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Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law

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Representation, Mandate, and Agency: A Kommentar on Louisiana’s New Law

Wendell H. Holmes
Symeon C. Symeonides

This Article is a presentation and constructive critique of Louisiana's new law of representation and mandate. The Article compares the provisions of the new law with the solutions developed by Louisiana jurisprudence as well as with the equivalent institutions of the Roman law, modern continental civil law, and American common law.

The Article concludes that, despite several shortcomings, the new law makes a significant contribution to modern civil law in general and to the law of mixed jurisdictions in particular. While being faithful to Louisiana's civilian heritage, the new law recognizes the realities of contemporary transactional practice and the need for some uniformity with the law of the surrounding common law states. To that end, the new law appropriately sanctions certain useful common-law institutions, such as apparent authority and undisclosed agency, and recasts them in terms compatible with a civil code. If only for this reason, the new Louisiana law is worthy of a careful examination by other civil-law or mixed jurisdictions that recognize the same needs.

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I. INTRODUCTION

In 1997, the Louisiana Legislature enacted Act No. 261 (Act or Revision) which revised the provisions of the Louisiana Civil Code of 1870 on the institution known as mandate in the civil law and agency in the common law. The Act went into effect on January 1, 1998, and, by its own terms, “[it] shall apply to existing mandates and procurations, unless the application would impair obligations or vested rights.”1 This is an article-by-article commentary2 on most of the articles3 of the new Act.

The new Act was drafted by Professor A.N. Yiannopoulos, who served as the Reporter for this project under the auspices of the Louisiana State Law Institute, the official law reform agency of the state entrusted with the revision of the Louisiana Civil Code and other codes. It is therefore fitting that this Commentary, like this issue of the Review, is dedicated to him. Professor Yiannopoulos has devoted more than two decades of his professional life to revising

2. This form of article-by-article commentary is a continuation of previous attempts to introduce to Louisiana a form of writing that is both common and popular with busy judges and practitioners in other civil-law jurisdictions. For previous attempts, see Symeon C. Symeonides & Nicole Duarte Martin, The New Law of Co-Ownership: A Kommentar, 68 Tul. L. Rev. 69 (1993); Symeon Symeonides, One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription, 44 LA. L. Rev. 69 (1983).
3. The new Act comprises articles 2985 through 3032 of the Louisiana Civil Code. This Commentary discusses articles 2985 through 3023. The remaining nine articles deal with termination of the mandate and the mandatary's authority. Because of the space limitations of this Review, these latter articles are not discussed here. Also for the same reasons, articles 3001 through 3015 are discussed in a very brief fashion.

For purposes of accountability only, it is noted that the discussion of Articles 2985 through 2990, 2998, and 2990 through 3000 is authored by Professor Symeonides, while the discussion of Articles 2991, 2993 through 2997, and 3001 through 3023 is authored by Professor Holmes.
and modernizing the Louisiana Civil Code. He began in the 1970s with the revision of Book II of the Civil Code on Things and, when that massive project was completed, he turned his indefatigable energies to Book I, and then to Book III. More than twenty years and 600 civil code articles after he began his legislative work, Yiannopoulos has earned the title of *le législateur*.

The revision of the mandate articles is Professor Yiannopoulos’s latest, but by no means his last, legislative project. Coincidentally, mandate was also the subject on which he published his first law review article in Louisiana, a few months after his arrival to the state in 1958. In that article, Professor Yiannopoulos tried to dispel the confusion that characterized the treatment of the subject by some Louisiana courts by bringing to bear his vast knowledge of the civil law tradition and his keen understanding of the common law. Almost forty years later, he had the opportunity to implement his ideas for reforming the law of mandate, at least to the extent permitted by the realities of the collective process under the Institute’s deliberative bodies, the Advisory Committee, and the Council. Notwithstanding these collective—and also necessary—restraints, however, he, as the drafter of the Act, is the proper recipient of either praise or blame, whichever is due. This Commentary dispenses both.

Most of the blame, however, is on matters of detail. Overall, this assessment of the new Act is a decidedly positive one. The Act has taken some bold steps in recognizing and legitimating some useful common-law institutions such as undisclosed agency and apparent authority, which have long been part of the fabric of Louisiana

4. See A.N. Yiannopoulos, *Forward*, LA. CIV. CODE at xxxvi-xxxvii (A.N. Yiannopoulos ed., West 1999). The Revision of Book II was completed in four installments in the years 1976 to 1979. See id. Title III on Personal Servitudes was enacted in 1976; Titles IV-VI on Predial Servitudes, Building Restrictions, and Boundaries in 1977; Title I on Things in 1978; and Title II on Ownership in 1979. See id. In 1990, a new title on Co-ownership was added. See id.

5. See LA. CIV. CODE ANN. Book I, Title I (Natural and Juridical Persons) and Title III (Absent Persons), enacted in 1987 and 1990, respectively.

6. See id. Book III, Title VI (Matrimonial Regimes, 1979), Title XXIII (Occupancy and Possession, 1982), Title XXIV (Prescription, 1982-83), and Title V (Obligations Arising Without Agreement, 1995).

7. He is already working on revising the provisions of Title XIII of Book III on Deposit and Sequestration.


9. The composition of the Advisory Committee was as follows: Marc Amy; Dian T. Arruebarrena; Jeanne P. Breckinridge; Diane L. Crochet; Cary G. deBessonet; Robert A. Hawthorne, Jr.; Larry C. Hebert; Stephen E. Mattesky; Symeon C. Symeonides; Susan G. Talley; Robert P. Thibeaux; and James J. Carter, Jr., Staff Attorney.
transactional practice and jurisprudence. At the same time, the Act has stayed close to the civilian origin of Louisiana law and, by introducing the general concept of representation and separating procuration from mandate, has realigned the Louisiana Civil Code with its modern European counterparts. These developments and others are discussed below.

II. REPRESENTATION AND PROCURATION

A. Representation

Art. 2985. Representation
A person may represent another person in legal relations as provided by law or by juridical act. This is called representation.10

Art. 2986. The authority of the representative
The authority of the representative may be conferred by law, by contract, such as mandate or partnership, or by the unilateral juridical act of procuration.11

1. A New Name for an Old Concept

Articles 2985 and 2986 introduce a new name for an institution that has always existed in Louisiana, namely the notion that one person may act juridically for another in a way that directly produces legal consequences for or against that other person. This notion is called "representation."12 As used in the above articles, representation is broader than the terms "procuration," "power of attorney," "mandate," and "agency," in that all the latter terms contemplate a representative relationship that owes its origin to the volition of the represented expressed directly or indirectly.13 In contrast, as article 2986 provides, representation may also come into

11. Id. art. 2986.
12. Today this elementary notion is taken for granted, being recognized by virtually all legal systems. Indeed, it is hard to conceive of a smoothly functioning transactional practice in a legal system that does not recognize this concept. However, this has not always been so. For example, in its traditional formalism, the classical Roman law was slow to accept the notion that the juridical acts of one person can bind another. Although Roman law did recognize several instances in which a person could act through an intermediary, it did not recognize a comprehensive concept of representation. See W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 533-39 (Peter Stein ed., 3d ed. 1963). The recognition of this concept in the civil law world was the result of medieval continental legal science, especially of Grotius and the natural law school of thought. See REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 45-58 (2d ed. 1992).
13. These terms are defined infra notes 72-83 and accompanying text.
existence by operation of law and regardless of the will of the represented, such as in the case of minor unemancipated children who by law are represented by their parents. 14 This is the only new element introduced by—and perhaps the only utility of—the above articles, namely: (1) to alert the reader to the fact that, in addition to persons whose power to represent derive from the will of another, there are also persons whose power to represent another is granted directly by law; (2) to provide a new term of art for all persons authorized to represent others, regardless of the source of the pertinent power; and, (3) to signify the similarity and the common denominator in their respective functions by employing the same "umbrella term" for all classes of representatives.

2. Legal Representation in Modern Civil Codes

Because consensual or conventional representation (by procuration or mandate) is addressed in detail by other articles of Title XV and is discussed below, the only type of representation that calls for some discussion here is representation by law. As a general concept, this is a uniquely civilian institution. 15 To understand the need for this institution and to appreciate its utility, one must begin with two basic concepts: capacity to have rights and duties (so-called "personality") and capacity to enter into juridical acts. In earlier periods of history, including early Roman law, certain persons such as children or slaves lacked both types of capacity. For those persons the institution of representation had no role to play. 16 Today, under Louisiana law, all natural persons possess the former

14. See infra note 49 and accompanying text.
16. In early Roman law, children of any age were subject to the pater familias' absolute power and authority (patricia potestas) and did not have capacity to acquire rights. Consequently, not only were they incapable of contracting by themselves but neither could anybody else contract in their name. The pater familias would act not for them, but for himself. See Buckland, supra note 12, at 533-37; Zimmermann, supra note 12, at 45-58. Under these circumstances the concept of representation was unnecessary.
capacity, and most persons who have reached majority possess the latter capacity as well. For persons who possess both types of capacity, legal representation is unnecessary and conventional representation becomes an option for those who choose to act through an intermediary.

The institution of legal representation becomes necessary for those persons who possess the former but lack the latter capacity. Today, this includes unemancipated minors as well as majors who because of a mental or physical infirmity are incapable of taking care of themselves. Recognizing this inability, civil law systems place these persons under a protected status, one of the consequences of which is a total or limited incapacity to enter into certain juridical acts. Precisely because the reason for imposing this incapacity is to protect rather than to punish the incapable, these systems seek other mechanisms for replacing, to the extent possible, the withdrawn capacity. Providing such a mechanism is necessary not only for the sake of these persons (enabling them to fulfill their basic needs and rendering meaningful their “capacity to have rights and duties”) but also for the sake of society at large (for example, facilitating the flow of transactions). The mechanism that civil law systems have developed to this end is the institution of legal representation, whereby a person designated in advance or chosen by a court is empowered by law to act on behalf of the incapable person under procedures and limitations defined by law.

These procedures and limitations, as well as the pertinent nomenclature, differ from one legal system to another and from one institution to the next, but they all possess the above basic characteristics. For example, most civil law codes provide that parents “represent the[ir] children . . . in all civil acts”; that “[t]he guardian

\[17. See L. CIV. CODE ANN. art. 27 (West 1993) (“All natural persons enjoy general legal capacity to have rights and duties.”).\]

\[18. See id. art. 28 (“A natural person who has reached majority has capacity to make all sorts of juridical acts, unless otherwise provided by legislation.”).\]

\[19. For the corresponding institutions of the common law, see Stoljar, supra note 15, at 99-147.\]

\[20. L. CIV. CODE ANN. art. 27 (West 1993).\]


\[22. CODICE CIVILE [ITALY C.C.] art. 320 (Italy); see also § 1626 BÜRGERLICHES GESETZBUCH [BGB] (F.R.G.) (“By virtue of the parental authority the father and the mother have . . . the right and the duty to take care of the person and property of the child . . . [and this] includes the representation of the child.”); GREEK CIV. CODE art. 1501 (“The father represents the child in any juridical act relating to its personal status or its patrimony.”); accord art. 152 ALLGEMEINES BÜRGERLICHES GESETZBUCH [AUS. ABGB] (Aust.); CÓDIGO CIVIL [SPAIN C.C.] art. 154 (Spain) (Julio Romarach, Jr. trans., 1984); CÓDIGO CIVIL [ARG.
... represents [the minor] in all civil acts"; and that curators of interdicts or of other incapable persons have in principle the same representative powers as the guardian of minors. Civil-law countries define these representative powers in varying detail in the titles of the particular civil code dealing with parental authority, guardianship (tutorship), and curatorship, respectively, and all are found in the Book of the code entitled “Persons” or “Family Law.” The principles that are common among the above three cases of legal representation, however, are placed in a separate Title under the heading “Representation,” where they are treated together with the general principles of conventional representation. This Title is placed in different books of the civil code—in Italy in the book on Obligations, and in Germany and Greece in the book on General Principles—which contain principles that apply throughout the civil code (and throughout the whole of private law) unless displaced by more specific statutory provisions.

The scheme of the German, Greek, and to a lesser extent the Italian, civil codes appears abstract but is systematic and efficient. All the common principles encountered in all relations in which one person acts as a representative of another (whether or not the power to do so is derived from the law or from a juridical act) are placed in that part of the civil code in which all general principles are placed. All the specifics of the underlying (internal) relationship between the representative and the represented are placed in the parts of the civil code where these relationships are regulated, that is, in the part dealing with parental authority, tutorship, curatorship, and mandate, respectively.

Côd. Civ.] art. 308 (Arq.); Code civil suisse [Switz. Cc] art. 304 (Switz.); Minpo, art. 884 (Japan).

23. Italy C.c. art. 357; accord § 1793 BGB; Greek Civ. Code art. 1631.

24. See Switz. Cc art. 424; see also §§ 1915, 1793 BGB; Greek Civ. Code art. 1698.

25. See Book One of the Italian Civil Code entitled “Persons and the Family.”

26. See Book Four of the German Civil Code and Book Four of the Greek Civil Code entitled “Family Status.”

27. See Chapter VI, arts. 1387-1400 of Title II (“Contracts in General”) of Book Four (“Obligations”) of the Italian Civil Code.


29. For the function of the Book on General Principles in the Greek and German civil codes, see Symeon C. Symeonides, The General Principles of the Civil Law, in Introduction to Greek Law 53, 53-54 (Konstantinos D. Kerameus & Phaedon J. Kozyris eds., 2d ed. 1993).
3. Legal Representation in the French *Code civil*

The French *Code civil*, being older than the aforementioned codes, did not achieve, and perhaps did not aspire to, the same degree of systematization as other European civil codes. It does not expressly provide for the umbrella concept of representation that encompasses not only conventional but also legal representation. Instead, the *Code civil* regulates expressly only the contract of mandate, although this is only one of the many ways in which a representative relationship can come into existence. This is not to say, however, that the *Code civil* does not recognize the concept of legal representation. For example, it provides that parents "represent the minor in all civil acts,"\(^{30}\) as do tutors\(^{31}\) and curators.\(^{32}\) In contrast to the aforementioned codes, however, the *Code civil* does not extract from these forms of legal representation their common principles and does not treat them together in a separate title devoted to that topic.

In the 1940s, the Commission set up to reform the *Code civil* posed the question of whether one should "construct a general theory of representation applicable to all juridical acts or whether one should be content to refer that matter to the book on contracts."\(^{33}\) The question was answered by drafting a section entitled "De la représentation" which was to be included in the chapter entitled "De

\(^{30}\) *CODE CIVIL* [FR. C. CIV.] art. 389-3 (Fr.). This article provides in part: "L'administrateur légal représentera le mineur dans tous les actes civils, sauf les cas dans lesquels la loi ou l'usage autorise les mineurs à agir eux-mêmes." ["The legal administrator represents the minor in all civil acts, except cases where the law or usage authorize minors to act for themselves."] Id. The "legal administrator" is the parents if the parental authority is exercised by both parents and, if not, the custodial parent. See id. art. 389; see also id. arts. 389-392.

\(^{31}\) See id. art. 450.

\(^{32}\) See id. art. 492 which speaks of an adult person placed under tutelage as a person who "has need of being represented in a continuous manner in the acts of civil life" ("a besoin d'être représenté d'une manière continue dans les actes de la vie civile"). For a discussion in English of this and the above cited articles of the Code civil, see 1 PLANIOl & RIPERT, TREATISE ON THE CIVIL LAW pt. 2, nos. 1635-2106, at 14-245 (La. St. L. Inst. trans., 12th ed. 1959).

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la formation des acts juridiques. 34 Unfortunately, for reasons unrelated to this discussion, the reform never materialized. 35

4. Legal Representation in Traditional Common Law

Although civil law systems take the concept of legal representation for granted and consider it the best, if not the only mechanism for enabling incapable persons to partake in juridical acts, common-law systems have never bought into the idea of a comprehensive concept of legal representation. 36 In fact, they have not accepted this concept even with regard to the parent-child relationship 37 which, in civil law systems, was the birthplace of legal representation. 38 The reasons for the common law’s reluctance to recognize this institution are many and varied, but they probably include the following:

1. The fact that the common law never had the concept of patria potestas which in the Roman civil law gradually gave birth to the primordial instance of legal representation of children and later of other incapable persons; 39


35. For an earlier projet which had adopted the idea described in the text, but which also did not materialize, see PROJET DU CODE DES OBLIGATIONS DU COMITE FRANCO-ITALIEN POUR L’UNION LEGISLATIVE (1924, 1927).

