colorado Medical Treatment Decision Act); **Moffett v. Life Care Ctrs. of Am.**, 219 P.3d 1068 (Colo. 2009) (agent has authority to enter into arbitration agreement as a part of nursing home admission process under written medical durable power of attorney); **Lujan v. Life Care Ctrs. of Am.**, 222 P.3d 970 (Colo. App. 2009) (power of person acting as health proxy does not include authority to agree to arbitration because that is not a “medical treatment” decision).

4. An agent may invoke a jury waiver provision in the principal’s contract with a third party. **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2010).

5. Agency principles may not apply where an agent has independent authority to take action. **In re Estate of Sandstead**, 2016 COA 49, ¶¶ 38-39, 412 P.3d 799, *rev'd on other grounds sub nom. Sandstead-Corona v. Sandstead*, 2018 CO 26, 415 P.3d 310.

## 8:9A ACTUAL AUTHORITY — DEFINED

**An agent acts with actual authority when, at the time of taking action that affects the principal:**

- 1. The agent believes (his) (her) (its) actions are consistent with the way the principal wishes the agent to act; and**
- 2. The agent’s belief is reasonable.**

**In determining whether the agent’s belief is reasonable, you should consider the principal’s words (and) (or) conduct directed to the agent and the agent’s understanding of the principal’s wishes.**

### Notes on Use

1. The rule of actual authority should not be confused with the rules governing express and implied authority. *See* Instructions 8:9B and 8:11.
2. When applicable, this instruction should be used with Instructions 8:9B, 8:10, and 8:11.

### Source and Authority

1. This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 21, 396 P.3d 651 (citing RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006)); **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); and **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶¶ 18, 32, 37 (citing RESTATEMENT (THIRD) OF AGENCY § 2.02 (2006)).
2. “Actual authority is premised on ‘a principal’s expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent’s action, and the agent’s reasonable understanding of the principal’s manifestation.’” **Fresquez**, ¶ 18 (quoting RESTATEMENT (THIRD) OF AGENCY, § 2.01 cmt. c)).
3. “The focal point for determining whether an agent acted with actual authority is the agent’s reasonable understanding at the time the agent takes action.” **Fresquez**, ¶ 19 (quoting § 2.01 cmt. c.). “An agent has actual authority to take action designated or implied in the principal’s manifestations to the agent and acts necessary or incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.” *Id.* (quoting § 2.02(1)). “The context in which principal and agent interact, including the nature of the principal’s . . . personal situation, frames the reasonableness of an agent’s understanding of the principal’s objectives.” *Id.* (quoting § 2.02 cmt. e). “An agent’s actual authority encompasses acts necessary to accomplish the end the principal has directed that the agent achieve.” *Id.*
4. Actual authority incorporates concepts of express and implied authority. **State Farm**, ¶ 21, 396 P.3d at 656; **Willey**, 876 P.2d at 1264; **Fresquez**, ¶ 21.

5. Whether an agent has actual authority to execute a document on the principal's behalf requires both an objective and subjective inquiry: the agent must subjectively believe the agent possesses authority, and that belief must be objectively reasonable in light of the principal's actions. **Fresquez**, ¶ 20 (citing § 2.02, cmt. e).

6. An agent has a duty to take action only within the scope of the agent's actual authority. **Fresquez**, ¶ 37 (citing RESTATEMENT (THIRD) OF AGENCY § 8.09 & cmt. b).

## **8:9B EXPRESS AUTHORITY — DEFINED**

**An agent acts with express authority when the principal directly states that the agent may perform a particular act on the principal’s behalf.**

### **Notes on Use**

The rule of express authority should not be confused with the rules governing actual authority. *See* Instruction 8:9A.

### **Source and Authority**

This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 21, 396 P.3d 651; **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); and **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶ 21.

## 8:10 INCIDENTAL AUTHORITY — DEFINED

**In addition to any express authority given by a principal to an agent, an agent has the incidental authority to do those acts that are necessary, usual, and proper to accomplish the express authority.**

### Notes on Use

1. When applicable, this instruction should be used with Instructions 8:9 and 8:11.
2. An agent's incidental authority may be limited or excluded by his or her principal. RESTATEMENT (SECOND) OF AGENCY § 35 (1958). A principal may nonetheless be bound under the doctrine of apparent authority. *See* **Indep. Indem. Co. v. Int'l Tr. Co.**, 96 Colo. 92, 39 P.2d 780 (1934); Instruction 8:12. When there is sufficient evidence of such limitation or exclusion, this instruction, and, if applicable, Instruction 8:12, should be appropriately modified. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. g (2006) (stating that a "principal may direct an agent to do or refrain from doing a specific act").

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF AGENCY § 35 (1958). *See also* **State Farm Mut. Auto. Ins. Co v. Johnson**, 2017 CO 68, ¶ 22, 396 P.3d 651; **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); **Indep. Indem. Co.**, 96 Colo. at 102, 39 P.2d at 784; **Montoya v. Grease Monkey Holding Corp.**, 883 P.2d 486 (Colo. App. 1994), *aff'd on other grounds sub nom. Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); **Dyer v. Johnson**, 757 P.2d 178 (Colo. App. 1988); **Savage v. Pelton**, 1 Colo. App. 148, 27 P. 948 (1891); and RESTATEMENT (THIRD) OF AGENCY § 2.02(1) & cmt. d (2006) (stating that agent has authority to take action "implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act," and comment further clarifying the circumstances under which an agent may be granted incidental authority to accomplish the principal's objectives).

2. The Third Restatement provides that an agent's interpretation of the principal's manifestations must be reasonable. RESTATEMENT (THIRD) OF AGENCY § 2.02(2), (3) (2006).

