**2.3: The Attorney as Agent**

The attorney-client relationship is a principal-agent relationship. The client is the principal and the attorney is the client’s agent. But it is a unique form of principal-agent relationship, because the client’s ability to control the attorney’s exercise of agency is limited, and because the attorney has duties not only to the client, but also to the court and the public.

**Professional Relationships**

In this respect, the attorney-client relationship resembles other professional relations. In the doctor-patient relationship, patients decide whether to seek treatment, but doctors decide how to provide treatment. In the professor-student relationship, students decide whether to attend school, but professors decide what to teach. And in the priest-penitent relationship, priests have duties not only to the penitent, but also to God.

In an attorney-client relationship, the client decides the objectives, but the attorney decides the means. The client decides how much authority to delegate to the attorney, and retains the right to make all major decisions, but cannot dictate all of the attorney’s actions. The attorney is entitled and required to exercise independent judgment about how to achieve the client’s goals.

For example:

* In a contract negotiation, the client is entitled to decide the key terms, but the attorney must decide how to achieve them.
* In civil litigation, the client is entitled to decide whether to settle, but the attorney must decide whether to assert a particular claim or defense.
* In criminal litigation, the client is entitled to decide whether to plead guilty, but the attorney must decide which witnesses to call and how to conduct cross-examination.

Moreover, in an attorney-client relationship, the attorney not only has a duty to protect the interests of the client, but also has a duty to protect the interests of the court and the public. An attorney is an agent of both the client and the court. In theory, while attorneys must pursue the interests of their clients, they also must not mislead the court, or allow their clients to lie to the court. Of course, in practice, this is often easier said than done.

**Attorneys as Agents**

As agents of their clients, attorneys often have the authority to act on behalf of their clients, but it may take the form of express, implied, or apparent authority.

| **Express Authority** | When an attorney acts pursuant to *authority explicitly granted* by the client. |
| --- | --- |
|  | Ex.) Clients can grant express authority to an attorney in an engagement letter or later instructions. |
| **Implied Authority** | When an attorney acts pursuant to authority *necessarily granted* by the attorney-client relationship |
|  | Ex.) Attorneys have implied authority to exercise discretion in implementing the instructions of their clients. |
| **Apparent Authority** | When an attorney acts pursuant to authority delegated by the client and an opposing party relies on the delegation, especially when the authority is normally reserved to the client. |
|  | Ex.) if a client delegates the authority to approve a final settlement, and an opposing party relies on the delegation, the attorney may have apparent authority, even though the decision to approve a final settlement is normally reserved to the client. |

When attorneys act pursuant to express, implied, or apparent authority, their actions bind their clients. But when attorneys act without authority, their actions are *ultra vires\*[[1]](#footnote-0)*, and may not be binding. Of course, when attorneys act without authority, they may also be liable for malpractice.

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**Attorneys as Fiduciaries**

*A friendship founded on business is better than a business founded on friendship.*[[2]](#footnote-1)

The attorney-client relationship is unusual because attorneys are fiduciaries of their clients.



As Cardozo famously explained, a fiduciary “is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928). Accordingly, fiduciaries must act only for the sole benefit and interest of the principal, and must put the interests of the principal above their own interests.

As fiduciaries, attorneys have a legal duty to act only in the interests of their clients, and to put the interests of their clients above their own interests. Accordingly, attorneys may never form a relationship that would create a conflict of interest with a current or former client, without the client’s informed consent.

| [**Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer/) |
| --- |
| 1. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. 2. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. 3. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. 4. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. |

| **Restatement (Third) of the Law Governing Lawyers, Introductory Note (2000)** |
| --- |
| Traditionally, some lawyers considered that a client put affairs in the lawyer's hands, who then managed them as the lawyer thought would best advance the client's interests. So conducting the relationship can subordinate the client to the lawyer. The lawyer might not fully understand the client's best interests or might consciously or unconsciously pursue the lawyer's own interests. An opposite view of the client-lawyer relationship treats the lawyer as a servant of the client, who must do whatever the client wants limited only by the requirements of law. That view ignores the interest of the lawyer and of society that a lawyer practice responsibly and independently.  A middle view is that the client defines the goals of the representation and the lawyer implements them, but that each consults with the other. Except for certain matters reserved for client or lawyer to decide, the scope of the lawyer's authority is itself one of the subjects for consultation, with room for the client's wishes and the parties' contracts to modify the traditionally broad delegation of authority to the lawyer. This approach, accepted in this Restatement, permits a variety of allocations of authority. |