36. This statement is limited to the “traditional” common law, as opposed to current statutory law in common-law jurisdictions. No attempt has been made to examine the extent to which contemporary common-law systems have introduced similar concepts by statute.

37. See Stoljar, supra note 15, § 7-206. “[A] basic difference between ANGLO-AMERICAN [law] and CONTINENTAL law . . . . is that in CONTINENTAL, including SOCIALIST, law the parents are by law the administrators of their minor children’s property as well as their representatives.” Id. § 7-206, at 101.

[G]enerally in all jurisdictions at COMMON LAW[] the parents do not qua parents possess an inherent right in relation to the assets of their children. Unless they are specifically appointed as guardians or trustees, they have no more right than a stranger to do anything with the children’s property: nothing in their status as parents entitles them to administer it.

Id. § 7-206, at 102 (footnote omitted). “In Continental (but again not ANGLO-AMERICAN) law the parents’ inherent right to administer is joined by a legal right of representation . . . . The minor, in other words, thus gets an automatic (legal or statutory) representative not only entitled but indeed required to act for him.” Id. § 7-211, at 104. “In ANGLO-AMERICAN law . . . no ab initio system of representation exists: hence for purposes both of administration and litigation, a guardian needs to be appointed . . . .” Id. § 7-213, at 106; see also 2 ZWEIGERT & KÖTZ, supra note 15, at 102-03.

38. See 2 ZWEIGERT & KÖTZ, supra note 15, at 102.

39. “It is probable that the Common Law has no comprehensive statutory representation because it did not have the concept of patria potestas.” Id.
(2) The fact that, from the beginning of its history, the common law has looked at these matters through the prism of agency which is too different a concept from which to extrapolate solutions for the predicament of legal incompetents. Indeed, common law agency differs from civil law legal representation in several ways, including the following:

(i) agency depends on the volition of the principal (whether that volition is expressed or implied, actual or imputed, and whether it is expressed through acts or omissions), whereas legal representation is independent of the volition of the represented who, after all, is incapable of formulating or expressing a volition;

(ii) agency connotes a relationship in which the principal is capable of exercising control over the agent (whether or not that capacity to control is bargained away), whereas in legal representations the represented lacks the capacity to control the representative (which is why the legal order provides other vehicles of control, such as court supervision, consent of “family council,” etc.); and

(iii) to the extent that an agency relationship qualifies as, or sufficiently resembles, an employment relationship, it can give rise to delictual liability of the principal for the acts of the agent, whereas legal representation as such never entails delictual responsibility of the represented.

(3) Unlike the civil law, the common law was never bothered by, and in fact invented, the notion of separating legal and equitable title. In turn, this notion gave birth to the institution of the trust which provides an alternative means of protecting children and other incompetents who own property. With that institution in place, the need for an additional or parallel (albeit less expensive) mechanism of protecting children and other incapables was not as strong in the common law as it might have been in the civil law world; and

(4) The general aversion of the common law towards abstraction. Indeed, there is no denying that legal representation is a theoretical construct, the practical utility of which depends on the details. Some systems prefer to focus on the details without worrying about how the details fit into a general scheme. Both the common law and the early Roman civil law began that way. Modern civil law has taken the latter step of constructing the general scheme within which the details fit.
5. Legal Representation in the Old Louisiana Civil Code

Not surprisingly, the Louisiana Civil Codes of 1825 and 1870 followed the French model. Like the French code and unlike the German, Greek, or Italian codes, the Louisiana Civil Code does not contain a separate title on representation in general, and treats the conventional representation only in the context of the contract of mandate.40 However, until 1960, the Louisiana Civil Code, like the Code civil, did contain several provisions which recognized the existence of the concept of legal representation with regard to parents,41 tutors,42 and curators of interdicts.43 In a stroke of genius, the drafters of the Code of Civil Procedure of 1960 decided to purge the Civil Code of most of these provisions44 and to replace them with

40. See LA. CIV. CODE arts. 2985-3034 (1870).
41. See id. arts. 222, 235. Article 222 provided that the parents' authority to deal with the minor's property was the same "as in case of minors represented by tutors...." See id. art. 222. Article 235 provided that parents "may, as long as their children are under their authority, appear for them in court in every kind of civil suit, in which they may be interested, and they may likewise accept any donation made to them." See id. art. 235. In 1960, the above quoted portion of article 222 was moved to the Code of Civil Procedure. See LA. CODE. CIV. PROC. ANN. art. 4501 (West 1961).
42. See LA. CIV. CODE art. 337 (1870). This article provided that tutors "shall have the care of the person of the minor, and shall represent him in all civil acts." Id. In 1960, this article was repealed and replaced with a similar article in the Code of Civil Procedure. See LA. CODE. CIV. PROC. ANN. art. 4262 (West 1998); see also infra note 48 (quoting Code of Civil Procedure article 4262).
43. See LA. CIV. CODE art. 415 (1870) (subjecting curators to the rules governing tutors). In 1960, this article was replaced by a similar article in the Code of Civil Procedure. See LA. CODE. CIV. PROC. ANN. art. 4554 (West 1961).
44. Of the provisions cited supra in notes 41-43, only article 235 was left in the Civil Code. This is somewhat ironic because although most of the articles moved to the Code of Civil Procedure were substantive. See, e.g., LA. CODE. CIV. PROC. ANN. art. 4261 (West 1998). Article 235 could qualify as procedural to the extent it speaks of representation "in court in every kind of civil suit." LA. CIV. CODE ANN. art. 235 (West 1993). Furthermore, the fact that the only article left in the Civil Code gives parents plenary power of representation in court, but only limited power of representation in juridical acts outside the context of court proceedings (for example, only to "accept any donation") is another anomaly that could give rise to an a contrario argument that parents lack the power to represent their minor children in juridical acts other than donations. The reason this argument would be incorrect is the fact that this power is granted by the Code of Civil Procedure, albeit through a cross-reference to the articles on tutors. See infra note 45.

The purging of provisions of this kind from the Civil Code continued in the revision of the law of obligations in 1984. Until that time, article 1785 of the Civil Code of 1870 provided that unemancipated minors could contract "with the intervention of their tutors," which under the scheme of the Code also included parents. LA. CIV. CODE art. 1785 (1870). The word "intervention" is ambiguous. It could mean either that the minor could contract through the medium of the tutor, that is, with the tutor acting as the minor's representative, or that the minor himself could contract but with the tutor's concurrence. In either case, this provision served a useful purpose in that it affirmatively provided a means through which minors could enter into contracts. The 1984 Obligations Revision removed the above-quoted provision without explanation, although the Revision did provide explanations for removing
identical or similar provisions in the Code of Civil Procedure under an arrangement that is a marvel of draftsmanship. This decision would have been understandable if one were to assume that legal representation of minors and interdicts is necessary only in the context of court proceedings. However, even these drafters must have known better because the articles they were removing from the Civil Code provided for representation "in all civil acts" and because the new articles of the Code of Civil Procedure also provide for representation "in all civil matters."

Be that as it may, there has never been any doubt that in Louisiana, minor unemancipated children are represented by their parents, that this power is granted directly by law, and that, as long as the parent's marriage lasts, the power exists without the necessity of court confirmation. In contrast, in the case of tutors and curators of other provisions from the former article. See L. CIV. CODE ANN. art. 1923 cmts. (West 1987) (replacing former article 1785). The articles surrounding article 1923 address situations in which an unassisted unemancipated minor enters into a contract by himself, and even recognize the role of their "legal representatives" in rescinding such a contract, see, e.g., id. arts. 1919, 1921, but are completely silent on the possibility of minors contracting through their parents or tutors. Although this apparent gap could prove problematic, the problem is avoided if one keeps in mind that the articles of the Code of Civil Procedure, see infra notes 45-46, 48, which, although not mentioned in any of the comments under the Obligations articles, recognize the representative role of parents and tutors.

45. For example, the Code of Civil Procedure devotes fifteen detailed articles (articles 4261-4275) to the less common institution, the tutorship of minors, and therein provides that the tutor "shall represent [the minor] in all civil matters." L. CODE CIV. PROC. ANN. art 4262 (West 1998). Then, the Code devotes only two articles to parents and through a cross-reference to the articles on tutors gives parents the same powers "as in [the] case of a minor represented by a tutor." Id. art. 4501 (West 1961). The Code does the same with regard to curators. See id. art. 4554.

46. What the drafters apparently did not know was how to define the limits of their own jurisdiction. For example in article 4261 they provide: "The tutor shall have custody of and shall care for the person of the minor. He shall see that the minor is properly reared and educated in accordance with his station in life." L. CODE CIV. PROC. ANN. art. 4261 (West 1998). While this article is well-drafted and almost poetic, does it belong in a code of procedure?

47. See L. CIV. CODE ANN. art. 337 (1870) (repealed 1960) (emphasis added); see also supra note 42.

48. See L. CODE CIV. PROC. ANN. art. 4262 (emphasis added) (West 1998) ("[The tutor] shall enforce all obligations in favor of the minor and shall represent him in all civil matters."). Through cross-references in the pertinent articles, this article is also made applicable to parents and curators of interdicts. See, e.g., id. arts. 4501 (parents), 4554 (curators) (West 1961).

49. For detailed discussion of the subject of legal representation of minors and other incompetents, see KATHERINE S. SPAHT, LOUISIANA FAMILY LAW COURSE §§ 15-18 (2d ed. 1998); Christopher L. Blakesley, Child Custody and Parental Authority in France, Louisiana and Other States of the United States: A Comparative Analysis, 4 B.C. INT'L & COMP. L. REV. 283 (1981); Robert A. Pascal, Contracts of the Minor or His Representative Under the Louisiana Civil Code, 8 L. A. REV. 383 (1948); C. Ellis Henican, Jr., Comment, Care of the Person and Property of the Minor, 32 Tul. L. REV. 299 (1958).
interdicts, the power is also granted by law rather than by the volition of the represented, but the representatives must be appointed by the court.50

The same is true in most other instances of legal representation provided by the Civil Code or the Code of Civil Procedure, such as in the cases of: “absent person[s]” who own property in this state that is under the authority of a court-appointed curator;51 absent creditors who are represented by a court-appointed attorney;52 “unrepresented,” “non-resident,” or “absentee” defendants who are represented by a court-appointed attorney as provided in articles 5091-5098 of the Code of Civil Procedure;53 “absentee” heirs or legatees who are represented by a court-appointed attorney;54 a “vacant succession” that is administered and represented by a court-appointed “administrator;”55 etc.56 The fact that in the above cases the “representative” is appointed by a court rather than directly by law does not mean that these are “judicial” rather than “legal” representations. After all, the court’s authority to appoint a representative is granted by law rather than by the represented person.57

Similarly, the fact that in some of these instances the representative is authorized to act in his own name rather than in the name of the represented does not mean that he is not a true representative.58 After all, even in cases where the representative is permitted to act in his own name, he is still required to act for the benefit of the represented. Any doubts that might have existed under

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52. See La. Civ. Code art. 3088 (1870): “Absent creditors ... are to be represented by an attorney ....”
54. See id. art. 3171.
56. Obviously, the above does not purport to be an exhaustive list of legal representatives. For example, the Code of Civil Procedure and the Revised Statutes are replete with provisions authorizing court appointment of attorneys to represent children and other persons incapable of representing themselves. See, e.g., La. Rev. Stat. Ann. § 9:345 (West 1991) (attorney to represent the child in visitation proceedings); id. § 9:603 (attorney to represent absentee minor or interdict); id. § 9:3185 (curator ad hoc for absent defendant).
57. In the above-mentioned instances, the will of the represented is irrelevant because the represented is either legally (as in the case of minors and interdicts) or factually (as in the case of absentees or absent persons) incapable of conferring the power.
58. See, e.g., La. Code Civ. Proc. Ann. art. 4264 (West 1998) (providing that “[t]he tutor acts in his own name as tutor, and without the concurrence of the minor”); see also Pascal, in Spafft, supra note 49, § 15.16: “To say that the father (or mother) represents the minor means that he acts in his own name, not in the name of the minor.”
the old law, which confined the definition of mandataries to persons who acted "in [the principal's] name" had long been resolved by the jurisprudence which recognized the concept of undisclosed mandate, and have been completely eliminated by the new definition of mandate which considers as mandataries all persons who "transact one or more affairs for the principal" under his express, implied, or apparent authority, and regardless of whether they do so in their own name.

Conversely, the fact that the representative may act in his own name rather than in the name of the represented should not obscure the fact that, like a mandatary, the representative acts not on his own behalf or benefit, but rather on behalf and for the benefit of the represented. Finally, the fact that, as in the case of the mandatary, the juridical acts of the representative operate directly in favor of or against the represented distinguishes these representatives from other persons such as trustees who, although they also act for the benefit of others, do so in their own name and in their own right.

6. The Utility of the New Articles

New articles 2985 and 2986 are not intended to and do not change any of the above principles. After all, these articles are merely definitional rather than substantive. As said earlier, their only function is to draw attention to the existence of all these various kinds of legal representation and to suggest that there are certain similarities between them and certain aspects of conventional representation. This suggestion of similarities, however, is very indirect and incomplete. It can be surmised from the use of a common term to encompass both legal and conventional representations (the umbrella term "representation"), from the creation of a new chapter called "Representation," and from changing the name of Title XV from "Of Mandate" to "Representation and Mandate."

It would have been highly desirable if the new Act were to take the next logical step and provide expressly that "unless otherwise provided, legal representation is subject to the rules governing

59. La. Civ. Code art. 2985 (1870); see also infra notes 72-73 and accompanying text.
60. See Sentell v. Richardson, 29 So. 2d 852, 855-56 (La. 1947); see also discussion infra notes 293-298 and accompanying text.
61. La. Civ. Code Ann. art. 2989 (West Supp. 1999) (emphasis added); see also discussion infra Part III.A.
mandate to the extent that their application is compatible with the particular legal representation.\textsuperscript{64} Such an article would have the practical effect of \textit{making applicable} in a supplementary fashion the articles on mandate to fill the gaps of those parts of the code that deal with legal representation. These gaps are not negligible, especially because many instances of legal representation are provided in the Code of Civil Procedure, which is ill-equipped to deal with substantive institutions. An even better and bolder step would have been to follow the model of the modern civil codes described above and to actually identify those common principles between legal and conventional representation and to treat them together.\textsuperscript{65} This solution would have been a real service to the legal profession and would have brought Louisiana law to the twentieth century just before this century is about to expire.

While it is regrettable that the new Act has failed to take either of these steps, it is also important to note, in the interest of accuracy of the historical record, that this failure should not be blamed on the Act’s drafter, Professor Yiannopoulos, whose proposals to that effect were rejected by the Council of the Louisiana State Law Institute. This august deliberative body, which is known for its commitment to progress, thought that the only proper use of the term “representation” was the use made in Civil Code article 881 to describe the right of descendants of an heir who had predeceased the \textit{de cujus} to inherit in the heir’s place.\textsuperscript{66} Ironically, that article recognizes that this so-called representation is “a fiction of the law.”\textsuperscript{67} Apparently, in the eyes of some members of the Council, this fiction has displaced reality so that any other use of the term representation, even one that is closer to the dictionary definition of it, would be confusing. Eventually, a majority of the Council grudgingly allowed the use of the term representation in articles 2985-2986 but under the express condition\textsuperscript{68} that the Reporter

\textsuperscript{64} As the reader will notice, the above quoted sentence tracks almost verbatim the language of La. Civ. Code Ann. art. 2988, \textit{infra} text accompanying note 71, regarding procuration.

\textsuperscript{65} For an indication of what these common principles might encompass, see the pertinent articles of the Italian, Greek, and German civil codes, cited \textit{supra} notes 22-28.

\textsuperscript{66} See La. Civ. Code Ann. art. 881 (West Supp. 1999) (“Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented.”).

\textsuperscript{67} Id.

\textsuperscript{68} A researcher would search in vain for means of documenting the above discussion. The old practice of the Institute was to tape-record the Council’s deliberations and then to use the tapes to compile detailed minutes. It is unknown whether those tapes are kept by the Institute, but in recent years the practice had been to erase the tapes after the writing of the minutes. Since the mid-1990s, the practice of tape-recording the discussions
would draft a comment specifically explaining the difference between this term and the fictional representation of article 881. Under these circumstances, any attempt to do more, such as by taking either of the two steps suggested above, was bound to fail.