## 8:11 IMPLIED AUTHORITY — DEFINED

In addition to any express authority given by a principal to an agent, an agent has implied authority to take actions:

(1. On behalf of (his) (her) (its) principal that are customary in the trade or business involved, if the principal knew or should have known of such practices;) (and) (or)

(2. That the agent had taken before on behalf of (his) (her) (its) principal that the principal knew of and by (his) (her) (its) conduct or lack of conduct impliedly approved;) (and) (or)

(3. That the agent had the incidental authority to perform on the principal's behalf.)

### Notes on Use

1. When applicable, Instruction 8:10 (defining incidental authority) should be used with this instruction.

2. Use whichever parenthesized portions of this instruction are appropriate. The word “customary” is used in accordance with **Montoya v. Grease Monkey Holding Corp.**, 883 P.2d 486, 488 (Colo. App. 1994), *aff'd sub nom. Grease Monkey International, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); and **Dyer v. Johnson**, 757 P.2d 178, 180 (Colo. App. 1988).

3. An agent's implied authority may be limited or excluded by his or her principal. RESTATEMENT (SECOND) OF AGENCY § 36 (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. g (2006) (“A principal may direct an agent to do or refrain from doing a specific act.”). A principal may nonetheless be bound under the doctrine of apparent authority. *See Indep. Indem. Co. v. Int'l Tr. Co.*, 96 Colo. 92, 39 P.2d 780 (1934); Instruction 8:12. When there is sufficient evidence of such limitation or exclusion, this instruction and, if applicable, Instruction 8:12 should be appropriately modified.

### Source and Authority

1. The first numbered paragraph of this instruction is supported by **Montoya**, 883 P.2d at 488; **Dyer**, 757 P.2d at 180; and **Gates Iron Works v. Denver Engineering Works Co.**, 17 Colo. App. 15, 67 P. 173 (1901). *See also* **Russell v. First Am. Mortg. Co.**, 39 Colo. App. 360, 565 P.2d 972 (1977); **Savage v. Pelton**, 1 Colo. App. 148, 27 P. 948 (1891); RESTATEMENT (SECOND) OF AGENCY § 36 (1958).

2. The second numbered paragraph of this instruction is supported by **Moore v. Switzer**, 78 Colo. 63, 65, 239 P. 874, 875 (1925), in which the court stated:

Implied authority of an agent is actual authority evidenced by conduct, that is, the conduct of the principal has been such as to justify the jury in finding that the agent had actual authority to do what he did. This may be proved by evidence of acquiescence with knowledge of the agent's acts, and such knowledge and acquiescence may be shown by

evidence of the agent's course of dealing for so long a time that knowledge and acquiescence may be presumed. Knowledge of this course of conduct by one dealing with the agent is irrelevant, but knowledge thereof by the principal is, not only relevant, but essential, and must be proved either directly or indirectly as above.

*See also* **Cooley v. Eskridge**, 125 Colo. 102, 241 P.2d 851 (1952); **Citywide Banks v. Armijo**, 313 P.3d 647 (Colo. App. 2011).

3. The third numbered paragraph of this instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 22, 396 P.3d 651 (citing RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b); **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶ 21. *See also* RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2006) (stating that agent has “actual authority to take action designated or implied in the principal’s manifestations”).

4. “Implied authority” has also been defined as the authority to do “those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.” **Willey**, 876 P.2d at 1264; *see* **Johnson**, ¶ 22, 396 P.3d at 656; **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007); *see also* Instruction 8:10.

5. “Implied authority is actual authority circumstantially proved.” **Trinidad**, ¶ 21; *accord* **Citywide Banks**, 313 P.3d at 652.

6. A co-named insured on an automobile insurance policy has implied authority to waive UM/UIM benefits as result of express authority to purchase the insurance policy on behalf of another co-named insured. **Johnson**, ¶¶ 22-24, 396 P.3d at 656.

7. The Third Restatement provides that an agent’s interpretation of the principal’s manifestations must be reasonable. RESTATEMENT (THIRD) OF AGENCY § 2.02(2), (3) (2006).



## 8:12 APPARENT AUTHORITY (AGENCY BY ESTOPPEL) — DEFINITION AND EFFECT

**An agent has apparent authority when a principal, by words or conduct, has caused another person to reasonably believe that the principal has authorized an agent to act on the principal’s behalf, even though the principal may not have done so. When an agent has apparent authority, it is the same as if the principal had authorized the agent’s actions.**

### Notes on Use

1. This instruction should not be used when the principal is undisclosed because by definition, apparent authority cannot exist when the principal is undisclosed. Such may not be true when the principal is unidentified, as in the case of a partnership where the third person is dealing with the partnership and knows some of its members but not all of them. For historical discussion of this principle, see *W. SEAVEY, AGENCY* § 4 (1964).

2. The rule of apparent authority should not be confused with the rules governing incidental or implied authority. See Instructions 8:10 and 8:11.

### Source and Authority

1. This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 20, 396 P.3d 651, 656 (“An agent has apparent authority to affect a principal’s relations with a third party when the third party reasonably believes, based on the principal’s manifestations, that the agent has authority to act on behalf of the principal.” (citing RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006))); **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶ 25 (“Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” (citing RESTATEMENT (THIRD) OF AGENCY § 2.03)). See also **Bowser v. Union Bag Co.**, 112 Colo. 373, 149 P.2d 800 (1944); **Wilson v. Mosko**, 110 Colo. 127, 130 P.2d 927 (1942); **Burck v. Hubbard**, 104 Colo. 83, 88 P.2d 955 (1939); **Zeller v. Taylor**, 95 Colo. 503, 37 P.2d 391 (1934) (by implication); **Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe**, 107 P.3d 402 (Colo. App. 2004); **In re Marriage of Robbins**, 8 P.3d 625 (Colo. App. 2000); **Kuehn v. Kuehn**, 642 P.2d 524 (Colo. App. 1981); **Russell v. First Am. Mortg. Co.**, 39 Colo. App. 360, 565 P.2d 972 (1977); RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (defining apparent authority).