| **Restatement (Third) of the Law Governing Lawyers § 20 (2000)** |
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| 1. A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer under §§ 21- 23. 2. A lawyer must promptly comply with a client's reasonable requests for information. 3. A lawyer must notify a client of decisions to be made by the client under §§ 21- 23 and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. |

| **Restatement (Third) of the Law Governing Lawyers § 21 (2000)** |
| --- |
| As between client and lawyer:   1. A client and lawyer may agree which of them will make specified decisions, subject to the requirements stated in §§ 18, 19, 22, 23, and other provisions of this Restatement. The agreement may be superseded by another valid agreement. 2. A client may instruct a lawyer during the representation, subject to the requirements stated in §§ 22, 23, and other provisions of this Restatement. 3. Subject to Subsections (1) and (2) a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required by § 20. 4. A client may ratify an act of a lawyer that was not previously authorized. |

| [***L.F.S. Corp. v. Kennedy*, 337 S.E.2d 209 (S.C. 1985)**](https://scholar.google.com/scholar_case?case=3617278723232766553) |
| --- |
| **Summary:** Kennedy represented L.F.S. in an action against the Town of Kershaw. Kennedy settled the action and L.F.S. accepted the settlement, but later objected to Kennedy settling without its consent. The court held that L.F.S. ratified Kennedy’s actions by accepting the settlement. |

In this legal malpractice action, appellant L.F.S. Corporation appeals from the grant of respondents’ motion for non-suit. Appellant raises numerous issues by twenty-four exceptions; however, we need only reach one issue which moots those remaining. We Affirm.

L.F.S. began planning a subdivision called Havenwood in 1964. In the early 1970's, a dispute arose with the Town of Kershaw concerning the town's obligation to supply water to the subdivision under an alleged oral contract. Respondents were retained to represent the Corporation.

The gravamen of appellant’s complaint is that respondents failed to follow instructions concerning settlement negotiations, and permitted summary judgment to be entered based on an unauthorized agreement. Notwithstanding respondents' alleged failure to follow instructions, the record clearly demonstrates L.F.S. subsequently ratified respondents’ actions.

After entry of the disputed 1976 order, the town remitted $900.00 in tap fees to the Corporation pursuant to the order. The check was accepted by the Corporation, and endorsed over to respondents to be applied against legal fees owned by the Corporation. Thereafter, one of the Corporation's directors wrote a letter to respondents seeking advice concerning enforcement of the order.

The events subsequent to the 1976 order clearly demonstrate L.F.S. ratified respondents’ actions concerning entry of the order. The Corporation accepted financial benefit under the order, and sought to take advantage of the order. Acceptance of both benefits are clear, unequivocal acts of ratification.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Did Kennedy have authority to agree to the settlement? |
| 1. If not, why did the court affirm the settlement? |

| [***Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St. 3d 45 (Ohio 1988)**](https://scholar.google.com/scholar_case?case=5204071731731945569) |
| --- |
| **Summary:** James Whitney represented an estate insured by Ohio Casualty Insurance, which issued settlement checks to Whitney, payable to the estate. Someone typographically endorsed the checks and deposited them in Whitney’s office account. The court held that the endorsements were invalid, because Whitney lacked any authority to endorse the checks. |

DOUGLAS, J.

The sole question posed for our consideration is whether an insurance carrier may be liable for conversion when the carrier authorizes its bank to pay a draft over a forged endorsement. We answer the question in the affirmative and, accordingly, uphold the decision of the court of appeals.

Initially, appellant asks this court to find that its payment to James Whitney, the attorney for the estate and guardianship, constituted payment to the estate and guardianship. Accordingly, appellant would have us hold that appellant's obligation to the estate and guardianship was discharged when appellant both delivered the drafts in question to the agent of the estate and the guardianship, and then authorized payment of such drafts to the same party. We decline to make such a finding in this case.

In essence, appellant asks this court to determine whether an attorney has the inherent power to endorse a settlement check on behalf of his client. If so, appellant would be discharged from its obligation to the estate and guardianship; if not, appellant's obligation remains unpaid and owing. We find both that an attorney has no inherent authority to endorse a settlement check in the name of his client, and that, on the basis of the record before us, attorney Whitney made no such endorsement in this case.