Fortunately, none of this prevents courts from taking at least the first of the steps suggested above, namely recognizing the similarities between legal and conventional representation and filling the gaps left by the rules regulating the former through an analogical application of the rules governing the latter. The new articles permit and encourage this development, and in that sense this is their real utility.

B. Procuration

Art. 2987. Procuration defined; person to whom addressed

A procuration is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations.

The procuration may be addressed to the representative or to a person with whom the representative is authorized to represent the principal in legal relations.70

Art. 2988. Applicability of the rules of mandate

A procuration is subject to the rules governing mandate to the extent that the application of those rules is compatible with the nature of the procuration.71

1. Confusion of Terms and Concepts in the Civil Code of 1870

New article 2987 defines “procuration” in a way that separates it conceptually from the contract of mandate. In so doing, the new article eliminates the confusion of terms and concepts that characterized the Louisiana Civil Code’s prior provisions on this subject, a confusion that was traceable to the Code’s French sources.

has ceased, and the minutes have become very brief, describing only the Council’s decisions but not its discussions.

69. The Reporter faithfully complied. See LA. CIV. CODE ANN. art. 2985 cmt. (c) (West Supp. 1999) (stating that, as used in article 2985, representation “has nothing to do with the use of the word ‘representation’ in the law of successions to denote ‘a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the person represented,’ that is the deceased ancestor”) (quoting LA. CIV. CODE ANN. art. 881 (West Supp. 1999)). Equally unnecessary, but also attributable to the same reason, is another statement in the same comment stating that, as used in Article 2985, “the legal institution of representation has nothing to do with the use of the word representation to denote statements made by one person to another.” Id. art. 2985 (citations omitted).

70. LA. CIV. CODE ANN. art. 2987 (West Supp. 1999).

71. Id. art. 2988.
Article 2985 of the Louisiana Civil Code of 1870 used the two terms interchangeably by providing that “[a] mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs.”

This article was taken from the French *Projet du Gouvernement* of 1800, which was also the source of article 1984 of the *Code civil*.

Interestingly, the first Louisiana version of the above article was somewhat less confusing. In the Digest of 1808, the opening words of the pertinent article were “[l]e mandat ou procuration” which were translated into English as “[a] procuration or letter of attorney.”

The addition of the term “letter of attorney” was an understandable attempt to explain to a primarily English-speaking readership the meaning of the rather obscure French word *procuration*. More interesting was the fact that the English text did not contain the word “mandate.”

This, however, was not a mistranslation. Despite the tendency to question the competence and sometimes the integrity of the translators of the 1808 Digest, here the failure to use the English word “mandate” made the translation more

72. *LA. CIV. CODE* art. 2985 (1870) (repealed 1997).
74. Article 1984 *Code civil* provides:

> Le mandat ou procuration est une acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom. Le contrat ne se forme que par l'acceptation du mandataire.
> [Mandate or procuration is an act by which a person grants to another the power to do something for the principal and in his name. The contract is formed only through acceptance by the mandatary.]

75. See *LA. CIV. CODE* art. 1 (1808); infra note 79 and accompanying text.
76. The term is, of course, of Latin origin. In classical Roman law, a *procurator omnium bonorum* was a freedman (former slave) who was appointed by the master to look after and administer his property. See *ZIMMERMANN*, supra note 12. The act of appointment was called the *procuratio*. Gradually, and very cautiously, Roman law eventually granted to and against the master certain legal actions for the juridical acts entered into by the *procurator* on the master’s behalf. *See id.* Thus, the *procuratio* was one of the Roman institutions out of which eventually grew the more general concept of representation. For discussion of the *procuratio*, see J.H. Michel, *Quelques observations sur l'évolution du Procurateur en droit Romain*, in *ETUDES OFFERTEES À JEAN MACQUERON* 515 (1970).

The new Act deliberately and correctly avoids using the common-law terms “letter of attorney” and “power of attorney.” See *LA. CIV. CODE ANN.* art. 2987 cmt. (a) (West Supp. 1999).
77. See *LA. CIV. CODE* art. 1 (1808).
accurate78 for the sense in which the French term “mandat” was used in the French original was synonymous with the French term “procuration” in that they both signified the unilateral juridical act by which the principal (the “mandant”) confers representative power on the mandatory (the “mandataire”).79 It would therefore be redundant to use both words (“mandat” and “procuration”), especially because the use of another synonym (“power of attorney”) was thought necessary. Additionally, this latter synonym, although a distinctly common-law term and thus objectionable on that ground, was conceptually closer to the meaning of “procuration” in that it too connotes the unilateral juridical act by which the representative power is conferred. In contrast, depending on context, the French term “mandat” can mean either the unilateral act of conferring the representative power80 or the bilateral juridical act (contract) that results when the mandatory accepts.81 Because the latter is the more common usage of the term, its use as a synonym to procuration is confusing. By avoiding this use, the 1808 translators, and later the 1825 translators, were able to avoid this confusion.

Unfortunately, in the less erudite revision of 1870, this confusion was not avoided. As seen above, the 1870 Code uses the terms “mandate,” “procuration,” and “letter or attorney” interchangeably.82 This terminological confusion is eliminated by

78. In contrast, the failure of the 1808 translators to include the words “et en son nom” (“and in his [the principal’s] name”) in the English text resulted in an inaccurate translation. See COMPILED EDITION, supra note 73, at 391 (discussing Digest of 1808). This omission might have also been less innocent in that it runs contrary to one of the basic features of the French scheme, namely its steadfast refusal to recognize undisclosed agency. See infra text accompanying notes 137-138. This omission was cured in the 1825 and 1870 Codes which reinserted the above quoted words in the article. Compare LA. CIV. CODE ANN. art. 2954 (1825) (Comp. ed. 1972), with LA. CIV. CODE art. 2985 (1870). However, since 1947, these words have been effectively “read out” of the article. See Sentell v. Richardson, 29 So. 2d 852, 855 (La. 1947) (recognizing undisclosed agency); see also infra notes 293-298 and accompanying text.

79. This is confirmed by reading together the first two articles of the French Projet which were combined into one article (article 1984) by the Code civil. See supra note 74. By reading the second paragraph of this article, one easily understands that the term “mandat” in the first paragraph of the same article is used in the sense of the unilateral act of conferring the power (i.e., as a true synonym to procuration) rather than in the sense of the contract of mandate. This inference becomes less clear when the two provisions are placed in separate, albeit consecutive articles (as was done in the French Projet and the Louisiana Digest of 1808), and much more difficult when these articles are not consecutive (as was the case in the Civil Codes of 1870 and 1825, where these articles were separated by two other articles). See LA. CIV. CODE arts. 2985-2988 (1870).


82. See LA. CIV. CODE art. 2985 (1870).
new article 2987, which defines procuration in the sense of the unilateral act described above and sets it apart from the term "mandate," reserved exclusively to denote the bilateral juridical act or contract between a principal and a mandatary. 83

2. Confusion in the French Code civil

In addition, new Article 2987 eliminates the conceptual confusion which beset not only the Louisiana Civil Code but also the French Code civil. Indeed, the Code civil (and hence the Louisiana Civil Code of 1870) stands apart from modern civil codes in one important respect. Except for cases of legal representation described earlier in this Article, the Code civil views conventional representation as being tied inseparably to the contract of mandate. 84 It defines mandate as necessarily including the power of the mandatary to represent the principal. 85 In the scheme of the Code civil, a mandate without this power is not a mandate; and outside the sphere of legal representation, this power cannot exist without a mandate. 86 The former element is a departure from the Roman definition of the contract of mandatum which did not carry with it the power of the mandatary to represent the principal. 87

The latter element is something from which modern civil codes have departed, mostly as a result of the influence of the work of Paul Laband, a nineteenth century German scholar. 88 The German Civil Code and all the civil codes influenced by it adopt a sharp distinction between the conferral of power of representation (Vollmacht), on the one hand, and the underlying relationship between the representative and the represented, on the other hand. 89 The former is a unilateral

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83. See LA. CIV. CODE ANN. art. 2987 (West Supp. 1999).
84. See FR. C. CIV. art. 1984.
85. See id.
86. See id.
87. See BUCKLAND, supra note 12, at 514-21; ZIMMERMANN, supra note 12, at 413-14, 420-21.
88. See Paul Laband, Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch, 10 ZEITSCHRIFT FÜR HANDELSRECHT 183 (1866).
89. This separation is evidenced by the fact that, as explained above, these codes devote a separate title to the general concept of representation and then regulate the contract of mandate in the part of the code dealing with nominate contracts. See supra Part II.A.2. The meaning of this separate treatment is that the power to represent another is independent of the relationship between the represented and the representative. This independence is easier to detect in cases of legal representation where as explained above, the represented does not express any will either to have, or especially to select, a representative or to form a contractual relationship with him or her. See supra Part II.A.2. In cases of conventional representation, however, this independence is more difficult to discern because the decision
juridical act, while the latter is a bilateral juridical act—a contract. That contract can be a mandate, which in these codes does not on its own entail representative powers, a partnership, an employment contract, a contract for services, or any other similar contract.

This separation of representation from mandate is considered by some German authors as one of the greatest accomplishments of the modern civil law.\(^90\) If this is true, then one might say that, by adopting a similar though not as complete separation, the new Act has moved Louisiana a step closer to modern civil law.\(^91\)

3. Conceptual Differences Between Procuration and Mandate Under the New Act

Under the new Act, the differences between procurement and mandate can be gleaned from juxtaposing the two definitions provided in new articles 2987 and 2989, respectively.

<table>
<thead>
<tr>
<th>Article 2987</th>
<th>Article 2989</th>
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<tbody>
<tr>
<td>A procuration is a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations.(^92)</td>
<td>A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.(^93)</td>
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This juxtaposition reveals the following conceptual differences between procurement and mandate:

1. A procuration is a unilateral juridical act, whereas a mandate is a contract, i.e., a bilateral juridical act;\(^94\)
2. In both acts, one person, called the “principal,” confers authority on another person, called “representative” and “mandatary,” respectively;
3. The content of the conferred authority is different. In a procuration, the authority is to “represent” the principal, that is, to

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\(^90\) See Müller-Freienfels, *Agency*, supra note 33, at 81 ("The clear and sharp distinction of these two notions has been one of the major achievements of nineteenth-century European legal science."); Hans Dölle, *Juristische Entdeckungen, 42 VERHANDLUNGEN DES ZWEIUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES* B1 (1959) (calling this notion one of the most remarkable "juristic discoveries" in legal history).

\(^91\) The newest continental civil code, the Dutch Civil Code of 1992, adopts the same separation. See *BURGERLIJK WETBOEK* [BW] bk.3 tit.3, bk. 3 tit.7 (Neth.).

\(^92\) *L.A. CIV. CODE ANN.* art. 2987 (West Supp. 1999).

\(^93\) Id. art. 2989.

\(^94\) See infra Part II.B.4.
act in the principal’s place as the principal would have acted. In a mandate, the authority is to “transact...for the principal,” that is, to carry out a particular activity and accomplish a result for the benefit of the principal.

(4) In a procuration, the authority is to represent the principal “in legal relations,” that is, in acts of a juridical nature. In a mandate, the authority is to transact “one or more affairs for the principal,” that is, to carry out acts of either a juridical or material nature, or both.

Beginning with the last point, there is little doubt that the term “affairs” as used in new article 2989 encompasses material acts. This is stated directly in the comments accompanying this article and can also be gleaned from the fact that the same term is employed in the articles of the Civil Code regulating the institution of negotiorum gestio, that is the management of the “affairs” of another without a mandate. Indeed in the context of the latter institution the quoted term is understood as encompassing primarily material acts, although it does not exclude juridical acts. What is also clear is that the use of the word “affairs” as opposed to “juridical acts” in the new article 2989 was as deliberate as it was consistent with the traditional definition of mandate.

In turn, the use of the broader term “affairs” in the definition of mandate helps explain the most important conceptual difference between mandate and procuration. Although procuration and mandate...
may—and usually do—coexist in the same relationship, this is by no means necessary. A procuration, namely, the conferral of authority to represent, is not an essential element of a mandate. At least in theory, a mandatary need not be a representative. For example, a mandatary that is authorized to do only material acts for the principal is clearly not a representative. Conversely, a representative need not be a mandatary. For example, as explained above, a legal representative such as a tutor or a curator is clearly not a mandatary, if only because the relationship between the representative and the represented, not being a contract, cannot be a mandate. Even in cases of conventional representation, however, the underlying relationship between the representative and the represented need not be based on a contract of mandate. It may be based on a partnership contract, an employment contract, or another nominate or innominate contract.

4. Procuration Is a Unilateral Juridical Act

As said above, article 2987 defines procuration as a “unilateral juridical act.” What is the meaning of the quoted term, and what is the practical significance of so defining the procuration?

Regarding the first question, it is worth noting that this is the first time the term “unilateral juridical act” is employed in the text of the Louisiana Civil Code or, for that matter, any other Louisiana statute. Although neither this term, nor the broader term “juridical act” is
defined by the text of the Civil Code, their meanings are no longer disputed. A juridical act is any lawful volitional act (declaration or manifestation of will) intended to produce legal consequences to which the law attributes the intended consequences or other legal consequences. A juridical act is unilateral when it is the product of the will of one party and its completion or effectiveness does not depend on the will of another party. A juridical act is bilateral or multilateral when it is the product of the combined wills of more than one party. A testament is the clearest example of a unilateral act, while a contract is the clearest example of a bilateral juridical act.

The second question asked above is more difficult because, despite being a unilateral act, the procuration—by its very nature—always contemplates the possibility of becoming the basis of a bilateral act in that it invites the expression of will or the act of another party, the representative. When that party expresses his will to act pursuant to the grant of authority or acts accordingly, a contract

104. The definitions provided by the comments to several articles of the Civil Code are helpful. See, e.g., LA. CIV. CODE ANN. art. 492 cmt. (b) (West 1980) (stating "a juridical act is a manifestation of will intended to have legal consequences"); id. art. 3471 cmt. (c) (West 1994) (stating "a juridical act is a lawful volitional act intended to have legal consequences"); id. art. 3483 cmt. (b) (stating a juridical act is "a licit act intended to have legal consequences").

105. A juridical act that contains the declarations of will of multiple persons may still be a unilateral juridical act if those wills are "parallel and cast in the same direction." SAUL LITVINOFF & W. THOMAS TETE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 144 (1969). Examples of such acts are a procuration issued jointly by several principals naming the same representative or a joint renunciation of a servitude by the co-owners of the dominant estate.

106. See LA. CIV. CODE ANN. arts. 626 (West 1980) (renunciation of usufruct); id. arts. 737, 771-772 (renunciation of predial servitudes); id. arts. 1014-1015 (West 1952) (renunciation by heirs); id. art. 1802 (renunciation of solidarity); id. art. 2348 (West 1985) (renunciation by a spouse of right to concur in management decisions); id. art. 3029 (West 1994) (renunciation of authority by mandatory); id. arts. 3449-3451 (renunciation of right to plead prescription); see also id. art. 2339 (West 1985) (declaration by a spouse reserving the fruits of his or her separate property); id. arts. 3433-3434 (West 1994) (abandonment of possession); id. arts. 3424-3425 (acquisition of possession); id. art. 3418 (acquisition of ownership of an abandoned movable by occupancy); id. art. 977 (West 1952) (acceptance of a succession); id. art. 1559 (revocation of a donation); id. art. 368 (West 1993) (emancipation of a minor); id. art. 1944 (West 1987) ("offer of reward made to the public").

107. Traditional civil law terminology subdivides unilateral juridical acts into those which are and those which are not addressed to a particular recipient. See TOUSSIS, supra note 21, at 379. A procuration is an example of the former category. See LA. CIV. CODE ANN. art. 2987 (West Supp. 1999). The abandonment of possession and the acquisition by occupancy of an abandoned movable are examples of the latter category. The unilateral nature of these acts is more clearly visible in cases of the latter category because it is easier to see how these acts become operational, how they produce their effects, without the assent or participation of any other party.
between him and the principal comes into existence. What then are the practical consequences of classifying the procuration as a unilateral act if, by its nature, this act is bound to evolve into a bilateral act? A complete answer to this question belongs to the realm of the law of obligations and is beyond the scope of this paper. Suffice it to say, however, that one consequence is that the procuration's existence, validity, and interpretation will be judged by focusing exclusively on the principal's person and expression of will, and not the representative's. Another consequence is more clearly visible in cases in which, as permitted by article 2988, the procuration is communicated not to the representative but to a third party with whom the representative is authorized to deal. In such a case, the principal may, in certain circumstances, be bound by the procuration even before the representative has knowledge of it and thus before he can express a will to act pursuant thereto. For example, A, unbeknown to B, publishes in a newspaper an announcement appointing B as A's "general representative" in a specified locality. Pursuant to this announcement, C serves B with process in a suit directed against A, which process B accepts without knowing its contents. In such a case, in the absence of contrary statutory provisions, the service of process is binding on A, although there is no contract between A and B.