2. Apparent authority is “established by proof of written or spoken words or other conduct of the principal which, reasonably interpreted, causes a person to believe that the principal consents to have the act done on his behalf by a person purporting to act for him.” **Fresquez**, ¶ 25 (quoting **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357, 363 (Colo. App. 2007)).

3. For a general historical discussion of apparent authority and the typical situations in which it may exist, see *W. SEAVEY, AGENCY* § 8, at 13-14 (1964); *P. MECHEM, OUTLINES OF THE LAW OF AGENCY* §§ 84-95 (4th ed. 1952).

4. For the distinction between apparent and implied authority, see **Johnson**, ¶¶ 20-22, 396 P.3d at 656; **Moore v. Switzer**, 78 Colo. 63, 239 P. 874 (1925); and **Sigel-Campion Live Stock Comm'n Co. v. Ardohain**, 71 Colo. 410, 207 P. 82 (1922) (awareness of, and reliance on, a “holding out” by the principal required for apparent authority).

5. Where a third party has dealt with an agent and has established the existence of apparent authority, it is incumbent upon the principal who seeks to escape liability for the agent’s actions to show that the third party had knowledge or was charged with notice that the agent was acting beyond the scope of the agent’s authority. **Bowser**, 112 Colo. at 379-80, 149 P.2d at 803; **Zambruk v. Perlmutter 3rd Generation Builders, Inc.**, 32 Colo. App. 276, 510 P.2d 472 (1973); *see also* **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978).

6. The RESTATEMENT (SECOND) OF TORTS section 261 (1965), articulates the specific situation where liability will attach to the principal under the apparent authority doctrine for the intentional torts of the agent. **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468 (Colo. 1995) (Grease Monkey liable for the fraudulent acts of its Chief Operating Officer because the COO was put in a position that enabled him to commit fraud, he acted within his apparent authority, and he committed fraud).

7. “Apparent authority thus flows only from the acts and conduct of the principal.” **Johnson**, ¶ 20, 396 P.3d at 656 (citation omitted); *accord* **Fresquez**, ¶ 25.

8. Colorado courts have used the terms “ostensible agency,” “apparent agency,” “apparent authority,” and “agency by estoppel” interchangeably. **Carl’s Italian Rest. v. Truck Ins. Exch.**, 183 P.3d 636 (Colo. App. 2007); **Daly v. Aspen Ctr. for Women’s Health, Inc.**, 134 P.3d 450 (Colo. App. 2005).

## 8:13 SCOPE OF AUTHORITY OR EMPLOYMENT — DEPARTURE

**An agent is acting outside the scope of (his) (her) (its) (authority) (employment) when the agent substantially departs from (his) (her) (its) principal’s business by doing an act intended to accomplish an independent purpose of the agent’s own or for some other purpose which is unrelated to the business of the principal and not reasonably included within the scope of the agent’s (authority) (employment). Such departure may be of short duration, but during such time the agent is not acting within the scope of (his) (her) (its) (authority) (employment).**

### Notes on Use

1. Use whichever parenthesized word, “authority” or “employment,” is more appropriate.
2. When more appropriate, substitute the word “employee” for “agent” and the word “employer” for “principal.”
3. When appropriate, this instruction should be given with Instruction 8:8 or 8:9.

### Source and Authority

1. This instruction is based on **Kirkpatrick v. McCarty**, 112 Colo. 588, 152 P.2d 994 (1944); and **Marron v. Helmecke**, 100 Colo. 364, 67 P.2d 1034 (1937). For additional cases, see the Source and Authority to Instruction 8:18. *See also* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) (defining when act is within or outside scope of authority); RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958).
2. An employee who is lodging in a public accommodation, preparing to eat, or going to or returning from a meal is performing an act necessarily incident to his or her employment. **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964).
3. As to when a departure may not be substantial, see **Gibson v. Dupree**, 26 Colo. App. 324, 144 P. 1133 (1914).

## 8:14 RATIFICATION — DEFINITION AND EFFECT

**A person may act as the agent for another without authority. If the person for whom the act was done has full knowledge of all the important facts, that person may, by words or conduct, ratify or accept the action after it was done. Ratification after the action is the same as authorization before the action.**

### Notes on Use

Where a person expressly ratifies an act under circumstances that make it appear that person is assuming the risk of any lack of complete knowledge, such ratification may still be effective even though the person lacks full knowledge. **W. Inv. & Land Co. v. First Nat'l Bank**, 64 Colo. 37, 172 P. 6 (1918). In such circumstances, this instruction should be appropriately modified.

### Source and Authority

1. This instruction is supported by **Nunnally v. Hilderman**, 150 Colo. 363, 373 P.2d 940 (1962); **Fresquez v. Trinidad Inn, Inc.**, 2022 COA 96, ¶ 60; **Fiscus v. Liberty Mortgage Corp.**, 2014 COA 79, ¶ 40, 373 P.3d 644, *aff'd on other grounds*, 2016 CO 31, 379 P.3d 278; **Siener v. Zeff**, 194 P.3d 467 (Colo. App. 2008); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); **Hauser v. Rose Health Care Systems**, 857 P.2d 524 (Colo. App. 1993); and **M.S.P. Industries, Inc. v. Diversified Mortgage Services, Inc.**, 777 P.2d 237 (Colo. App. 1989) (discusses both requirements and effect of a ratification).