In Ohio, as elsewhere, "an attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action." Similarly, an attorney has no inherent authority to enter into a contract for the sale of real estate for his client. While this court has not previously addressed whether an attorney may endorse his client's name on a check or draft tendered to effect a settlement, numerous other courts have done so. The clear majority of these courts find that no such authority exists. Therefore, while we recognize that the decisions on this question are in conflict, we believe that the better rule is that an attorney possesses no inherent authority, arising solely from the attorney-client relationship, to endorse his client's name on a settlement check or draft. The authority to receive a negotiable instrument on behalf of a client does not imply the power to endorse it.

Accordingly, we hold that an attorney, absent any express authority from his client, has no authority to endorse the client's name on a check or draft tendered to effect a settlement.

Further, contrary to appellant’s contention that attorney Whitney properly endorsed and deposited the drafts into his escrow account, the only admissible evidence in the record, Whitney’s affidavit, reflects that Whitney endorsed neither draft and that the drafts were deposited into one of Whitney's general office accounts. Further, even assuming that Whitney endorsed the drafts, an “unauthorized signature” includes both a forgery and a signature made by an agent exceeding his actual or apparent authority. Thus, given our finding that attorneys have no inherent authority to endorse their client’s name to a settlement draft, and the undisputed fact that there was no apparent or actual authority vested in Whitney to endorse the drafts herein, Whitney’s endorsements, had he made any, would be unauthorized and appellant's obligation to the estate and guardianship would remain in effect.

The endorsements at issue herein were typewritten and restrictive in character. While such endorsements may, at times, be valid, we find that the endorsements at issue herein were unauthorized and thus not valid to operate as the signature of either the administrator or the guardian, the payees thereon.

An “‘unauthorized’ signature or indorsement is one made without actual, implied, or apparent authority and includes a forgery.” Further, an "unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.” Thus, an unauthorized signature does not operate as the signature of the named payee and, accordingly, may not act to pass title to an instrument or relieve the drawer of his obligation to pay the payee.

In the instant case, appellees presented the sworn affidavits of attorney Whitney, Orin Morris and Tom Swope. These affidavits established that Whitney did not endorse the drafts at issue, and that Morris and Swope neither signed nor authorized anyone else to sign these drafts. Further, Morris and Swope are the only parties who possessed the authority to authorize an agent to sign on their behalf. Moreover, appellant has failed, through the use of any admissible evidence, to refute the statements contained in the affidavits. Accordingly, the endorsements appearing on the second and third drafts, No. X559281 and No. X559280, were unauthorized and the payment of the drafts, as endorsed, constituted a conversion.

Appellant authorized the payment of the drafts. Even though the appellant was the original drawer, appellant was also the drawee for purposes of liability.

We, therefore, affirm the judgment of the court of appeals and remand the cause to the trial court for determination of the currently pending claims.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Why did the insurance company pay the checks? |
| 1. Why did the court hold that payment was improper? |
| 1. What should the insurance company have done? |
| 1. Would the court have found the checks to be valid if the attorney had signed them rather than typing the client’s name on the endorsement line? |

| [***Makins v. District of Columbia*, 861 A. 2d 590 (D.C. 2004)**](https://scholar.google.com/scholar_case?case=15179046394258640818) |
| --- |
| **Summary:** John Harrison represented Brenda Makins in a discrimination action against the District of Columbia. Harrison attended a settlement conference, reached an agreement, left the room to call Makins, and finalized the agreement when he returned. But Makins later refused to sign the agreement, claiming that she had refused to settle without reinstatement. The District of Columbia tried to enforce the settlement agreement, but the court refused, holding that Harrison lacked apparent authority to accept the settlement offer. |

The United States Court of Appeals for the District of Columbia Circuit has certified the following question to this court:

Under District of Columbia law, is a client bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms.

For reasons set forth below, we answer the question in the negative. In so doing, we confine our analysis to the undisputed facts and those recited in the certified question.

In November 1998, Brenda Makins, represented by John Harrison, Esquire, brought an action against the District of Columbia in the United States District Court for the District of Columbia claiming sex discrimination and retaliatory firing. Makins had been employed in the District's Department of Corrections from 1995 until her discharge in 1997. Her complaint sought reinstatement, compensatory damages, and attorneys’ fees.

In the summer of 2000, at a pre-trial conference, the district judge referred Makins' case to a magistrate judge “for settlement purposes only” and ordered the District to “have present at all settlement meetings an individual with full settlement authority.” A similar admonition was absent as to Ms. Makins. A few days later, the magistrate ordered the “lead attorney(s) for the parties” to appear before him for a settlement conference; the order required that the “parties shall either attend the settlement conference or be available by telephone for the duration of the settlement conference.”