5. Coexistence of Procuration and Mandate

As said above, once the representative accepts the procuration, a contract is formed between him and the person who issued the procuration. Although that contract need not be a mandate, in most cases it is likely to be. Thus, procuration and mandate are likely to coexist in many cases. However, even when they do not coexist, the two acts will be governed for the most part by the same rules. This flows from new article 2988 which provides that "[a] procuration is subject to the rules governing mandate to the extent that the[ir] application ... is compatible with the nature of the procuration."^109

108. See LA. CIV. CODE ANN. art. 2987 cmt. (d) (West Supp. 1999). "The recipient of the procuration does not bind himself to do anything. However, if he accepts the procuration or acts accordingly, a contract may be formed between the principal and the representative. This contract may be a mandate or another nominate contract." Id. This comment might be slightly misleading to the extent it implies that the "recipient of the procuration" and the person who "accepts the procuration or acts accordingly" need be the same person. However, as the text of the article states, this is not necessary because the procuration may be addressed either to the representative or to a third party. In the latter case, it is the representative's act, not that of the third party that would result in a contract "between the principal and the representative." Id.

109. Id. art. 2988.
The comments amplify this provision by stating that "the obligations of the principal and the representative toward each other, the rights and obligations of the principal and the representative toward third persons, and the termination of the power of attorney are determined by analogous application of the rules governing mandate."\(^{110}\) This supplemental and analogical application of the articles on mandate is both necessary and proper. It is necessary because, unlike other modern civil codes, the new Act has not taken the bolder step of regulating in detail representation and procuration. It is also proper because, unlike those modern civil codes but like the French and the old Louisiana civil codes, the new Act continues to view mandate as a relationship whose primary function is the mandatary's representation of the principal.

### III. MANDATE

#### A. General Principles

**Art. 2989. Mandate defined**

* A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.*\(^{111}\)

1. Mandate Is a Contract

   Article 2989 defines mandate as a contract, that is, an "agreement by two or more parties,"\(^{112}\) which is "formed by the consent of the parties established through offer and acceptance."\(^{113}\) Although article 2989 does not specifically require acceptance by the mandatary,\(^{114}\) this requirement flows easily from the very use of the word "contract" as well as from the next article, article 2990, which incorporates by reference all the general rules of contracts, including those pertaining to offer and acceptance.\(^{115}\) One of these articles is article 1927, which provides that, in principle, "offer and acceptance may be made orally, in writing, or by action or inaction."\(^{116}\)

   Defining mandate as a contract distinguishes it from the unilateral juridical act of procuration, a distinction which was

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110. *Id.* art. 2988 cmt.
111. *Id.* art. 2989.
112. *Id.* art. 1906 (West 1987).
113. *Id.* art. 1927.
114. See *La. Civ. Code Ann.* art. 2988 (1870) (stating that "[t]he contract of mandate is completed only by the acceptance of the mandatary").
116. *Id.* art. 1927 (West 1987).
discussed earlier. More importantly, defining mandate as a contract helps distinguish it from the common-law institution of agency which can come into existence even in the absence of a contract between the principal and the agent. Generally speaking, in civil-law systems, in the absence of such a contract, one is not bound by the juridical acts of another. Moreover, the existence of such a contract does not suffice for holding the principal bound to the juridical acts of the mandatary. It is necessary that these acts must have been within the mandatary’s authority as conferred by the principal. As will be explained later, the new Act reaffirms both of these civilian principles but also introduces exceptions to them. Thus, according to new article 3021, “one who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary.” This article can apply in two situations: (1) when there is no contract at all between the putative principal and the putative mandatary and (2) when there is such a contract, but it does not confer on the mandatary the authority to enter into the particular contract with the third person. In either case, the principal will be bound under article 3021, and in both cases the basis for his liability will be extra-contractual and similar to what common-law systems call “apparent authority” or “agency by estoppel.”

2. Object of Mandate

According to article 2989, in a contract of mandate the principal “confers authority” on the mandatary “to transact one or more affairs for the principal.” The comments accompanying this article explain that the word “affairs” encompasses both juridical and material acts. Indeed, to transact effectively juridical acts for the principal, a mandatary may have to carry out certain incidental and sometimes not so incidental material acts. This is why it would have been unwise to limit mandate to the performance of juridical acts. Nevertheless, a question worth exploring is whether a mandate in which the mandatary’s authority is confined to performing only material acts is truly a mandate, or whether it is instead another

117. See supra notes 101-106 and accompanying text.
118. See, e.g., LA. CIV. CODE art. 3010 (1870); FR. C. CIV. ARTS. 1989, 1998; BGB §§ 164, 177; GREEK CIV. CODE ARTS. 211, 229; ITALY C.C. ARTS. 1388, 1398.
120. Id. art. 3021.
121. See infra Part III.C.2.
122. Id. art. 2989 (emphasis added).
123. See id. art. 2989 cmts. (d)-(e), supra notes 97 & 100 and accompanying text.
124. See id. art. 2989 cmt. (e).
contract. This other contract can be an employment contract creating a master-servant relationship, or it can be contract for “work by the job,” referred to as contract for services.

a. Mandate vs. Employment Contract

Distinguishing a mandate from the master-servant relationship is important for many reasons. Not the least of which is the fact that while a master is liable for the offenses and quasi-offenses of his servants, a principal as such is never delictually liable for the offenses or quasi-offenses of the mandatary, unless of course the mandatary is also the principal’s servant. The difference between these two relationships has been discussed repeatedly by Louisiana courts which have clearly articulated the criteria for distinguishing between the two. Thus, according to the Louisiana Supreme Court’s decision in Blanchard v. Ogima, these criteria include one party’s right to control the activities of the other party, the degree of control regarding the time and space elements of those activities, and the existence of a close economic relationship between the two parties. Thus, as the court said:

Although a servant may possess the qualities of an agent, all agents do not qualify as servants. . . . Employer-employee status may be included within the master-servant relation, but principal-agent status cannot unless the agent is also a servant. . . . “Servant” must be interpreted as that particular kind of agent who has a very close economic relation to, and is subject to very close control by, the principal. A servant is one who offers his personal services for a price. He is an integral part of his employer’s business and must submit to the control of his physical conduct as well as of his time. A non-servant agent contributes to the business of his employer, but he is not such a

125. See id. arts. 2746-2750.
126. See id. art. 2756 (West 1996); see also id. arts. 2756-2777 (regulating these contracts).
127. See id. art. 2320.
130. "It is the right of control of the time and physical activities in the other party and the existence of a close relationship between the parties which determine that one is a servant." Blanchard, 215 So. 2d at 905.
part of it that his physical acts and the time to be devoted to the business are subject to control.131

The above criteria were as sound under the old law as they are under the new law. Thus, the distinction between mandate and employment contracts should not pose any problems for Louisiana courts under the new Act.

b. Mandate vs. Contract for Services

In contrast, the distinction between mandate and a contract of services is more difficult because in both of these contracts the right and degree of control over the other party’s activities that characterizes the master-servant relationship is lacking. Yet this distinction has practical ramifications on the parties’ rights and duties, including the right to unilaterally terminate the contract.

Before suggesting an answer to this question under the new Act, it may be helpful to briefly survey the answer given by other civil codes. For example, the Italian132 and the Dutch civil codes133 limit the scope of mandate to the transaction of “juridical acts” for the principal. Thus, under these codes, a contract calling for the performance of only material acts is simply not a mandate. The German and Greek civil codes provide that a mandate may encompass material acts134 but, in keeping with the Roman law origin of this institution, define mandate as necessarily gratuitous.135 Thus, under these codes, a remunerative contract, regardless of its scope, cannot be a mandate. The French Code civil departed from the Roman law tradition by providing that a mandate is gratuitous but only in the absence of a contrary agreement.136 Thus, under this code, the question of distinguishing remunerative mandates from contracts for services depends on what one considers as the essential elements of mandate. In turn, this question depends on the definition of mandate provided in Code civil article 1984, which defines mandate as a contract in which the principal grants to the mandatory “le pouvoir de faire quelque chose

131. Id. at 906-07.
132. See ITALY C.C. art. 1703.
133. See BW bk. 7, art. 400. This article recognizes the need for distinguishing between the two contracts and defines mandate in a way that avoids overlap with employment contracts. It defines mandate as “a contract whereby one party, the mandatary, binds himself toward the other party, the mandator, to perform one or more juridical acts on account of the mandator without being a relationship of employment.” Id. (emphasis added).
134. See § 662 BGB; GREEK CIV. CODE art. 713.
135. See infra note 172.
136. See FR. C. CIV. art. 1986.
pour le mandant et en son nom.” 137 While the word “chose” (thing) encompasses both juridical and material acts, the words “pouvoir” (power) and “en son nom” (in his name) seem to confine the scope of mandate to juridical acts, 138 and the Cour de Cassation, France’s highest court of ordinary jurisdiction has so held.139 Thus, under French law, a contract does not qualify as mandate unless: (a) it confers the power to enter into juridical acts, and (b) these acts are to be entered into by the mandatary “in the name” of the principal. Conversely, a contract that authorizes only material acts or juridical acts that are not to be conducted in the name of the principal is not a mandate.

Until the enactment of the new Act, the pertinent codal provisions in Louisiana were virtually identical to the corresponding French provisions.140 The Code Napoleon of 1804 defined mandate as a contract which is only presumptively gratuitous141 and in which the principal grants to the mandatary “le pouvoir ... de faire quelque chose pour le mandat et en son nom.”142 The same definitions were reproduced in the Digest of 1808, except that the word chose was changed to affaires, the English translation of which was carried over into the Civil Code of 1870.143 In 1947, however, the words “and in his name” were effectively read out by the Louisiana Supreme Court in Sentell v. Richardson,144 thus introducing the concept of undisclosed agency which is now codified by the new Act.145

As will be explained later, the introduction of undisclosed agency to Louisiana was both inevitable and useful. However, this development eliminated one of the two French criteria for

137. Id. art. 1984; supra note 74 (“the power to do something for the principal and in his name”).
138. As Planiol concludes, “[t]he use of the word ‘power’ implies that it has to do with juridical acts.” PLANIOL & RIPERT, supra note 32, § 2232, at 287 n.2.
139. See Judgment of Feb. 19, 1968, Cass. Civ. Ire, [1968] Bull. Civ. No. 69, at 54-55 (Fr.). “Il y a mandat lorsque des personnes chargent une autre d’accomplir pour leur compte un acte juridique, ... et non des actes matériels, sans pouvoir de représentation, éléments qui caractérisent le contrat d’entreprise ...” (“There is a mandate when persons charge another to accomplish for their account a juridical act, and not material acts without power of representation, elements which characterize the contract for services . . . “). Id. at 55 (emphasis added).
140. See LA. CIV. CODE art. 2991 (1870); LA. CIV. CODE art. 2960 (1825).
142. Id. art. 1984 (“the power ... to do something for the principal and in his name”) (emphasis added).
143. See LA. CIV. CODE art 2954 (1825); LA. CIV. CODE art. 2985 (1870) (Comp. ed. 1972).
144. 29 So. 2d 852, 855-56 (La. 1947).
145. See discussion infra Part III.A.3.
distinguishing between mandate and a remunerative contract of services and thus has reduced the usefulness of the French doctrine in formulating the proper Louisiana answer to the above question. Thus, in contrast to the prevailing French solution, in Louisiana, under both post-Sentell jurisprudence and the new Act: (1) a contract in which one party instructs the other to act in the former party's name continues to qualify as a mandate, but (2) a contract in which one party instructs the other party to act in the latter party's name may or may not qualify as a mandate. Whether or not it does so qualify will depend on the meaning attributable to the word "affairs" and the surrounding words used in new article 2988.

As said above, both the etymology and the history of the word "affairs" leave no doubt that it encompasses not only juridical but also material acts. Thus, a contract in which the principal authorizes both types of acts can clearly qualify as a mandate contract, whether or not the acts are to be performed in the principal's name. On the other hand, it is submitted that a contract should not be considered a mandate: (1) if it calls for the performance of exclusively material acts and (2) if those acts are not to be performed in the name of the principal. This solution finds support in the tenor of new article 2989, especially in the use of the words "authority" and "transact," both of which indicate that what is contemplated is juridical acts. Indeed, material acts are not "transacted" but are rather performed or carried out. Similarly, one does not speak of "authority" to perform material acts. Thus, it is not a coincidence that the quoted term is not used in any of the Civil Code articles providing for contracts for services. Additional support can be found in the comments accompanying article 2989 and in at least one other article of the new Act, article 2999. After explaining that the word "affairs" may encompass both juridical and material acts, the comments to article 2989 draw attention to the fact that "most of the provisions on mandate have been drafted with the making of juridical acts in mind." One of these provisions is new article 2999 which provides that "[a] person of limited capacity may act as a mandatary for matters

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146. The gratuitous or remunerative character of the contract could also be an additional but not determinative criterion.
148. See, e.g., L.A. CIV. CODE ANN. art. 2675 (West 1996) (defining a lease of labor or industry as "a contract by which one of the parties binds himself to do something for the other, in consideration of a certain price"); id. art. 2756 (defining a contract of work by the job as a contract in which one "undertake[s] a building or a work for a certain stipulated price").
for which he is capable of contracting."¹⁵⁰ This provision would have been unnecessary if the Act contemplated mandates consisting exclusively of material acts.

3. Undisclosed Mandate

As said earlier, the Louisiana Civil Code of 1870, like its French counterpart, defined mandate as being necessarily representative, that is, as requiring that the mandatory act in the principal’s name.¹⁵¹ This requirement has been eliminated by the jurisprudence since 1947, thus importing to Louisiana the common-law concept of undisclosed agency.¹⁵² Appropriately recognizing the tremendous usefulness of this concept but also acknowledging the existing reality, the new Act codifies this jurisprudence. Thus, article 2989 omits any reference to this requirement, while articles 3017-3018 and 3022-3023 provide for the fully or partially disclosed mandate.¹⁵³

4. Mandate vs. Agency

While the introduction of undisclosed agency and the recognition of the concept of apparent authority¹⁵⁴ have brought Louisiana mandate law closer to the common law institution of agency, there are still some differences between the Louisiana law of mandate and the common law of agency. These differences are noted at the appropriate places in the discussion that follows.

5. Applicability of Law of Obligations

Art. 2990. Applicability of the rules governing obligations

In all matters for which no special provision is made in this Title, the contract of mandate is governed by the Titles of “Obligations in General” and “Conventional Obligations or Contracts.”¹⁵⁵

Article 2990 restates the obvious, namely, that because mandate is a contract, it is governed by the general rules on contracts for all matters for which the special rules on mandate do not provide otherwise. Similarly, because, like any other contract, a mandate generates obligations, those obligations are governed by the rules

¹⁵⁰. Id. art. 2999 (emphasis added).
¹⁵¹. See L.A. CIV. CODE ANN. art. 2985 (1870).
¹⁵². See Sentell v. Richardson, 29 So. 2d 852 (La. 1947).
¹⁵³. See infra notes 312-329, 406-415 and accompanying text.
found in the title of the Civil Code entitled “Obligations in General,” with regard to all matters not provided for in the title on Mandate.

This cross-reference helps avoid repetition. For example, it explains why the new Act does not reproduce former articles 2988-2990 of the Louisiana Civil Code of 1870 which dealt with acceptance and its modalities. These matters are now governed by Civil Code articles 1927-1947 on contract formation.\textsuperscript{156} Similarly, the failure to reproduce former article 2987, which provided that “[t]he object of the mandate must be lawful” and that the power conferred “must be one which the principal himself has the right to exercise,”\textsuperscript{157} is also inconsequential because the same principles are contained in the general rules on conventional obligations\textsuperscript{158} which are rendered applicable through the cross-reference contained in article 2990. Also rendered applicable through this cross-reference are some more basic principles such as the self-evident notion that strictly personal obligations, being nondelegable,\textsuperscript{159} cannot be the object of a mandate.