2. The legal effect of a ratification as set out in the last sentence of this instruction is supported by **Poudre Valley Furniture Co. v. Craw**, 80 Colo. 353, 251 P. 543 (1926). *See also Philips Indus., Inc. v. Mathews, Inc.*, 711 P.2d 704, 706 (Colo. App. 1985) (the legal effect of ratification of unauthorized sale by agent includes “the agent’s entitlement to its usual commissions, fees, and expenses”).

3. A failure to act to repudiate an agent’s act may constitute ratification. **Siener**, 194 P.3d at 472 (acceptance of benefits, failure to repudiate, knowledge of circumstances all factors to consider in determining whether client whose attorney makes an unauthorized settlement has ratified it).

4. The burden of proving ratification with full knowledge of all material facts is on the party alleging ratification occurred. **Fiscus**, ¶ 40, 373 P.3d at 652; **Siener**, 194 P.3d at 472.

## 8:15 KNOWLEDGE OF AGENT IMPUTABLE TO PRINCIPAL

**A principal is considered to know or have notice of information if the principal's agent, while acting within the scope of the agent's authority, learns or receives notice of the information.**

### Notes on Use

In certain cases, knowledge acquired by an agent prior to becoming an agent may also be imputable to the agent's principal. *See Schollay v. Moffitt-West Drug Co.*, 17 Colo. App. 126, 67 P. 182, 184 (1901). In such cases this instruction should be appropriately modified.

### Source and Authority

1. This instruction is supported by *Filatov v. Turnage*, 2019 COA 120, ¶ 21, 451 P.3d 1263, 1268 (“Notice to an agent is notice to the principal.”); *Gray v. Blake*, 131 Colo. 560, 283 P.2d 1078 (1955); and *Denver, S. P. & P. R.R. v. Conway*, 8 Colo. 1, 5 P. 142 (1884). *See also Hauser v. Rose Health Care Sys.*, 857 P.2d 524 (Colo. App. 1993); RESTATEMENT (THIRD) OF AGENCY, § 5.02 (2006).

2. When an agent acts adversely to the interests of its principal, there is an exception to the general rule that the knowledge of an agent is imputable to its principal. *Vail Nat'l Bank v. Finkelman*, 800 P.2d 1342 (Colo. App. 1990).

3. Generally, knowledge of, or notice to, a general partner of a limited partnership is imputable to the limited partners if such knowledge or notice concerns partnership business and was received or acquired by the general partner while transacting partnership business. *BMS P'ship v. Winter Park Devil's Thumb Inv. Co.*, 910 P.2d 61 (Colo. App. 1995), *aff'd on other grounds*, 926 P.2d 1253 (Colo. 1996). Also, the knowledge of a partner concerning general partnership business is imputable to all of the partners. *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236 (Colo. App. 1998).

4. Imputed knowledge is different from actual knowledge. Actual knowledge requires an active or conscious belief or awareness. *Jehly v. Brown*, 2014 COA 39, ¶¶ 12-13, 327 P.3d 351; *see also Clown's Den, Inc. v. Canjar*, 33 Colo. App. 212, 518 P.2d 957 (1973) (differentiating between actual and imputed knowledge of principal).

## 8:16 TERMINATION OF AGENT'S AUTHORITY

**The authority of an agent to represent (his) (her) (its) principal is terminated** (*insert the appropriate terminating event, e.g., "upon the death of the principal"*). **The party claiming the authority of an agent was terminated has the burden of proving it.**

### Notes on Use

1. In certain cases, for example, the termination by a principal of the authority of a general agent may not be effective as against third persons unless they have been given notice. *See* Instruction 8:17.

2. This instruction is not applicable to agencies "coupled with an interest."

### Source and Authority

1. This instruction is supported by **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391 (Colo. 1987) (partial list of grounds for termination) (citing RESTATEMENT (SECOND) OF AGENCY §§ 105-07, 117-19); **Lowell v. Hessey**, 46 Colo. 517, 105 P. 870 (1909) (principal's revocation of agency authority terminates only upon notice to the agent); and **Boettcher DTC Building Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988) (agency terminates upon completion of the assigned task). *See* RESTATEMENT (THIRD) OF AGENCY §§ 3.06 (termination of actual authority), 3.07 (death, cessation of existence, and suspension of powers), 3.08 (loss of capacity), 3.09 (termination by agreement or changed circumstances), 3.10 (manifestation terminating actual authority), 3.11 (termination of apparent authority) (2006).

2. The burden of establishing a termination rests on the party who asserts it. **Paulsen v. Rourke**, 26 Colo. App. 488, 145 P. 711 (1915) (termination by revocation).

3. For a discussion of the irrevocability of an agency coupled with an interest, see **In re Estate of Gray**, 37 Colo. App. 47, 541 P.2d 336 (1975).

4. For the effect of the death or incompetency of a bank customer on the authority of a payor or collecting bank, see section 4-4-405, C.R.S.

5. As to the appointment and termination of the authority of an insurance agent, that is, an "insurance provider," see sections 10-2-416 and 10-2-416.5, C.R.S.

## 8:17 TERMINATION OF AGENT'S AUTHORITY — NOTICE TO THIRD PARTIES

Where (*name of third party*) (had previously dealt with an agent of a known principal [*name*]) (knew [*name of agent*] to be the principal [*name of principal*]'s agent) (was likely to deal with [*name of agent*] on the basis of [his] [her] [its] knowledge that [*name of agent*] was an agent of the principal [*name*]), (*name of third person*) had a right to assume the agent's authority would continue until (he) (she) knew or was notified of the principal's termination of the agent's authority.

No particular form of notice of termination is required. Notice is sufficient if it provides information that would cause a reasonable person to investigate the possible termination of the agent's authority.