When the conference took place, Makins was not present. After two and a half hours of negotiations, Harrison and the attorneys for the District reached an agreement. Makins would receive $99,000 and have her personnel records amended from “discharged” to “resigned” (to preserve her retirement benefits if she were able to obtain other creditable employment). In return, Makins would dismiss her claims against the District. Mr. Harrison left the hearing room with cell phone in hand, apparently to call Ms. Makins. When he returned, the attorneys “shook hands” on the deal and later reduced it to writing. A few days later, when Harrison presented Makins with a copy for her signature, she refused to sign it. The District then filed a Motion to Enforce Settlement. Makins retained another attorney, and the court held an evidentiary hearing in which Harrison, Makins, and the lead attorney for the District testified.

The testimony of Makins and Harrison was at odds respecting whether Harrison had been given authority to settle absent a provision for her reinstatement to her job. The District Court, observing this “sharp conflict” in testimony, declined to resolve it. Instead, the court assumed arguendo that Harrison did not have actual authority to settle the case short of reinstatement. The court granted the District's motion to enforce the settlement on the alternative ground that Harrison had apparent authority to bind Makins to the agreement. The court saw “no justification for the District of Columbia not to reasonably believe that Mr. Harrison had the full confidence and authority of his client.”

There is arguably some inconsistency as to the extent of authority required of an attorney in settlement negotiations. Indeed, a review of relevant case law and principles enunciated by the American Bar Association and the American Law Institute demonstrate some differences not only over the extent of authority, but also the appropriate definitions of authority. To the extent that there tends to be this inconsistency among the cases, it reflects, in part, a difference in the application or integration of agency law with legal ethics principles, the attorney-client relationship and policy considerations.

This dissonance may in part be seen as a result of the intersection of ethical guidelines and rules governing the client-lawyer relationship and the relationship of a principal to her agent in the context of settlement agreements. On the one hand, the District of Columbia Code of Professional Responsibility Ethical Consideration 7-7 provides that it is the exclusive authority of “the client to decide whether [s]he will accept a settlement offer." Similarly, District of Columbia Rule of Professional Conduct 1.2(a) provides that a “lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.” On the other hand, “it is well established that settlement agreements are entitled to enforcement under general principles of contract law.” Agency principles are applied to determine whether the attorney or agent had authority to bind his principal to the settlement contract. Of course, an attorney can settle his client's case if he or she has actual authority to do so. Agency principles also recognize the authority of the agent to bind the client based on the doctrine of apparent authority.

The Restatement (Second) of Agency § 8 defines apparent authority as “the power to affect the legal relations of another person by transactions with third persons, professedly as an agent for the other, arising from and in accordance with the other's manifestations to such third persons.” Thus, unlike actual authority, apparent authority does not depend upon any manifestation from the principal to her agent, but rather from the principal to the third party. This court has stated that apparent authority arises when a principal places an agent “in a position which causes a third person to reasonably believe the principal had consented to the exercise of authority the agent purports to hold. This falls short of an overt, affirmative representation by a principal.” In such circumstances, an agent's representations need not expressly be authorized by his principal. The apparent authority of an agent arises when the principal places the agent in such a position as to mislead third persons into believing that the agent is clothed with the authority which in fact he does not possess. Apparent authority depends upon “the third-party's perception of the agent's authority.” The third party's perception may be based upon “written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on her behalf by the person purporting to act for her."

We reiterate that apparent authority is an established doctrine in this court's jurisprudence, and that settlement agreements are enforceable under general contract principles. But because apparent authority depends upon the principal's manifestations to the third party, the issue before us is what conduct by a client in the settlement context is sufficient reasonably to cause a third person to believe that the attorney representing the client has full, final settlement authority, rather than something short of that. Whether an agent had apparent authority is a question of fact and the party asserting the existence of apparent authority must prove it. In determining whether the agent had apparent authority to bind the principal, "consideration should be given, *inter alia*, to the actual authority of the agent, the usual or normal conduct of the agent in the performance of his or her duties, previous dealings between the agent and the party asserting apparent authority, any declarations or representations allegedly made by the agent, and lastly, the customary practice of other agents similarly situated." We take as a given that a third party in the shoes of the District of Columbia would reasonably assume that Makins had authorized attorney Harrison (1) to attend the settlement conference, and (2) to negotiate on her behalf; neither Makins nor amicus contends otherwise. We hold, however, that absent further manifestations by Makins — not Harrison — which are not contained in the certified question, there was insufficient conduct by the client to support a reasonable belief by the District that Harrison had full and final authority to agree to the settlement terms.