6. Interest Served

\textit{Art. 2991. Interest served}

The contract of mandate may serve the exclusive or the common interest of the principal, the mandatary, or a third person.\textsuperscript{160}

Article 2991 states essentially the same rule as pre-Revision Code article 2986\textsuperscript{161} which had attracted relatively little jurisprudential attention. Whether the mandate serves the exclusive interest of only one party, as opposed to the common interest of two or more, may be significant primarily in two contexts. First, to the extent that both the principal and the mandatary have an interest in the subject of the mandate, the potential of a conflict of interest arises. In that event, consistent with the general status of the mandatary as a fiduciary,\textsuperscript{162} such conflicts are to be resolved in accordance with the overriding obligation of good faith imposed by the Code.\textsuperscript{163}

\textsuperscript{157} LA. Civ. Code Ann. art. 2987 (1870).
\textsuperscript{159} See id. art. 1766 (defining “strictly personal” obligations).
\textsuperscript{161} Compare id., with LA. Civ. Code Ann. art. 2986 (1870) (repealed 1997).
\textsuperscript{162} See infra notes 265-278 and accompanying text.
\textsuperscript{163} See LA. Civ. Code Ann. art. 1759 (West 1987); id. arts. 2991 cmt. (b), 3001 cmt. (b) (West Supp. 1999).
Second, to the extent that the mandatary has an interest in the mandate, questions may arise as to its revocability by the principal. Under pre-Revision law, the principal could generally revoke a mandate at will. The former code also made reference to “irrevocable powers of attorney.” In turn, the jurisprudence adopted the common law institution of an irrevocable “agency coupled with an interest.” According to Montgomery v. Foreman, the leading case on this issue, such an agency would be created when the mandatary had such an interest in the subject of the mandate that “the contract containing the mandate is a bilateral or synallagmatic agreement,” in which event the principal cannot revoke the mandate without just cause. As stated by the court, “when the authority of mandate over a thing is given in part as security for monies advanced or obligations incurred by the mandatary, or is necessary to effectuate such security, then it would be inequitable to allow the principal to revoke the mandate at will.”

Regarding termination, new article 3025 now provides that “[a] mandate in the interest of the principal, and also of the mandatary or of a third party, may be irrevocable, if the parties so agree . . . .” Although the general topic of termination is beyond this article’s scope, a few brief observations on this article are in order. First, the comments accompanying the article do not elaborate on the type of ‘interest’ the mandatary must have to trigger application of the article, but Montgomery and other jurisprudence will likely be looked to by analogy.

Second, the article’s requirement that, in addition to the mandatary’s interest, an agreement is necessary for creating an irrevocable mandate departs from, and narrows considerably, the rule enunciated in Montgomery. On the other hand, the fact that an

167. Montgomery, 410 So. 2d at 1167. This is to be contrasted with a simple interest in the exercise of the mandate, such as a commission or contingency fee. On the basis of this test, the court concluded that an agreement between landowners and a real estate agent which gave the agent the right to develop the property at his sole expense and to sell the property, remitting a minimum amount per running foot to the owners and retaining the balance, was an agency coupled with an interest. See id. at 1167-68.
168. L.A. CIV. CODE ANN. art. 3025 (West Supp. 1999) (emphasis added). Of course this is simply an exception to the general power of the principal to terminate the mandate freely. See id. cmt. (b).
agreement can be implied from the circumstances 169 may limit the breadth or significance of the change.

Finally, in cases where the mandate is for the interest of a third party, the article's requirement that an agreement between "the parties" is necessary for making the mandate irrevocable is ambiguous. Does the article contemplate an agreement between the principal and the mandatary, or an agreement between the principal and the third party? It seems that either answer would be an innovation to present Louisiana law.

7. Onerous or Gratuitous Contract

Art. 2992. Onerous or Gratuitous Contract

The contract of mandate may be either onerous or gratuitous. It is gratuitous in the absence of contrary agreement. 170

Article 2992 "reproduces the substance of Civil Code Article 2991 (1870)," 171 which followed the French solution of departing from the Roman law tradition under which a mandate was a necessarily gratuitous contract. 172 What remains from that tradition is merely a presumption that mandate is gratuitous, 173 a presumption which can be rebutted by contrary agreement. Under general contract principles, this agreement can be express or tacit and can be inferred from the surrounding circumstances or conventional usages. 174 Indeed, the decision of some European civil codes such as the German and Greek to define mandate as a necessarily gratuitous contract 175 was not only unrealistic when made and especially thereafter, but has also resulted in rendering almost useless the whole institution of mandate. The French and the Louisiana codes have made a wiser choice in this regard, and the new Act has continued that tradition.

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169. See LA. CIV. CODE ANN. art. 2054 (West 1987).
171. See id. art. 2992 cmt.
172. See DIG. 17.1.4 (Paul, Ad Edictum 32) ("Mandatum nisi gratuitum nullum est.").
173. If the mandate is gratuitous, then the mandatary is treated less stringently. See LA. CIV. CODE ANN. art. 3002 (West Supp. 1999) (providing that "[w]hen the mandate is gratuitous, the court may reduce the amount of loss for which the mandatary is liable").
174. See, e.g., LA. CIV. CODE ANN. arts. 2054-2055 (West 1987).
175. See supra notes 134-135 and accompanying text.
8. Form

Art. 2993. Form

The contract of mandate is not required to be in any particular form. Nevertheless, when the law prescribes a certain form for an act, a mandate authorizing the act must be in that form.⁷⁶

a. Form and “Equal Dignity”

The comments to article 2993 aver that it “reproduces the substance of Article 2992 of the Louisiana Civil Code of 1870.”¹⁷⁷ This is true of the first sentence of the new article, which indeed is essentially the equivalent of former article 2992.¹⁷⁸ The second sentence of the new article, however, enunciates a substantive rule which has no counterpart in the former code articles, although it is firmly grounded in the jurisprudence. According to this jurisprudence, whenever the extrinsic law demands that an act be in a certain form, the authority of a mandatary to consummate that act for his principal must be in the same form.¹⁷⁹ That rule in turn is similar, but not identical, to an early common-law agency doctrine, the “equal dignity rule,” which required an agent’s authority to execute an instrument to be in writing if the instrument itself was required to be in writing.¹⁸⁰

While the general principle espoused by the second sentence has been recognized in a long line of opinions,¹⁸¹ the Louisiana Supreme Court most recently addressed it in Tedesco v. Gentry Development, Inc.¹⁸² In Tedesco, the plaintiffs entered into a written contract to purchase immovable property from the defendant corporation, signed

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¹⁷⁶. LA. CIV. CODE ANN. art. 2993 (West Supp. 1999).
¹⁷⁷. Id. art. 2993 cmt. (a).
¹⁷⁸. See LA. CIV. CODE ANN. art. 2992 (1870) (repealed 1997) (“A power of attorney may be given, either by a public act or by a writing under private signature, even by letter. It may also be given verbally, but of this testimonial proof is admitted only conformably to the title: Of Conventional Obligations.”).
¹⁸¹. See cases cited supra note 179.
¹⁸². 540 So. 2d 960 (La. 1989).
by the corporation’s president. The court held that the contract was unenforceable because the president had no written authority to sell the property. In so doing, the court refused to distinguish between actual and apparent authority; in the court’s words, “just as testimonial proof cannot be used to prove the sale of immovable property (or the agreement to sell such property), testimonial proof cannot be used to prove the agent’s authority to execute the contract, whether that authority was actual or apparent.”

Although Tedesco was unsurprising, given the prevailing earlier jurisprudence, the principal irony in the court’s analysis is that it perceived a codal basis for this rule where none previously existed. The court supported its conclusion by citing (1) article 2440, which requires that a sale or promise of sale of an immovable must be by authentic act or act under private signature; (2) former article 2996, which required express authority “to alienate or give a mortgage, or do any other act of ownership;” and (3) former article 2997, which (extrapolating from the general principle pronounced in former article 2996) required express authority to, among other things, “sell or to buy.” The flaw in that analysis, however, is that neither of the latter two code articles said anything about requiring a writing; they simply required express authority which, obviously, can be oral as well as written. It is simply a leap of faith to conclude that because article 2440 requires an agreement to sell immovables to be written, former articles 2996 and 2997 required that the express authority to execute such an agreement as buyer or seller must be in writing as well. No such conclusion is inexorably compelled by logical interpretation of the then existing provisions of the Civil Code.

Neither the Tedesco court, nor the drafters of new article 2993 articulate the policy underlying the adoption of this rule. It is one thing for the legislature to determine that, because of various considerations associated with certain transactions, sound policy dictates the imposition of certain formality requirements as a precondition to their enforceability. Indeed, borrowing from their English common law heritage and that country’s 1672 “Statute against

183. See id. at 961.
184. See id. at 965.
185. Id. at 964. Related issues involving apparent authority are discussed infra notes 375-405.
186. See Tedesco, 540 So. 2d at 964.
188. L.A. CIV. CODE ANN. art. 2996 (1870) (repealed 1997).
Frauds and Perjuries, all of the common-law states have some form of general statute of frauds, requiring a signed, written memorandum for certain agreements to be enforceable, as well as other specific statutes of frauds. It is, however, not self-evident that the same policies always justify imposing the same requirements for the contract of mandate by which authority is granted to satisfy the signature requirement attached to the underlying substantive transactions. If we are to sanction the frustration of a party's expectation based upon his failure to obtain written evidence of a mandatary's authority to bind his principal, it would seem appropriate to identify some good reason for so doing, given that this can be a classic "trap for the unwary." Frankly, it is difficult in many instances to see what that reason is.

In that regard, it is also important to note that the rule of article 2993 is contrary to that of the modern common law. Under the early common law, it was clear that, for instruments required to be under seal, sealed authority of an agent was generally likewise required. The significance of the seal, however, has generally been abolished. Thus, in common law states, unless there is a specific statute requiring written authorization of certain transactions, written authority is not necessary for the execution of a writing. Simply put, the "equal dignity rule" no longer generally obtains under modern common law doctrine. In this respect, then, the Revision does not move Louisiana law towards the national commercial mainstream. Instead it arguably creates a minefield, especially for out-of-state lawyers.

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190. See Statute Against Frauds and Perjuries, 1672, 24 Car. 2, ch. 3 (Eng.).
192. For example, all states other than Louisiana have adopted § 2-201 of the Uniform Commercial Code, which requires a written memorandum for all contracts for the sale of goods for the price of $500 or more. See U.C.C. § 2-201(1).
193. Of course, other formalities beyond a simple writing may apply, for example, notarial act.
195. See, e.g., MISS. CODE ANN. §§ 75-9-1 to 75-9-7.
196. See, e.g., CAL. CIV. CODE § 2309 (Deering 1985) (providing that "authority to enter into a contract required by law to be in writing can only be given . . . in writing"); MISS. CODE ANN. § 15-3-1 (1972) (requiring that contracts within the statute of frauds signed by the party to be charged or "some [other] person by him or her thereunto lawfully authorized in writing").

In some other states, however, there is no statutory requirement that an agent have written authority to execute contracts subject to the statute of frauds. See, e.g., N.Y. GEN. OBLIG. LAW § 5-701 (McKinney Supp. 1998).
197. See RESTATEMENT, supra note 194, § 30(1); REUSCHELIN & GREGORY, supra note 180, § 12; SEAVY, supra note 194, § 19, at 36.
b. Application of the Rule

The comments to article 2993 offer two examples of the application of the rule as to form. First, because donations must be by authentic act, a mandate authorizing a mandatary to make a donation must also be by authentic act. Second, because an act of compromise must be written, a mandate authorizing a mandatary to execute a compromise must likewise be in writing.

As the foregoing discussion illustrates, however, the choice of these examples may have the unfortunate effect of obscuring the area in which the rule of form has been clearly the most important, which is transactions in immovable property. Virtually all of the reported cases dealing with this question have involved either transfers of immovable property under article 1839 or contracts for the sale of immovables under article 2440, although one pre-Revision case extended the rule to contracts of suretyship under article 1847. Practically speaking, it is the stability of transactions in immovables that is most threatened by the application of the rule of form, and which should be most strongly emphasized in discussions of the rule.

The above does not exhaust the possibilities for applying article 2993, which will depend upon the sweep with which courts interpret its reach. Another obvious example is negotiable instruments. Under the Louisiana commercial laws, a negotiable instrument must, by its nature, be in writing because it must be subject to being possessed.

198. See L.A. CIV. CODE ANN. art. 2993 cmt. (c) (West Supp. 1999).

199. See L.A. CIV. CODE ANN. art. 1536 (West 1987). Indeed, this is one context in which the rule of form has logic. The law requires an authentic act for an inter vivos donation because the donor is depleting his patrimony without receiving anything in return, and thus the authentic act encourages contemplation of the consequences of his acts. If the donor seeks to accomplish the donation through a mandatary, requiring an authentic act for the mandate thus serves the same function.


201. See L.A. CIV. CODE ANN. art. 3071 (West 1994).


203. See id. art. 1839. Of course, the second sentence of article 1839 makes an oral transfer enforceable between the parties if the transferor admits it under oath. See id. Thus, logically, if the transferor is the principal and admits under oath that he orally authorized his mandatary to make the transfer, the lack of written authorization might likewise be cured. No such mechanism exists with respect to a mandatary of the transferee, however.

204. See L.A. CIV. CODE ANN. art. 2440 (West 1996).


206. See L.A. CIV. CODE ANN. art. 1847 (West 1987) (prohibiting the proof of promises to pay a debt of a third person or promises to pay a debt extinguished by prescription by parol evidence).
transferred, negotiated, and so forth. Thus, it would appear that article 2993, read literally, could be construed to require written authority for a mandatary to execute a negotiable instrument for his principal. Whether this is consistent with current usage is highly questionable.

9. Authority

Art. 2994. General authority

The principal may confer on the mandatary general authority to do whatever is appropriate under the circumstances.208

The comment under article 2994 states that "[t]his provision resolves questions concerning the validity of a mandate conferring general authority." However, as far as can be ascertained, no such questions have arisen, if only because the old article 2995, which is cited as the source of the new article, provided categorically that the mandate "may vest an indefinite power to do whatever may appear conducive to the interest of the principal." In any event, the new article obviates questions as to whether some expression or specification of authority granted is essential to a mandate. Thus, a mandatary could be hired as "general manager" of a business without further elaboration, and thereby receive the authority to perform all acts appropriate to that position. Such authority would also include that created by implication under new article 2995, which is discussed below.211

It should be noted that the common law uses the concept of "general agency" in a much different sense. At common law, a "general agent" is one "authorized to conduct a series of transactions involving a continuity of service." The emphasis is on continuity of service; the degree of discretion of the general agent can be very limited in scope.213

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207. See L.A. REV. STAT. ANN. §§ 10:3-101 to 10:3-807 (West 1993). For example, the definition of "negotiation" is a "transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Id. §10:3-201(a). The former version of the U.C.C., adopted in Louisiana in 1974, incorporated the necessity of a "writing" as part of the definition of negotiable instrument, but the present version abandons that as obvious surplusage. See L.A. REV. STAT. ANN. § 10:3-104, repealed by 1992 La. Acts 3165.
209. Id. art. 2994 cmt.
211. See infra notes 217-221 and accompanying text.
212. RESTATEMENT, supra note 194, § 3(1).
213. See id. § 3 cmts. (b)-(c).
Art. 2995. Incidental, necessary, or professional acts
The mandatary may perform all acts that are incidental to or necessary for the performance of the mandate.

The authority granted to a mandatary to perform an act that is an ordinary part of his profession or calling, or an act that follows from the nature of his profession or calling, need not be specified. 214

Art. 2996. Authority to alienate, acquire, encumber, or lease
The authority to alienate, acquire, encumber, or lease a thing must be given expressly. Neither the property nor its location need be specifically described. 215

Art. 2997. Express authority required
Authority also must be given expressly to:
(1) Make an inter vivos donation.
(2) Accept or renounce a succession.
(3) Contract a loan, acknowledge or make remission of a debt, or become a surety.
(4) Draw or endorse promissory notes and negotiable instruments.
(5) Enter into a compromise or refer a matter to arbitration.
(6) Make health care decisions, such as surgery, medical expenses, nursing home residency, and medication. 216

Articles 2995, 2996, and 2997 are considered together because they are inextricably linked, although this may not be self-evident from their terms. As explained below, this linkage will inevitably create difficulties for Louisiana courts in trying to reconcile the tensions created by the interplay of the three articles.