### Notes on Use

1. The rule set out in this instruction is generally applicable only in the case of a general, as opposed to a special, agent. Only in rare instances does a special agent's authority continue after termination without notice.

2. A principal's termination of an agent's authority does not revoke an agent's apparent authority. The agent's apparent authority arises from the principal's manifestation of the agent's authority to deal with third parties. The right of third parties to deal with an agent based on the agent's apparent authority remains unaffected until the third parties have knowledge or have been notified that the agent's authority has been terminated. The specific notice required depends upon the facts.

3. Use whichever parenthesized clauses are appropriate to the facts of the case.

4. If there is a dispute as to any of the facts contained in the parenthetical clauses, this instruction should be phrased conditionally, e.g., "If (*name of third person*) (had previously dealt with an agent of a known principal) (knew [*name of agent*] to be [*name of alleged principal*]'s agent, and [*name of agent*] in fact had been [*name of alleged principal*]'s agent)," etc.

### Source and Authority

1. This instruction is supported by **West Denver Feed Co. v. Ireland**, 38 Colo. App. 64, 551 P.2d 1091 (1976); and RESTATEMENT (SECOND) OF AGENCY §§ 127-133, 135-136 (1958). For historical discussion of these principles, see **W. SEAVEY**, AGENCY §§ 51-53 (1964); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 2.01 cmt. c, 3.11 (2006).

2. There is sufficient notice of termination of the agency where a creditor learns, actually or constructively, that the former principal has ceased to do business or transferred the enterprise to another. **W. Denver Feed Co.**, 38 Colo. App. at 67, 551 P.2d at 1093-94.

3. As to the appointment and termination of the authority of an insurance agent, that is, an "insurance provider," see sections 10-2-416 and 10-2-416.5, C.R.S.

## B. LIABILITY ARISING FROM AGENCY

### Introductory Note

1. Divisions of the court of appeals disagree as to whether a principal is liable for physical injuries caused by agent independent contractors. *Compare* **Daly v. Aspen Ctr. for Women's Health, Inc.**, 134 P.3d 450, 454 (Colo. App. 2005) (holding that “[o]rdinarily, a principal is not liable for physical injuries caused by the negligence of a nonservant agent” (citing RESTATEMENT (SECOND) OF AGENCY § 250 (1958))), *with* **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (holding that a principal was vicariously liable for injuries caused by an agent’s negligent driving, without regard to agent’s independent contractor status).

2. The supreme court has not squarely addressed the issue. In **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468, 473 (Colo. 1995), the court noted in dicta that “[w]hen the servant or agent uses the apparent authority of the relationship with the master or principal, the Restatement (Second) of Agency also holds principals vicariously liable for the physical torts of agents who are not servants, i.e., if the tort was committed within the scope of the agency.” The court also explained that employees and independent contractor agents are distinguishable partly because an employer, unlike an independent contractor agent, is liable for physical harm resulting from an employee’s physical conduct in the scope of employment. *Id.* In light of the unsettled nature of Colorado law, the Committee takes no position on the issue.



**8:18 PRINCIPAL AND AGENT — BOTH PARTIES SUED — ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF AUTHORITY**

**For the plaintiff, (name), to recover on (his) (her) (its) claim(s) of (insert applicable theory of liability, e.g., “breach of fiduciary duty”) against the defendant, (alleged principal’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “breach of fiduciary duty”) claim(s) against the defendant, (alleged agent’s name);**

**(2. The defendant, [alleged agent’s name], was the agent of the defendant, [alleged principal’s name], at the time of the [insert applicable theory of liability, e.g., “breach of fiduciary duty”] [.] [; and])**

**(3. The defendant, [alleged agent’s name], was acting within the scope of [his] [her] [its] authority at the time of the [insert appropriate description of events, e.g., “occurrence,” “promise was made,” “representation was made,” etc.] .)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged principal’s name), on the claim(s) of (insert applicable theory of liability, e.g., “breach of fiduciary duty”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “breach of fiduciary duty”), against the defendant, (insert alleged principal’s name).**

**Notes on Use**

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal’s behalf and bind the principal in contract. **Grease Monkey Int’l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent’s torts if the agent is acting with apparent authority. *See Grease Monkey Int’l*, 904 P.2d at 475-76 (holding principal liable for agent’s fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who “is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.” **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass’n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in

cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of authority, or both, is at issue.

4. When there is a dispute as to whether an agency relationship exists, Instruction 8:1 (defining the agency relationship) should be given along with this instruction.

5. When the scope of agency is at issue, Instruction 8:9 (defining scope of authority) should be given with this instruction.

6. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

1. This instruction is supported by **City of Aurora v. Colorado State Engineer**, 105 P.3d 595, 622 (Colo. 2005); and **Cooley v. Eskridge**, 125 Colo. 102, 241 P.2d 851 (1952).

2. One who hires an independent contractor is generally not vicariously liable for torts committed by the contractor. **Huddleston**, 841 P.2d at 288; **Lopez v. City of Grand Junction**, 2018 COA 97, ¶ 44, 488 P.3d 364. However, an independent contractor may be an agent, and the person engaging such agent may be held vicariously liable for torts committed by the agent within the scope of the agency. **Cheney v. Hailey**, 686 P.2d 808, 811 (Colo. App. 1984) (“Because an agency relationship existed, [the principal] was vicariously liable whether or not [the agent] was in fact an independent contractor.”); *see* RESTATEMENT (SECOND) OF AGENCY § 14N (1958).

3. If an independent contractor is not an agent, the doctrine of respondeat superior does not give rise to vicarious liability for the independent contractor’s negligence because an independent contractor, unlike an employee, is not subject to the principal’s control. **Daly v. Aspen Ctr. for Women's Health, Inc.**, 134 P.3d 450, 452 (Colo. App. 2005).