As pointed out, in the District of Columbia the decision to settle belongs to the client, a fact confirmed by our decisions.

The RESTATEMENT (THIRD) further confirms the generally accepted distinction between the power to conduct negotiations and the power to end the dispute. Conducting settlement negotiations is properly in the attorney's domain: "in the absence of a contrary agreement or instruction, a lawyer normally has authority to initiate or engage in settlement discussions, although not to conclude them." Concluding those settlement negotiations, however, is strictly the client's prerogative: "the decision to settle is reserved to the client because a settlement definitively disposes of client rights."

These ethical principles are key to the issue before us, because they not only govern the attorney-client relationship, they inform the reasonable beliefs of any opposing party involved in litigation in the District of Columbia, as well as the reasonable beliefs of the opposing party's counsel, whose practice is itself subject to those ethical constraints. It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties — especially when represented by counsel, as here — must bear the risk of unreasonable expectations about an attorney's ability to settle a case on the client's behalf. “When a lawyer purports to enter a settlement binding on the client but lacks authority to do so, the burden of inconvenience resulting if the client repudiates the unauthorized settlement is properly left with the opposing party, who should know that settlements are normally subject to approval by the client and who has received no manifested contrary indication from the client.”

Applying these principles, we conclude that the two client manifestations contained in the certified question — sending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf — were insufficient to permit a reasonable belief by the District that Harrison had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have. The District, in its briefs, points only to actions and representation of record by Harrison, not Makins, as support for the reasonableness of its belief. Thus, it asserts that “Mr. Harrison represented that Ms. Makins was available by telephone and that he would consult with her when appropriate”; that “Mr. Harrison spoke on his cell phone with plaintiff at least three times during the conference”; and that “at one point, Mr. Harrison left the room to phone plaintiff about the defendant's latest settlement proposal, and returned, phone in hand, to accept the proposal with one new condition regarding amendment of personnel forms.” All of this information (including information purportedly about the client, Makins) was known to the District of Columbia only through representations made by Harrison, the attorney. As the Circuit Court stated in certifying the question to us: “Neither the District nor the magistrate ever heard from Makins, in person or by telephone. What the District derives from the telephone calls between Makins and Harrison amounts to nothing more than Harrison's representations of — and the District's educated guesses about — what was said in private between them, a disputed factual question the district court did not resolve.” Harrison's conduct and representations about his own authority, in short, are not dispositive to whether Makins herself furnished the basis for a reasonable belief that he was authorized to conclude the settlement.

At the *en banc* argument, counsel for the District characterized the record as showing that Makins “sent” Harrison to the settlement conference, thus manifesting to the court and the District his apparent authority to settle her claim. But Makins had little choice, short of discharging Harrison, except to allow him to continue to represent her in the negotiations at the ordered conference. To execute a settlement agreement then and there is quite another matter.

Since Ms. Makins, as principal, did not make any manifestation of authority to the District's attorneys, other than retaining Harrison, under the facts as certified in the question, a finding of apparent authority is precluded under the law of this jurisdiction. The District also presents several policy arguments supporting enforcement of settlement agreements on apparent authority grounds, none of which we find compelling. To be sure, settlement of disputes, both in trial courts and on appeal, is to be encouraged as sound public policy. However, we are not persuaded that the settlement process will be impeded simply by requiring some manifestation of the client's authorization to support a claim of apparent authority in these cases where the client challenges the authority of his attorney to settle the claim. In addition, “apparent authority is an equitable doctrine that places the loss on one whose manifestations to another have misled the latter." Our holding is consistent with this principle. Since Makins manifested nothing by words or conduct on which reliance could be placed (she merely continued to retain Harrison), our answer to the certified question is not erosive to that policy.

We answer the certified question in the negative.

| **CHECK YOUR KNOWLEDGE** |
| --- |
| 1. What kind of authority did the District of Columbia claim the attorney had? Why was it insufficient? |
| 1. What if Makins actually agreed to the settlement, but then had second thoughts? |
| 1. What is the purpose of “apparent authority”? Under the standard adopted by the court, is it possible for an attorney to exercise apparent authority? |

**Further Reading:**

1. CITATION TO BLACK’S LAW DICTIONARY [↑](#footnote-ref-0)
2. John D. Rockefeller. [↑](#footnote-ref-1)