On the purely doctrinal level, article 2995, as successor to former article 3000, 217 provides the codal basis for what the common law would call an agent’s implied authority: 218 the authority to perform acts that are consistent with the principal’s express directions though not spelled out therein. 219 A leading Louisiana case, AAA Tire &

215. Id. art. 2996.
216. Id. art. 2997.
217. See LA. CIV. CODE ANN. art. 3000 (1870) (repealed 1997) (“Powers granted to persons, who exercise a profession, or fulfill certain functions, of doing any business in the ordinary course of affairs to which they are devoted, need not be specified, but are inferred from the functions which these mandataries exercise.”).
218. Ironically, some cases construing former article 3000 have used it as the basis for recognizing apparent, as opposed to implied, authority, a manifestly erroneous conclusion. See, e.g., Radiofone v. Oxford Bldg. Servs., 347 So. 2d 327, 329-30 (La. Ct. App. 1977).
219. See, e.g., SEAVY, supra note 194, § 8. Some commentators suggest that there may be distinctions between the concepts of implied and incidental authority. See REUSCHLEIN & GREGORY, supra note 180, §§ 14-15.
Export, Inc. v. Big Chief Truck Lines, Inc., defined the concept as follows:

[An agency] is created by implication when, from the nature of the principal’s business and the position of the agent within that business, the agent is deemed to have permission from the principal to undertake certain acts which are . . . reasonable and necessary concomitants of the agent’s express authorization. Implied authority connotes permission from the principal for the agent to act, though that permission is not expressly set forth orally or in writing. Generally, one should look from the viewpoint of the principal and the agent to determine whether the agent has implied authority.220

Article 2995, then, reflects the simple reality that one cannot expect a principal to enumerate the full range of acts which should logically fall within the mandatary’s authority. Rather, authority must, practically speaking, encompass those acts which the mandatary could reasonably believe to be necessary and proper to accomplish the purposes expressly directed by the principal.221 Conversely, articles 2996 and 2997 seem premised on a policy determination that authority for the specific transactions included therein must never be implied, but rather must without exception be express.

There are at least two difficulties with the above scheme: One practical and one theoretical. The practical problem is that, inevitably, implied authority under article 2995 will subsume transactions for which articles 2996 or 2997 ostensibly demand express authority. That tension is well-illustrated by a pre-Revision case, Radiofone v. Oxford Building Services.222 In that case, the plaintiff contracted to provide a beeper paging service to the defendant through its project manager in New Orleans.223 The defendant later sought to repudiate the contract, arguing that its manager had no authority from the board to make such a contract.224 Citing former article 3000, the court concluded that the manager had “apparent authority” (in reality, implied authority) to bind the corporation, stating that “[w]ere we to require each business dealing with a corporation to be authorized by written resolution before recognizing its validity, we would impede the

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221. See id. Note that, as stated in AAA Tire, authority exists as a function of what the mandatary reasonably believes, as opposed to the third person with whom he deals. See id.
223. See id. at 328-29.
224. See id. at 329. It might be noted that the manager paid the initial charge for the pager by his own personal check, although the opinion states that he signed the subscription agreement as a representative of Oxford Building Services. See id. at 328-29.
Thus, according to the court, corporations must be "liable for contracts entered into by their unauthorized agents when the objects of the agreements [are] goods or services the corporation might require in the normal conduct of its business."226

Although the court's characterization of such a species of authority as "apparent" is clearly inaccurate, the real value of the opinion is the court's remarkably candid observation that, were it minded to do so, it could have just as easily struck the contract down on the basis of lack of express authority under the former code articles.227 Specifically, the court noted:

We could reach an opposite result in this case by reasoning the agreement in question was the sale of a service and rely on that part of C.C. art. 2997, which requires authority to buy and sell to be express. But this would defeat the purpose of C.C. art. 3000. We note an inconsistency in the spirit in which our courts apply the apparent authority theory to validate contracts vis-a-vis the strict proof demand to defeat them.228

In other words, one lesson of Radiofone is that the unyielding demand of articles 2996 and 2997 for express authority, without exception, for the enumerated transactions cannot peacefully coexist with the recognition of implied authority in article 2995. In fact, Radiofone also teaches that the rules of these articles are clear invitations to result-oriented jurisprudence: if the perceived equities favor the principal, relieve him of liability for lack of express authorization; if they favor the third person dealing with the mandatary, uphold the contract as within the mandatary's implied authority under article 2995. Surely this is not a generally desirable state of affairs.

Perhaps even more troubling is that, doctrinally, no explanation is given as to why this inherent conflict need exist at all. To begin with, there is no suggestion as to why the specific transactions included in articles 2996 and 2997 are singled out for special treatment, other than the mere fact that the pre-Revision code so provided.229 One may accept the general precept that certain transactions are, as a class, more significant than others, thus justifying specific, "express" authorization, but if the law makes those choices, it would be useful to

225. Id. at 329.
226. Id. The court appears to use "unauthorized" here in the sense of lacking express authorization.
227. See id. at 330.
228. Id. (emphasis added).
articulate the policies underlying the line-drawing. Why, for example, must a mandatory always have express authority to borrow money for his principal, but not to hire and fire the principal’s employees? Nothing in the commentary illuminates in any way the rationale for articles 2996 and 2997.

Even if one were to conclude that the choices made in articles 2996 and 2997 are appropriate ones, a final question remains: why did the drafters believe that no exceptions whatsoever should be made to the rule that authority for the enumerated transactions must be express? It is simple enough to posit a regime under which authority for certain transactions ordinarily must be express, while at the same time recognizing exceptions to that rule under appropriate circumstances.

Indeed, this essentially is the common-law approach; the Restatement of Agency specifically articulates situations under which the authority to buy or sell, lease, receive payment, borrow, and make negotiable instruments is inferred. In addition, the Restatement specifically enumerates the implied authorities of a manager of a business.

230. See Restatement, supra note 194, § 52 (“Unless otherwise agreed, authority to buy property for the principal or to sell his property is inferred from authority to conduct transactions for the principal, if such purchase or sale is incidental to such transactions, usually accompanies them, or is reasonably necessary in accomplishing them.”).

231. See id. § 67.

(1) Unless otherwise agreed, authority to lease land or chattels is inferred from authority to manage the subject matter if leasing is the usual method of dealing with it or if, in view of the principal’s business and other circumstances, leasing is a reasonable method of dealing with it.

(2) Authority to lease land or chattels is not inferred merely from authority to sell the subject matter, to take charge of it, or to receive rents from it.

Id.

232. See id. § 71 (“Unless otherwise agreed, authority to receive payment is inferred from authority to conduct a transaction if the receipt of payment is incidental to such a transaction, usually accompanies it, or is a reasonably necessary means for accomplishing it.”).

233. See id. § 74 (“Unless otherwise agreed, an agent is not authorized to borrow unless such borrowing is usually incidental to the performance of acts which he is authorized to perform for the principal.”).

234. See id. § 76 (“Unless otherwise agreed, an agent is not authorized to execute or to endorse negotiable paper unless such execution or endorsement is usually incidental to the performance of the acts which he is authorized to perform for the principal.”).

235. See id. § 73:

Unless otherwise agreed, authority to manage a business includes authority:

(a) to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it;

(b) to procure equipment and supplies and to make repairs reasonably necessary for the proper conduct of the business;
It is true, of course, that a Restatement is, by its nature, substantially more detailed than a civil code. Nonetheless, some exceptions to articles 2996 and 2997 would be consistent not only with the spirit of the common law rules but, more importantly, with that of article 2995 itself. Even limited exceptions are far more reflective of the business realities of the modern commercial world and the reasonable expectations of those acting therein. It is a safe prediction that courts will tend to resist vigorous application of articles 2996 and 2997 to garden-variety transactions of mandataries with general authority. Faced with the dilemmas presented by seemingly inflexible rules, courts will seek mechanisms to create the flexibility necessary to resolve disputes in such a fact-sensitive area.

Fortunately, ameliorative doctrines do exist. For example, the principal who with knowledge of the mandatary’s acts receives the benefits thereof may be deemed to have tacitly ratified them after the fact, notwithstanding the lack of express authority.236 Indeed, acquiescence in a series of ostensibly “unauthorized” transactions could give rise to an estoppel or, at some point, even be considered as a species of “express” authority. That observation leads to a final point: The ultimate issue under articles 2996 and 2997 is how “express” express authority must be? It seems likely that, in contrast to the Radiofone approach of simply choosing to follow one Code article rather than another, courts will seek to find an “expression” of authority in some words or conduct of the principal which the court can interpret in a fashion (reasonably or unreasonably) as permitting an equitable result.

10. Self-Contracting

Art. 2998. Contracting with one’s self

A mandatory who represents the principal as the other contracting party may not contract with himself unless he is authorized by the

(c) to employ, supervise, or discharge employees as the course of business may reasonably require;
(d) to sell or otherwise dispose of goods or other things in accordance with the purposes for which the business is operated;
(e) to receive payment of sums due the principal and to pay debts due from the principal arising out of the business enterprise; and
(f) to direct the ordinary operations of the business.

Id. 236. See L.A. CIV. CODE ANN. art. 1843 (West 1987).
principal, or, in making such contract, he is merely fulfilling a duty to the principal. 237

a. Self-Contracting Prohibited

Article 2998 states the self-evident proposition that a mandatary may not contract with himself. Technically, such self-contracting would be possible because a mandatary who acts within the limits of his authority acts not for himself but for his principal. Colloquially speaking, he is wearing the principal’s hat. The thrust of the above article is that the mandatary may not, at the same time and in the same act, wear his own individual hat. 238 As obvious as this proposition may sound, it was not stated explicitly in any of the civil codes prior provisions on mandate. Thus, as stated in the comments under article 2998, “[t]his provision is new.” 239

b. Exceptions

The comments also acknowledge that article 2998 “is based on” article 235 of the Greek Civil Code, article 1395 of the Italian Civil Code, and section 181 of the German Civil Code. 240 The words “based on” suggest both similarities and differences from the source provisions. The similarities are that, like article 2998, all three source provisions generally prohibit self-contracting as defined above and that all three allow the equally self-evident exception for cases in which self-contracting is authorized by the principal. 241 Further, under general principles, subsequent ratification by the principal should have the same effect as prior authorization.

The differences are the following: All three source provisions include within the scope of the prohibition of self-contracting contracts entered into by a person acting as the mandatary of both contracting parties. 242 In contrast, such contracts do not fall within the scope of article 2998. Furthermore, such contracts seem to be permitted by article 3000. 243 Like article 2998, the three source provisions allow an

238. For situations in which the mandatary contracts with himself in his capacity as mandatary for another principal, see infra notes 240-249 and accompanying text.
239. L.A. CIV. CODE ANN. art. 2998 cmt.
240. See id.
241. The Italian Civil Code requires specific authorization. See ITALY C.C. art. 1395. The Greek and German civil codes speak of acts allowed by the principal. See § 181 BGB; GREEK CIV. CODE art. 235.
242. See supra note 241.
243. See L.A. CIV. CODE ANN. art. 3000.
exception from the principle of prohibiting self-contracting, but this exception is phrased differently. The Greek and German civil codes allow an exception for a juridical act which "consists exclusively in the fulfillment of an obligation,"244 while the Italian Civil Code allows an exception for any contract the content of which "is established in such a way as to preclude the possibility of a conflict of interests."245 Thus, this part of article 2998 is closer to the Greek and German provisions but it may differ from both of them to the extent it speaks of a "duty" rather than an "obligation" and it specifies that the duty must be one owed "to the principal."246 A relevant example from the Greek jurisprudence is a situation in which a mandatary acting in his individual capacity pays himself (in his capacity as the principal's mandatary) a debt owed by the mandatary to the principal, or vice versa.247 Another example that fits the language of the Louisiana article is a situation in which a mandatary authorized to sell perishable goods belonging to the principal buys the goods after exhausting all efforts to find other suitable buyers. In light of the mandatary's duty "to fulfill with prudence and diligence the mandate he has accepted,"248 such a sale or purchase should be considered the fulfillment of "a duty to the principal,"249 and thus should not fall within the prohibition of self-contracting provided in article 2998.

11. Capacity

Art. 2999. Person of limited capacity

A person of limited capacity may act as a mandatary for matters for which he is capable of contracting. In such a case, the rights of the principal against the mandatary are subject to the rules governing the obligations of persons of limited capacity.250

This article is based on article 3001 of the Louisiana Civil Code as amended in 1979.251 The source article, however, provided only for emancipated minors, which, of course, have full contractual capacity.252 In contrast, the new article speaks of "persons of limited capacity" as defined in article 2999.
capacity,” which includes unemancipated minors, as well as persons placed under limited interdiction. To the extent these persons are capable of contracting for themselves they are also capable of serving as mandataries for another. Thus, a minor who under article 1923 is capable of entering into certain “contracts for necessaries” is also capable of entering into the same contracts as mandatory for another. Furthermore, persons of limited capacity may perform all the material acts contemplated by the mandate.254

12. Mandatory of Both Parties

**Art. 3000. Mandatory of both parties**

A person may be the mandatory of two or more parties, such as a buyer and a seller, for the purpose of transacting one or more affairs involving all of them. In such a case, the mandatory must disclose to each party that he also represents the other.255

Article 3016 of the Louisiana Civil Code of 1870 provided that “[t]he broker or intermediary is he who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatory of both.” The 1870 Code also contained four other articles regulating the duties and responsibilities of brokers. These articles have not been reproduced by the new Act because in the meantime brokerage is regulated by special legislation.258

The new Act does, however, sanction the concept of what may be colloquially called a “double agent,” namely a person who, in one and the same act, acts as the mandatory of more than one principal. Article 3000 allows such a person to act on behalf of both or all the principals even in the same transaction and even if their respective interests are not parallel, subject only to his obligation to disclose this fact to the affected principals.259 Thus, under this article, a person may represent both the seller and the buyer and in that capacity negotiate and effectuate the sale of a house. Obviously, such a sale is a species of self-contracting.

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253. *See id.* at 1923.

254. For the question of whether a contract that calls for the performance of exclusively material acts can qualify as a mandate, see *supra* notes 123-150 and accompanying text.


257. *See id.* arts. 3017-3020 (repealed 1997).


259. *See id.* art. 3000. “Under this provision, depending on particular arrangements, a broker may be a mandatory of the buyer, of the seller, or of both the buyer and the seller.” *Id.* art. 3000 cmt. (b).
that is prohibited by article 2998. Yet, the possibility of a conflict of interests is equally present in both situations. Recognizing this problem, article 3017 of the Louisiana Civil Code of 1870 required the mandatary to "observe the same fidelity towards all parties, and not favor one more than another." Although this article was not reproduced by the new Act, the same duty of fidelity continues to exist by virtue of new article 3001.

B. The Internal Relations Between the Principal and the Mandatary

1. In General

The methodology employed in this subpart diverges from that of the previous parts of the Article. Rather than providing an article-by-article discussion, this subpart provides a brief summary of articles 3001 through 3015. In addition to the space limitations of this Review, this divergence is justified by the fact that the new articles on internal relations do not change in any significant way the pre-Revision law, although some matters previously unexpressed are now expressed. Moreover, on a practical level, most disputes invoking the law of mandate tend to involve the rights and liabilities of the principal and third person, rather than principal and mandatary. Finally, the rules expressed in articles 3001 through 3015 are ultimately fairly self-evident. They flow essentially from the fiduciary nature of the relationship itself. As a function thereof,

260. See id. art. 2998.
261. LA. CIV. CODE art. 3017 (1870) (repealed 1997).
262. See LA. CIV. CODE ANN. art. 3001 (West Supp. 1999).
263. Compare LA. CIV. CODE ANN. art. 3001 (West Supp. 1999), with LA. CIV. CODE art. 3002 (1870) (repealed 1997); LA. CIV. CODE ANN. 3002 (West Supp. 1999), with LA. CIV. CODE art. 3003 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3004 (West Supp. 1999), with LA. CIV. CODE arts. 3005, 3023 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3005 (West Supp. 1999), with LA. CIV. CODE art. 3015 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3007 (West Supp. 1999), with LA. CIV. CODE arts. 3007, 3009 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3008 (West Supp. 1999), with LA. CIV. CODE art. 3010 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3009 (West Supp. 1999), with LA. CIV. CODE art. 3014 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3010 (West Supp. 1999), with LA. CIV. CODE art. 3021 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3011 (West Supp. 1999), with LA. CIV. CODE art. 3011 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3012 (West Supp. 1999), with LA. CIV. CODE art. 3022 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3013 (West Supp. 1999), with LA. CIV. CODE art. 3024 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3019 (West Supp. 1999), with LA. CIV. CODE art. 3025 (1870) (repealed 1997); LA. CIV. CODE ANN. art. 3015 (West Supp. 1999), with LA. CIV. CODE art. 3026 (1870) (repealed 1997).