4. In **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978), the supreme court recognized the “inherently dangerous activity” exception to the general rule that employers of independent contractors are not vicariously liable for the torts of such contractors. *See* **Huddleston**, 841 P.2d at 288; **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Vikell Inv’rs Pac., Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997); *cf.* **Schell v. Navajo Freight Lines, Inc.**, 693 P.2d 382 (Colo. App. 1984) (federal administrative regulation requiring independent contractor be treated as employee).

5. Colorado’s Premises Liability Act creates a nondelegable duty that burdens the landowner with full liability regardless of fault imputable to other parties or nonparties. The landowner’s liability does not depend on vicarious liability for injuries caused by conditions created by a landowner’s agent. **Reid v. Berkowitz**, 2016 COA 28, ¶¶ 22-23, 370 P.3d 644.

6. A party may sue a principal on a theory of vicarious liability even if the party executes a covenant not to sue the agent and that covenant does not expressly reserve the right to sue the principal. **McShane v. Stirling Ranch Prop. Owners Ass'n**, 2017 CO 38, ¶¶ 25-26, 393 P.3d 978 (citing **Dworak v. Olson Constr. Co.**, 191 Colo. 161, 551 P.2d 198 (1976)).

## 8:19 PRINCIPAL AND AGENT — BOTH PARTIES SUED — NO ISSUE AS TO RELATIONSHIP AND SCOPE OF AUTHORITY

**The defendant, (*agent's name*), was the agent of the defendant, (*principal's name*), at the time of the (*insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.*).**

**For the plaintiff, (*name*), to recover on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*) against the defendant, (*principal's name*), you must find that the plaintiff proved by a preponderance of the evidence (his) (her) (its) (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*) claim(s) against the defendant, (*agent's name*).**

**If you find that the plaintiff, (*name*), has not proved (his) (her) (its) claim(s) against the defendant, (*agent's name*), then your verdict must be for the defendant, (*principal's name*), on the claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*).**

**On the other hand, if you find that the plaintiff, (*name*), has proved (his) (her) (its) claim(s) against the defendant, (*agent's name*), then your verdict must be for the plaintiff on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*), against the defendant, (*principal's name*).**

### Notes on Use

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See id.* at 475-76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who "is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill. Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. This instruction should be given when there is no dispute as to the relationship and scope of authority.

4. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

**Source and Authority**

See the Source and Authority to Instruction 8:18.

**8:20 PRINCIPAL AND AGENT — ONLY PRINCIPAL SUED — ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF AUTHORITY**

**For the plaintiff, (name), to recover on (his) (her) (its) claim of (insert applicable theory of liability, e.g., “breach of fiduciary duty”) against defendant, (alleged principal’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “breach of fiduciary duty”) claim(s);**

**(2. [Alleged agent’s name], was the agent of the defendant, [alleged principal’s name], at the time of the [insert appropriate description of events, e.g., “occurrence,” “promise was made,” “representation was made,” etc.] [.] [; and])**

**(3. [Alleged agent’s name] was acting within the scope of [his] [her] [its] authority at the time of the [insert appropriate description of events, e.g., “occurrence,” “promise was made,” “representation was made,” etc.] .)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged principal’s name), on the claim(s) of (insert applicable theory of liability, e.g., “breach of fiduciary duty”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “breach of fiduciary duty”), against the defendant, (alleged principal’s name).**

**Notes on Use**

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal’s behalf and bind the principal in contract. **Grease Monkey Int’l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent’s torts if the agent is acting with apparent authority. *See id.* at 475-76 (holding principal liable for agent’s fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who “is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.” **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass’n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions,

*see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of authority, or both, is at issue.

4. When there is a dispute as to whether an agency relationship exists, Instruction 8:1 (defining the agency relationship) should be given along with this instruction.

5. When the scope of agency is at issue, Instruction 8:9 (defining scope of authority) should be given with this instruction.

6. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### **Source and Authority**

See the Source and Authority to Instruction 8:18.

## 8:21 PRINCIPAL AND AGENT — ONLY PRINCIPAL SUED — NO ISSUE AS TO RELATIONSHIP AND SCOPE OF AUTHORITY

*(Agent's name)* was the agent of the defendant, *(principal's name)*, at the time of the *(insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.)*. Any act or omission of *(agent's name)* is the act or omission of the defendant, *(principal's name)*.

### Notes on Use

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See id.* at 475-76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who "is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. This instruction should be given when there is no dispute as to the relationship and scope of agency.

4. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

See the Source and Authority to Instruction 8:18.



## C. LIABILITY ARISING FROM RESPONDEAT SUPERIOR

### 8:22 EMPLOYER AND EMPLOYEE — BOTH PARTIES SUED — ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF EMPLOYMENT

**For the plaintiff, (name), to recover on (his) (her) (its) claims of (insert applicable theory of liability, e.g., “negligence”) against defendant, (alleged employer’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “negligence”) claim(s) against the defendant, (alleged employee’s name);**

**(2. The defendant, [alleged employee’s name], was the employee of the defendant, [alleged employer’s name], at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] [.] [; and])**

**(3. The defendant, [alleged employee’s name], was acting within the scope of [his] [her] [its] employment at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] .)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged employer’s name), on the claim(s) of (insert applicable theory of liability, e.g., “negligence”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “negligence”), against the defendant, (insert alleged employer’s name).**

#### Notes on Use

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of employment, or both, is at issue.

3. When there is a dispute as to whether the alleged tortfeasor is an employee or an independent contractor, Instructions 8:4 (defining employer and employee) and 8:5 (defining independent contractor) should be given along with this instruction.

4. When the scope of employment is at issue, Instruction 8:8 (defining scope of employment) should be given with this instruction.

#### Source and Authority

1. This instruction is supported by **Raleigh v. Performance Plumbing & Heating**, 130 P.3d 1011 (Colo. 2006); and **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468

(Colo. 1995). *See also* **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (employer liable for torts of employee committed while acting within scope of employment); **Bernardi v. Cmty. Hosp. Ass’n**, 166 Colo. 280, 443 P.2d 708 (1968) (hospital employer liable for negligence of employee nurse acting within scope of employment); **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964) (traveling employee acting within scope of employment because dining and lodging are activities incidental to employment); **Gibbons & Reed Co. v. Howard**, 129 Colo. 262, 269 P.2d 701 (1954) (employees not acting within scope of employment when borrowing company vehicle to move personal belongings); **Marron v. Helmecke**, 100 Colo. 364, 67 P.2d 1034 (1937) (employee not acting within scope of employment when conduct is not connected with the employer’s business); **Crosswaith v. Thomason**, 95 Colo. 240, 35 P.2d 849 (1934); **Lovejoy v. Denver & Rio Grande R.R.**, 59 Colo. 222, 146 P. 263 (1915); **Novelty Theater Co. v. Whitcomb**, 47 Colo. 110, 106 P. 1012 (1909); **Pierce v. Conners**, 20 Colo. 178, 37 P. 721 (1894); **Denver, S. Park & Pac. R.R. v. Conway**, 8 Colo. 1, 5 P. 142 (1884) (corporate employer held liable for negligence of employee); **Suydam v. FLI Fort Pierce, Inc.**, 2020 COA 144M, ¶ 13, 490 P.3d 930, 934 (“Under the doctrine of respondeat superior, an employer is liable for torts committed by its employee while acting within the scope of his or her employment. The employer is liable if the employee’s conduct was motivated by an intent to serve the employer’s interests and connected to acts the employee was authorized to perform.” (citation omitted)).

2. The doctrine of respondeat superior is based on the theory that the employee is the agent of the employer. **Daly v. Aspen Ctr. for Women’s Health, Inc.**, 134 P.3d 450 (Colo. App. 2005); *see* **Connes v. Molalla Transp. Sys., Inc.**, 831 P.2d 1316, 1320–21 (Colo. 1992).

3. Respondeat superior applies only to those acts committed while the employee was acting within the scope of employment. **Grease Monkey Int’l**, 904 P.2d at 473; *see* **Suydam**, ¶ 14, 490 P.3d at 934.

4. A supervising employee is not individually liable under the doctrine of respondeat superior for torts committed by subordinate employees. **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985).

5. The doctrine of respondeat superior does not bar recovery against individual corporate agents for torts committed while acting on behalf of the corporation. **JW Constr. Co. v. Elliott**, 253 P.3d 1265, 1270 (Colo. App. 2011) (“[A]n officer of a corporation is liable for torts that he or she personally commits even if acting in an official capacity on behalf of the corporation.”); **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9, 28 (Colo. App. 2010) (“Corporate agents are liable for torts of the corporation if they approved of, sanctioned, directed, actively participated in, or cooperated in such conduct.”); **Hoang v. Arbess**, 80 P.3d 863, 867 (Colo. App. 2003) (a corporate officer may “be held personally liable for his or her individual acts . . . even though committed on behalf of the corporation, which is also held liable”); **Sanford v. Kobey Bros. Constr. Corp.**, 689 P.2d 724, 725 (Colo. App. 1984) (when an officer, director, or agent of a corporation “personally commit[s] any negligent act, judgment should also [enter] against [the individual] personally”); *see also* **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (whether an individual defendant approved of, directed, actively participated in, or cooperated in the corporation’s negligent conduct is usually a question of fact for the jury).

6. Although an employer may not be liable under the doctrine of respondeat superior for a tort committed by an employee acting outside the scope of employment, the employer may be liable for the harm caused by the employee if it resulted from the employer's negligent supervision of the employee. **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988); *see also* **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993) (negligent hiring and supervision).

7. Respondeat superior liability is a derivative, or secondary, liability. *See* **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 30, 390 P.3d 836, 845 (subsequently abrogated by section 13-21-111.5(1.5), C.R.S., effective for cases filed on or after September 7, 2021); *see also* **Arnold v. Colo. State Hosp.**, 910 P.2d 104, 107 (Colo. App. 1995) (“An employer’s liability for an employee’s negligence based upon respondeat superior is only a secondary liability.”). Derivative liability means there must be some finding of employee culpability in order to find liability on the part of the employer. **Ferrer**, ¶ 30. An employer cannot be found liable for direct negligence claims, such as negligent hiring, supervision and retention, or entrustment, unless the employee’s own negligence causes an injury. *Id.* at ¶ 29. Therefore, when “an employer acknowledges vicarious liability for its employee’s negligence, a plaintiff’s direct negligence claims against the employer are barred.” *Id.* at ¶ 19. *But see* **Brown v. Long Romero**, 2021 CO 67, ¶ 29, 495 P.3d 955 (plaintiff’s direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee’s negligence).

8. Further, because the doctrine of respondeat superior is derivative in nature, the employer and employee are not joint tortfeasors. **Marso v. Homeowners Realty, Inc.**, 2018 COA 15M, ¶ 17, 418 P.3d 542; **Arnold**, 910 P.2d at 107 (Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S., is not applicable).