264. The fiduciary nature of the relationship has long been recognized by Louisiana courts. See, e.g., Gerdes v. Estate of Cush, 953 F.2d 201, 205 (5th Cir. 1992); Cuggy v. Zeller, 61 So. 209, 211-12 (La. 1913); cf. RESTATEMENT, supra note 194, § 1 (1) (defining agency as a fiduciary relation).
the mandatary owes his principal a duty to act with due care and diligence, a duty of loyalty to avoid conflicts of interest, and a duty to account. Correspondingly, the principal has a duty to hold the mandatary harmless for actions of the mandatary within his authority. Those duties are discussed below.

2. Duties of the Mandatary to the Principal

Articles 3001 through 3009 outline the obligations of the mandatary to the principal. Article 3001 imposes upon the mandatary the duty to fulfill his mandate "with prudence and diligence," and holds him liable to the principal for damages caused by his failure to perform,265 although those damages may be reduced by the court if the mandate is gratuitous.266 The duty of loyalty is not directly imposed by the mandate articles; it is said to derive from the general obligation of good faith.267

The mandatary likewise has a duty to provide information and to account to the principal268 and to turn over to the principal all that he receives pursuant to the mandate, except sufficient property to pay his expenses.269 He owes interest on the principal's money diverted to his own use.270

While the mandatary ordinarily must fulfill the mandate himself, under certain unforeseen circumstances he may delegate his duties to a substitute.271 If the act of substitution is authorized, the mandatary is responsible for acts of the substitute only if the mandatary was

265. La. Civ. Code Ann. art. 3001 (West Supp. 1999) ("The mandatary is bound to fulfill with prudence and diligence the mandate he has accepted. He is responsible to the principal for the loss that the principle sustains as a result of the mandatary's failure to perform.").

266. See id. art. 3002 ("When the mandate is gratuitous, the court may reduce the amount of loss for which the mandatary is liable.").


268. See La. Civ. Code Ann. art. 3003 (West Supp. 1999) ("At the request of the principal, or when the circumstances so require, the mandatary is bound to provide information and render an account of his performance of the mandate. The mandatary is bound to notify the principal, without delay, of the fulfillment of the mandate.").

269. See id. art. 3004 ("The mandatary is bound to deliver to the principal everything he received by virtue of the mandate, including things he received unduly. The mandatary may retain in his possession sufficient property of the principal to pay the mandatary's expenses and remuneration.").

270. See id. art. 3005 ("The mandatary owes interest, from the date used, on sums of money of the principal that the mandatary applies to his own use.").

271. See id. art. 3006 ("In the absence of contrary agreement, the mandatary is bound to fulfill the mandate himself. Nevertheless, if the interests of the principal so require, when unforeseen circumstances prevent the mandatary from performing his duties and he is unable to communicate with the principal, the mandatary may appoint a substitute.").
negligent in choosing the substitute or instructing him.\footnote{272} If the substitution was unauthorized, the mandatary is automatically responsible for the substitute's acts.\footnote{273} In all cases, the principal can pursue the substitute.\footnote{274}

For reasons discussed in detail later,\footnote{275} the pre-Revision Code did not address the question of the mandatary's responsibility to the principal, as opposed to third persons, for acts exceeding the mandatary's authority. Article 3008 now imposes liability on the mandatary for such acts, although the principal has no such responsibility to the mandatary unless the principal ratifies those acts.\footnote{276} Finally, consistent with the general principle that solidarity is not presumed,\footnote{277} multiple mandataries are not solidarily liable to a common principal unless otherwise agreed.\footnote{278}

3. Duties of the Principal to the Mandatary

Articles 3010 through 3015 state the obligations owed by the principal to the mandatary. Article 3010 now imposes an express obligation owed by the principal to the mandatary to perform authorized obligations, as well as obligations contracted by the mandatary after termination of the mandate without knowledge of termination.\footnote{279} The principal is liable to the mandatary for

\begin{itemize}
  \item \textit{Id. See id. art. 3007.}
  \begin{itemize}
    \item When the mandatary is authorized to appoint a substitute, he is answerable to the principal for the acts of the substitute only if he fails to exercise diligence in selecting the substitute or in giving instructions.
    \item When not authorized to appoint a substitute, the mandatary is answerable to the principal for the acts of the substitute as if the mandatary had performed the mandate himself.
    \item In all cases, the principal has recourse against the substitute.
  \end{itemize}
  \textit{Id. See id.}

  \textit{Id. See id.}

  \textit{Id. See infra notes 339-342 and accompanying text.}

  \textit{Id. See L.A. CIV. CODE ANN. art. 3008 ("If the mandatary exceeds his authority, he is answerable to the principal for resulting loss that the principal sustains. The principal is not answerable to the mandatary for loss that the mandatary sustains because of acts that exceed his authority unless the principal ratifies those acts.").}

  \textit{Id. See id. art. 1796 (West 1987).}

  \textit{Id. See L.A. CIV. CODE ANN. art. 3009 (West Supp. 1999) ("Multiple mandataries are not solidarily liable to their common principal, unless the mandate provides otherwise.").}

  \textit{Id. See id. art. 3010.}

  The principal is bound to the mandatary to perform the obligations that the mandatary contracted within the limits of his authority. The principal is also bound to the mandatary for obligations contracted by the mandatary after the termination of the mandate if at the time of contracting the mandatary did not know that the mandate had terminated.
\end{itemize}
unauthorized obligations only if he ratifies them. In this sense, the
mandatary's acts can be "authorized" if he fulfills his duties in a
manner more advantageous to the principal than originally
authorized.

The principal must reimburse the mandatory for expenses and
pay his agreed compensation, even if the purpose of the mandate was
not accomplished, so long as the failure was not the mandatory's
fault. He must compensate the mandatory for losses sustained,
provided they were not caused by the mandatory's fault, and pay
interest on amounts expended personally by the mandatory. Finally,
in contrast to the rule on multiple mandataries, multiple principals
are solidarily liable to their mandatory for affairs common to them.

C. External Relations

1. Relations Between the Mandatary and Third Persons

Art. 3016. Disclosed mandate and principal

A mandatary who contracts in the name of the principal within the
limits of his authority does not bind himself personally for the
performance of the contract.

The principal is not bound to the mandatory to perform the obligations that
the mandatory contracted which exceed the limits of the mandatory's authority
unless the principal ratifies those acts.

Id.

280. See id.

281. See id. art. 3011 ("The mandatory acts within the limits of his authority even
when he fulfills his duties in a manner more advantageous to the principal than was
authorized.").

282. See id. art. 3012.

The principal is bound to reimburse the mandatory for the expenses and
charges he has incurred and to pay him the remuneration to which he is entitled.
The principal is bound to reimburse and pay the mandatory even though
without the mandatory's fault the purpose of the mandate was not accomplished.

Id.

283. See id. art. 3013 ("The principal is bound to compensate the mandatory for loss
the mandatory sustains as a result of the mandate, but not for loss caused by the fault of the
mandatory.").

284. See id. art. 3014 ("The principal owes interest from the date of the expenditure on
sums expended by the mandatory in performance of the mandate.").

285. See supra note 278 and accompanying text.

286. See LA. CIV. CODE ANN. art. 3015 ("Multiple principals for an affair common to
them are solidarily bound to their mandatory.").

287. Id. art. 3016.
Art. 3017. Undisclosed mandate
A mandatary who contracts in his own name without disclosing his status as a mandatary binds himself personally for the performance of the contract.288

Art. 3018. Disclosed mandate; undisclosed principal
A mandatary who enters into a contract and discloses his status as a mandatary, though not his principal, binds himself personally for the performance of the contract. The mandatary ceases to be bound when the principal is disclosed.289

a. Disclosed and Undisclosed Agency in Louisiana: A Brief History

The general background in Louisiana of the doctrine of "undisclosed agency," i.e., the ability of an agent to create binding relations between his principal and third persons without disclosing the principal's existence or identity, has recently been discussed in some detail in this Review,290 and thus only a brief survey will be offered in this article. In short, common-law principles of undisclosed agency were imported into Louisiana beginning with the 1828 supreme court opinion in Williams v. Winchester,291 and for well over a century to follow the process was unabated.292 The first bump in the road challenging the efficacy of that process came in the 1947 supreme court case, Sentell v. Richardson.293 In Sentell, the defendant agreed to purchase stock for the plaintiff from a third person, without disclosing his purpose, and to transfer the stock to the plaintiff upon acquisition.294 Although the defendant was

288. Id. art. 3017.
289. Id. art. 3018.
291. 7 Mart. (n.s.) 22 (La. 1828).
292. For a collection of early cases, see Jones, supra note 290, at 412-14.
293. 29 So. 2d 852 (La. 1947).
294. See id. at 853-54.
successful in purchasing the stock, he refused to deliver it to the plaintiff, prompting suit.295

The defendant's principal response was that he was not a mandatary at all, basing this on former article 2985 which defined mandate as "an act by which one person gives power to another to transact for him and in his name, one or several affairs."296 The defendant argued that, because he did not act in the plaintiff's name, he could not be his mandatary.297 Rejecting that theory, the court stated:

Our opinion is that the words "and in his name" are not essential to the definition of a procuration or power of attorney, as defined in article 2985 of the Civil Code. If those words were essential to the definition there could be no such thing as a procuration or power of attorney to buy property for an undisclosed principal.298

Whatever one may think of the propriety of the court's conclusion,299 Sentell appeared to be a ringing reaffirmation of undisclosed agency theory as a basic principle of Louisiana agency law. In 1983, however, the Louisiana First Circuit Court of Appeal challenged that proposition in Teachers' Retirement System v. Louisiana State Employees Retirement System.300 Noting the lack of any reference to undisclosed agency in the Civil Code and without even citing Sentell, the Teachers' court utilized a civilian analysis to deny an undisclosed principal the right to sue a third person.301 The impact of Teachers' was, however, uncertain at best. One reason is that the Louisiana Supreme Court reversed the case on procedural grounds, and the undisclosed agency issue was not reconsidered.302 Within a year after Teachers', however, the First Circuit upheld an action by a third person against an undisclosed principal.303 Thus,
one might have reasonably concluded that Teachers' was an aberration, a one-time blip on a radar screen.

However, one who did so would have been wrong, because in 1992, Teachers' rose, phoenix-like, from its ashes, as the First Circuit again relied upon it to deny an undisclosed principal the right to sue a third person.\(^\text{304}\) This time, though, the supreme court granted writs, and the resulting opinion, *Woodlawn Park Limited Partnership v. Doster Construction Co.*, unequivocally reaffirmed that undisclosed agency was part of the fabric of Louisiana’s law of mandate, based not upon the Civil Code but rather as an importation from the common law.\(^\text{305}\) Indeed, on that point the court could hardly have been more blunt; Justice Lemmon stated:

> The Civil Code has never fully developed the concept of agency and representation with respect to the direct acquisition of rights and liabilities through the contractual action of a properly authorized intermediary who may or may not disclose his representative capacity. However, Louisiana courts, perhaps recognizing that agency as a field of commercial law should be uniform throughout the country, have adopted notions of common law agency.

> We restate approval of the use of common law agency notions in commercial transactions. In matters of commercial law, Louisiana has frequently taken steps to make our law uniform with other states.\(^\text{306}\)

> While the breadth of Justice Lemmon’s declaration has been criticized,\(^\text{307}\) the Revision affirms *Woodlawn Park* by explicitly providing for undisclosed agency as part of Louisiana’s positive law.\(^\text{308}\) However, if Justice Lemmon’s true desire was *complete* uniformity between Louisiana mandate law and common law, this purpose has not been fully achieved. For, as discussed below, some differences continue to exist.

b. Disclosed and Undisclosed Principals in the Revision

Article 3016 now specifically relieves the mandatary from any liability to the person with whom he deals so long as the mandatary (1) identifies his principal and (2) does not exceed his authority.\(^\text{309}\) In essence, this is what the common law refers to as an agent for a


\(^\text{306}\) 623 So. 2d 645, 647-48 (La. 1993).

\(^\text{307}\) Id. at 647-48 (citations omitted).

\(^\text{308}\) See, *e.g.*, North, supra note 290, at 296-99.

\(^\text{309}\) See *LA. CIV. CODE ANN.* arts. 3017-3018.
"disclosed" (sometimes fully disclosed) principal: the third person at the time of the transaction has notice both that the agent is acting for a principal and the principal's identity. Consistent with the common law, such a mandatary does not become a party to the contract, subject, of course, to any contrary agreement with those with whom he deals.

Conversely, under article 3017, a mandatary, who discloses neither the principal's identity nor that he is acting for a principal, is a party to the contract—what the common law calls an agent for an "undisclosed" principal. Article 3017 is likewise consistent with the common law as well as the pre-Revision jurisprudence.

In each of the above cases, the result flows from simple objective contract theory. When the principal is disclosed, the person dealing with the mandatary could reasonably understand that he is contracting only with the principal, and that would be his intent, absent some clear expression by the mandatary that he likewise promises performance of the obligation. On the other hand, when the principal is completely undisclosed, because there has been no manifestation of assent by the principal, the third person would obviously expect the liability of the mandatary, the only person of whose existence he is aware.

c. Partially Disclosed Principals Under the Revision

Article 3018 deals with what the common law refers to as an agent for a partially disclosed principal: the mandatary discloses that he is representing someone, but not who the "someone" is. Article 3018 adopts a rule somewhat more complex than the two preceding articles: such a mandatary is initially bound for the performance of the contract, but is released from liability upon identification of the principal. This is a rather peculiar rule, one

310. See Restatement, supra note 194, § 4 (1).
311. See id. § 320.
312. See id. § 4 (3).
313. See id. § 322.
315. See Restatement, supra note 194, § 320 cmt. (c) (West Supp. 1999).
316. See Restatement, supra note 194, § 186 cmts. (a)-(b); id. § 322.
317. See id. § 4 (2).
319. See id.
which differs both from the common law and the pre-Revision jurisprudence, and may represent one of the least successful choices made in the Revision.

As to the common law, the general rule is that an agent for a partially disclosed principal becomes a party to contracts he makes, absent some contrary agreement by the person with whom he deals.\(^{320}\) The rationale underlying the rule is, once again, one of objective contract theory. Here, in contrast to complete nondisclosure cases, the third person is aware that there is someone "lurking in the background" who at some point will presumably emerge. But few people would put their complete trust in the creditworthiness of an unidentified person. Thus, the most plausible ordinary interpretation would be that the third person would understand that the agent, whose identity he does know and whose creditworthiness is subject to evaluation, is at least a co-obligor on the contract.\(^{321}\) On the other hand, under the common-law approach, there is clearly no mechanism for automatic absolution of the agent by the simple act of disclosure. Rather, the agent remains a co-obligor or surety for the principal even after the principal steps forward, absent, of course, some specific agreement by the parties for the agent's release.\(^{322}\) But the Restatement clearly treats this as the exception to the generally assumed intentions of the parties.

Before the Revision, Louisiana jurisprudence failed to distinguish between undisclosed and partially-disclosed agency. Generally, the courts imposed personal liability on the agent for inadequately disclosing his principal,\(^{323}\) whether the agent failed completely to disclose that he was acting as an agent,\(^{324}\) or simply failed, in some way, to adequately identify his principal.\(^{325}\) At the same time, while

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320. See RESTATEMENT, supra note 194, § 321.
321. See id. § 321 cmt. (a). In the words of the Restatement:

The inference of an understanding that the agent is a party to the contract exists unless the agent gives such complete information concerning his principal's identity that he can be readily distinguished. If the other party has no reasonable means of ascertaining the principal, the inference is almost irresistible and prevails in the absence of an agreement to the contrary.

322. See id. § 321 cmt. (b); id. § 336 cmt. (d).
323. For a collection of cases and discussion of pre-Revision law, see Morris, Personal Liability, supra note 290, at 219-25.
not distinguishing the concepts, the courts reached results that were consistent with the ordinary common-law rules just discussed: Agents for either undisclosed or partially disclosed principals were generally held personally liable, absent contrary agreement.326

By distinguishing the concepts of undisclosed from partially-disclosed agency, the Revision brings about a cosmetic change to the jurisprudence. More importantly, however, by allowing the mandatary to terminate his liability merely by disclosing his principal, article 3018 not only brings about a substantive change from the jurisprudential regime but also deviates from the practice of common law states by adopting a rule unique to Louisiana. Of course uniqueness is not necessarily a vice; in this case, however, it may be of dubious merit.