9. A defense available to an employee may also be applicable to the employer. *See, e.g.*, § 13-21-108, C.R.S. (exemption for civil liability while rendering emergency assistance). However, “although a finding that an employee is not negligent requires a finding that the employer is not legally responsible, an action may proceed against an employer if the claim against the employee has been dismissed or barred, not on the merits of the claim, but on procedural grounds.” **Gallegos v. City of Monte Vista**, 976 P.2d 299, 301 (Colo. App. 1998) (statute of limitations defense by employee did not bar respondeat superior claim against employer).

10. A principal may also be vicariously liable for the fraudulent acts of the employee or nonemployee agent if those acts were committed while the agent was acting with apparent authority. **Grease Monkey Int’l**, 904 P.2d at 473. To find vicarious liability under this theory, the plaintiff must establish that the “agent was put in a position which enabled the agent to commit fraud, the agent acted within his [or her] apparent authority, and the agent committed fraud.” *Id.* at 475 (citing RESTATEMENT (SECOND) OF TORTS § 261 (1958)).

11. For a discussion of the applicability of the doctrine of respondeat superior to medical professional service corporations, *see* **Pediatric Neurosurgery, P.C. v. Russell**, 44 P.3d 1063 (Colo. 2002) (interpreting statute governing the formation and operation of medical professional service corporations, § 12-36-134, C.R.S.). However, in 2003, the General Assembly declared that the supreme court’s decision in **Russell** would “no longer” reflect the law of section 12-36-134. Ch. 240, sec. 1, § 12-36-134, 2003 Colo. Sess. Laws 1598. *See* **Daly**, 134 P.3d at 452

(healthcare facility did not “employ doctors, perform medical services, or interfere with a doctor’s independent medical judgment . . . [and thus could] not be held accountable under the doctrine of respondeat superior for the doctor’s alleged negligence”).

12. Employees commuting between home and work are not ordinarily acting within the scope of employment. **Stokes v. Denver Newspaper Agency, LLP**, 159 P.3d 691 (Colo. App. 2006) (worker’s compensation cases differ from respondeat superior cases); **Beeson v. Kelran Constructors, Inc.**, 43 Colo. App. 505, 608 P.2d 369 (1979). Therefore, an employee’s negligence while driving to or from work will not create respondeat superior liability. **Stokes**, 159 P.3d at 693; *cf.* **Goettman v. N. Fork Valley Rest.**, 176 P.3d 60, 70 (Colo. 2007) (a traveling employee is acting within the scope of his or her employment while lodging and dining on business trip because those activities are incident to employment).

13. Whether an employee was acting within the scope of employment is a question of fact. **Suydam**, ¶ 15, 490 P.3d at 934.

**8:23 EMPLOYER AND EMPLOYEE — BOTH PARTIES SUED — NO ISSUE AS TO RELATIONSHIP AND SCOPE OF EMPLOYMENT**

**The defendant, *(employee's name)*, was the employee of the defendant, *(employer's name)*, at the time of the *(insert appropriate description of events, e.g., "occurrence," "collision," "accident," etc.)*.**

**For the plaintiff, *(name)*, to recover on *(his) (her) (its)* claim(s) of *(insert applicable theory of liability, e.g., "negligence")* against the defendant, *(employer's name)*, you must find that the plaintiff proved by a preponderance of the evidence *(his) (her) (its)* *(insert appropriate theory of liability, e.g., "negligence")* claim(s) against the defendant, *(employee's name)*.**

**If you find that the plaintiff, *(name)*, has not proved *(his) (her) (its)* claim(s) against the defendant, *(employee's name)*, then your verdict must be for the defendant, *(employer's name)*, on the claim(s) of *(insert applicable theories of liability, e.g., "negligence")*.**

**On the other hand, if you find that the plaintiff, *(name)*, has proved *(his) (her) (its)* claim(s) against the defendant, *(employee's name)*, then your verdict must be for the plaintiff on *(his) (her) (its)* claim(s) of *(insert applicable theories of liability, e.g., "negligence")*, against the defendant, *(employer's name)*.**

**Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. This instruction should be given whenever there is no dispute as to the relationship and scope of employment.

**Source and Authority**

See the Source and Authority to Instruction 8:22.

**8:24 EMPLOYER AND EMPLOYEE — ONLY EMPLOYER SUED — ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF EMPLOYMENT**

**For the plaintiff, (name), to recover on (his) (her) (its) claim of (insert appropriate theories of liability, e.g., “negligence”) against the defendant, (alleged employer’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “negligence”) claim(s);**

**(2. [Alleged employee’s name], was the employee of the defendant, [alleged employer’s name], at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] [.] [; and])**

**(3. [Alleged employee’s name] was acting within the scope of [his] [her] [its] employment at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] .)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged employer’s name), on the claim(s) of (insert applicable theory of liability, e.g., “negligence”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “negligence”), against the defendant, (insert alleged employer’s name).**

**Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of employment, or both, is at issue.

3. When there is a dispute as to whether the alleged tortfeasor is an employee or an independent contractor, Instructions 8:4 (defining employer and employee) and 8:5 (defining independent contractor) should be given along with this instruction.

4. When the scope of employment is at issue, Instruction 8:8 (defining scope of employment) should be given with this instruction.

**Source and Authority**

See the Source and Authority to Instruction 8:22.

**8:25 EMPLOYER AND EMPLOYEE — ONLY EMPLOYER SUED — NO ISSUE AS TO RELATIONSHIP AND SCOPE OF EMPLOYMENT**

*(Employee's name)* was the employee of the defendant, *(employer's name)*, at the time of the *(insert appropriate description of events, e.g., "occurrence," "collision," "accident," etc.)*. Any act or omission of *(employee's name)* is the act or omission of the defendant, *(employer's name)*.

**Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. This instruction should be given whenever there is no dispute as to the relationship and scope of employment.

**Source and Authority**

See the Source and Authority to Instruction 8:22.