It may well be that both the change and the deviation are unintended. Because the comments to article 3018 do not acknowledge that the article changes the jurisprudence,327 it is difficult to hypothesize about the intent of the article. It may be that the drafters believed that when a mandatary acts for a partially disclosed principal, the ordinary intention of the parties would be that virtually all risks of the transaction should be borne by the third person, rather than by the mandatary. However, as explained above, such a belief is inconsistent with the assumptions adopted by the common law of our sister states.328 Thus, if the drafters’ intent was to bring Louisiana law closer to the common law on this issue, this intent has not been carried out.

More importantly, though, by creating an essentially risk-free scenario for the mandatary, article 3018 may be an invitation to opportunistic behavior. Suppose, for example, that Mandatary forms two corporations: ABC Corporation, which is solidly financed, and XYZ Corporation, which is nominally financed. Mandatary then contracts with Third Person, disclosing that he is acting as a mandatary for “a corporation.” The incentives thereby created are obvious: if the deal pans out, identify ABC Corporation as the “principal;” if it does not, identify XYZ Corporation and leave Third Person as the holder of the proverbial bag. It is just this sort of opportunism that the common law rule avoids.

Of course, our courts may find ways of policing truly outrageous behavior. For example, in the above hypothetical, the Mandatary may

326. See cases cited supra notes 324-325.
328. See supra text accompanying notes 320-322.
still face liability under a corporate veil-piercing theory as a shareholder, as opposed to a mere mandatary, assuming that appropriate facts are established to justify such a result. Nonetheless, this aspect of article 3018 seems an apt topic for reconsideration.

Art. 3019. Liability when authority is exceeded

A mandatary who exceeds his authority is personally bound to the third person with whom he contracts, unless that person knew at the time the contract was made that the mandatary had exceeded his authority or unless the principal ratifies the contract.

d. Consequences of “Exceeding” One’s Authority: A Historical Background

The rule announced in article 3019 is one of deceptive simplicity: as a counterpart to article 3008, which makes the mandatary “answerable” to his principal for losses sustained as a result of acts exceeding the mandatary’s authority, article 3019 “personally binds” him to the third person for such acts, absent knowledge that the mandatary exceeded his authority or ratification by the principal. In fact, though, there is much more to this issue than meets the eye, requiring some background discussion of the common law, the old Code, and the jurisprudence.

At common law, the situation is relatively simple. An agent has a duty to his principal not to act “except in accordance with the principal’s manifestation of consent.” Likewise, absent an effective disclaimer, an agent makes an implied warranty of his authority to persons with whom he deals. Accordingly, an agent who acts in excess of his authority may be liable for damages suffered either by the principal or the third person as a result of his actions. In

330. LA. CIV. CODE ANN. art. 3019.
331. See id. art. 3008. For discussion, see supra text accompanying note 276.
332. See id. art. 3019.
333. RESTATEMENT, supra note 194, § 383.
334. See id. § 329. The implied warranty does not arise if a third person knows that the agent lacks authority. See id.
335. See id. §§ 383, 399-401.
336. See id. § 329.
337. It has been observed that the nature of the agent’s liability is alternative; he is liable either to the principal or third person, but not both. The rationale is that, on the one hand, the agent may have exceeded his actual authority, but the principal may still be bound because of the agent’s apparent authority or inherent agency power. In that case, the principal
addition, an agent who tortiously misrepresents his authority can be held liable in tort for detrimental reliance on the misrepresentation.\textsuperscript{338} The Louisiana Civil Code never directly addressed the liability of a mandatary to his principal for acts exceeding his authority, for the very simple reason that former articles 3010 and 3021 stated that such acts could never bind the principal at all.\textsuperscript{339} Thus, because the code effectively negated such common-law concepts as apparent authority,\textsuperscript{340} there was no need in theory for a positive rule making the mandatary accountable to his principal for such acts. But the reality was, of course, quite different, because as discussed below, Louisiana courts imported common-law apparent authority into our jurisprudence,\textsuperscript{341} and correspondingly courts furnished a rule of liability essentially the same as at common law.\textsuperscript{342} This aspect of the mandatary’s liability is now covered by article 3008.\textsuperscript{343}

With regard to the mandatary’s liability to third persons, though, the Code always had express rules, and those should be considered in comparison to article 3019. The three operative provisions were former articles 3010, 3012, and 3013. Article 3010 provided: “The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney alone is bound by it in his individual capacity.”\textsuperscript{344} Article 3012 provided: “The mandatary, who has communicated his authority to a person with whom he contracts in

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{338} See RESTATEMENT, supra note 194, § 330.
\item \textsuperscript{339} See L.A. CIV. CODE art. 3010 (1870) (repealed 1997) (“The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.”); id. art. 3021 (repealed 1997) (“The principal is bound to execute the engagements contracted by the attorney, conformably to the power confided to him. For anything further he is not bound, except in so far as he has expressly ratified it.”).
\item \textsuperscript{340} See John D. Wogan, Comment, \textit{Agency Power in Louisiana}, 40 Tul. L. Rev. 110, 123-24 (1965).
\item \textsuperscript{341} See infra notes 375-381 and accompanying text.
\item \textsuperscript{342} See Morris, \textit{Personal Liability}, supra note 290, at 232-33, 237 nn.117-21 (citing cases).
\item \textsuperscript{343} See L.A. CIV. CODE ANN. art. 3008 (West Supp. 1999).
\item \textsuperscript{344} L.A. CIV. CODE ANN. art. 3010 (1870) (repealed 1997).
\end{enumerate}
\end{footnotesize}
that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee.\textsuperscript{345} Article 3013 provided: "The mandatary is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers."\textsuperscript{346}

At least two ambiguities existed with regard to the above articles. The first, and perhaps more important, was the conceptual basis for the mandatary's liability to third persons. Article 3010 stated that he was "bound" in his individual capacity. While this could be read literally as making the mandatary a party to the contract he made as a substitute for the principal, that would be an unfortunate interpretation of the law. As previously noted,\textsuperscript{347} the common law premises liability on an implied warranty theory, and clearly rejects the idea that the agent becomes a party to the contract.\textsuperscript{348} This is a sensible rule firmly grounded in objective contract theory, for if the agent became a party to the contract, then he would obtain the right to enforce it against the third person or, indeed, to assign his rights in the contract to others, subject to normal contract principles limiting assignability. Such a result would, however, clearly be inconsistent with the intentions of the third person, who understood himself to be contracting only with the principal through the actions of the agent.

Thus, properly understood, the former article 3010 should have "bound" the mandatary only in the sense of making him answerable in damages suffered by the third person for breach of what is effectively a warranty of authority, a view which Planiol endorsed.\textsuperscript{349} Unfortunately, while some of the pre-Revision opinions apply terms consistent with the idea that a mandatary who exceeds his authority may have become a party to the contract,\textsuperscript{350} no Louisiana case has considered authoritatively the true theoretical basis for the mandatary's liability.\textsuperscript{351}

\textsuperscript{345}. Id. art. 3012 (repealed 1997).
\textsuperscript{346}. Id. art. 3013 (repealed 1997).
\textsuperscript{347}. See supra text accompanying note 336.
\textsuperscript{348}. See RESTATEMENT, supra note 194, § 329 cmt. The one exception at common law arises from an unauthorized signature on a negotiable instrument. See id.; U.C.C. § 3-403(a) (providing unauthorized signature effective as signature of unauthorized signer in favor of person who in good faith pays the instrument or takes it for value). That exception applies in Louisiana as well. See LA. REV. STAT. ANN. § 10:3-403(a) (West 1993).
\textsuperscript{349}. See 2 PLANIOL & RIPERT, supra note 32, §§ 1020, 2256.
\textsuperscript{350}. See, e.g., Vordenbaum v. Gray, 189 So. 342, 348 (La. Ct. App. 1939) (stating a mandatary who exceeds his authority "is personally bound to fulfill the terms of the contract made").
\textsuperscript{351}. For a thorough discussion of the pre-Revision jurisprudence, see Morris, Personal Liability, supra note 290, at 237-44.
A second question involved the effect of the words "communicated his authority" and "exhibited his powers" in former articles 3012 and 3013, respectively. As one commentator has observed, the thrust of those provisions created exceptions to the general rule of liability in article 3010: In effect, if the mandatary has "communicated his authority" or "exhibited his powers," then the third person is responsible for interpreting that communication; if he construes the grant of authority from the principal too broadly, then he, not the mandatary, bears the risk. The end result is much the same as at common law: the agent who is silent impliedly warrants his authority and is liable without regard to fault if he exceeds it. Yet liability is avoided if the agent makes it clear that he makes no such warranty or if the third person knows he is unauthorized.

Narrowly read, however, articles 3012 and 3013 could have suggested that any exculpatory communication had to come from the mandatary himself; the articles were silent as to information acquired by the third person from other sources. Logically, there is no reason to distinguish between information derived from the mandatary and information derived from other sources. In either case, the ultimate question is one of objective contract theory: under all the circumstances, should the third person have understood that the mandatary was making his ordinary warranty of authority, or should he have understood that sufficient questions existed as to the mandatary's authority that the third person was essentially proceeding at his own risk? Unfortunately, the existing cases never really addressed this issue per se. One commentator surveying the jurisprudence concluded that, ultimately, the results in the reported cases support the view that, consistent with the common law, the source of information with regard to the mandatary's lack of authority was irrelevant.

e. Article 3019 Compared

On the basis of the foregoing discussion, several observations can be made about the new article 3019. First, the new article states that the mandatary exceeding his authority is "personally bound to the third person with whom he contracts." This language is, if

352. See id. at 234.
353. See RESTATEMENT, supra note 194, §§ 329, 331.
354. See LA. CIV. CODE arts. 3012, 3013 (1870) (repealed 1997).
355. See Morris, Personal Liability, supra note 290, at 235-36.
356. See id. at 236-42 (observing that this was Planiol's view).
357. LA. CIV. CODE ANN. art. 3019 (West Supp. 1999).
anything, even more susceptible than its predecessor to the interpretation that the mandatary actually becomes a party to the contract. Unfortunately, the comments under the article do not shed light on the conceptual basis for liability. For reasons previously expressed, it is submitted that courts should reject this interpretation and should conceptualize liability under article 3019 in warranty terms.

Article 3019, however, seems clearly to embrace the view that the source of information involving a mandatary’s lack of authority is irrelevant; liability is avoided if the third person “knew” that the acts exceeded the mandatary’s authority, without reference to how he knows those facts. In that sense, the failure to mention communication by the mandatary is a salutary change.

In another sense, however, the elimination of the “communicated his authority” and “exhibited his powers” language in former articles 3012 and 3013 may have an undesirable effect. As previously discussed, the basic thrust of those provisions seemed to be that if the mandatary “communicated” or “exhibited” appropriate information regarding his authority to the third person, and the latter either misinterpreted or even ignored it, then he did so at his own risk. By eliminating that language and adopting the rule that the mandatary avoids liability only if the third person “knew” that the mandatary exceeded his authority, article 3019 may substantially narrow the circumstances under which liability would be avoided.

The key question, of course, is the interpretation of the word “knew.” The Civil Code offers no definition of the word, but in the Louisiana commercial laws, to “know” or “have knowledge” is narrowly defined as “actual knowledge” of a fact. By contrast, one has “notice” of a fact when one “has actual knowledge” of it, “has received a notice or notification of it,” or “from all the facts and circumstances known to him at the time in question he has reason to know that it exists.” If article 3019 was meant to adopt an actual knowledge test, then the drafters chose an inappropriate standard. The courts should interpret the word “knew” broadly so as to achieve the doctrinally proper result. In other words, the mandatary should not be liable if the third person either knew, or from all the facts and circumstances had reason to know, that the mandatary exceeded his

358. See id. art. 3019 cmt. Indeed, the comment oddly does not identify former article 3010 as a source provision, only article 3013 and Quebec Civil Code art. 2158.
359. See L.A. CIV. CODE ANN. art. 3019.
361. Id.
authority. If, on the other hand, courts construe article 3019 as applicable only in cases of actual knowledge, then the article should be amended to adopt a broader, more objective rule.

Finally, article 3019 is consistent with pre-Revision law in restating in its final proviso, the self-evident proposition that the mandatary is also relieved of liability if the principal ratifies the contract. 362

2. Relations Between the Principal and Third Persons

Art. 3020. Obligations of the principal to third persons

The principal is bound to perform the contract that the mandatary, acting within the limits of his authority, makes with a third person. 363

Article 3020 restates a self-evident rule: a principal is liable for the authorized acts of his mandatary. "Authority" in article 3020 is used in the same sense as in the Restatement: 364 The mandatary's actual authority, either express or implied. 365 Like article 3021, the black-letter rules of the Restatement refer to "authority" without any qualifying adjectives, but in court opinions, including the Louisiana jurisprudence, the usage "actual authority, either express or implied" is common. 366

Of course the central factual determination in applying the principle of article 3020 is the scope of the mandatary's actual authority. The process by which that determination is made can be described easily: it is simply a matter of contract interpretation. The Louisiana jurisprudence has recognized a rule essentially the same as the common-law rule, 367 that subject to requirements of form, authority is created "by written or spoken words or other conduct of

362. See L.A. CIV. CODE ANN. art. 3019. In that regard it is important to remember that ratification can take place either by the principal's expression or tacitly by his knowing acceptance of the benefits of the contract. See L.A. CIV. CODE ANN. art. 1843 (West 1987).


364. See Restatement, supra note 194, § 7 ("Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him.").

365. Id. § 7 cmt. (e); see also REUSCHLEIN & GREGORY, supra note 180, § 14; SEAVY, supra note 194, § 8.


367. See, e.g., Tedesco v. Gentry Dev., Inc., 540 So. 2d 960, 963-64 (La. 1989); Boulos, 503 So. 2d at 7; Broadway, 285 So. 2d at 538; Interstate Elec. Co. v. Frank Adams Elec. Co., 136 So. 283, 285 (La. 1931); AAA Tire, 385 So. 2d at 429; see also supra text accompanying note 220 (quoting AAA Tire).

368. See supra text accompanying notes 177-207.
the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal’s account.” 369

As the AAA Tire case previously quoted so well stated, the existence of authority therefore turns on the question of whether the agent reasonably believed that his acts were authorized. 370 The perspective of those with whom he deals is not relevant to that inquiry. 371

It is likewise now clear under article 3020, as at common law, 372 that the rule applies regardless of whether the principal is disclosed, partially disclosed, or undisclosed. So long as the mandatary acts within his authority, the principal is bound regardless of the degree of disclosure by the mandatary. 373

Art. 3021. Putative mandatary

One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary. 374

a. Putative Mandate and Apparent Authority: Old Wine in a New Bottle

The recognition of the apparent authority doctrine in Louisiana has been discussed recently in this Review. 375 Suffice it to recall that two articles of the pre-Revision Code categorically proclaimed that a principal would never be bound by acts of a mandatary exceeding his authority. 376 Literally speaking, therefore, not only was there no codal foundation for an “apparent” agency theory, but there was indeed a very specific negation of the doctrine. The response of Louisiana courts to those articles of the old Code was, however, simple: they ignored them entirely. In an apparent concession to the necessity to protect the stability of transactions and the reasonable

370. See AAA Tire, 385 So. 2d at 429.
371. See id.
372. See RESTATEMENT, supra note 194, §§ 144, 186; REUSCHELEN & GREGORY, supra note 180, § 95; SEAVY, supra note 194, § 56.
373. See L.A. CIV. CODE ANN. art. 3020 cmt. (b) (West Supp. 1999).
374. Id. art. 3021.
375. See North, supra note 290, at 299-305.
376. Specifically, former article 3010 provided that acts exceeding the mandatary’s authority were “null and void with respect to the principal, unless ratified by the latter,” binding the mandatary alone. L.A. CIV. CODE art. 3010 (1870) (repealed 1997). Article 3021 stated that for any act that did not conform to the mandatary’s power, the principal “is not bound, except in so far as he has expressly ratified it.” Id. art. 3021 (repealed 1997).
expectations of third persons, the jurisprudence instead imported the common-law theory of apparent authority wholesale.\textsuperscript{377}

Apparent authority is defined by the Restatement as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons."\textsuperscript{378} As opposed to authority in its strict sense, which depends upon the reasonable interpretations by the agent of the conduct of the principal, apparent authority is created "by 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 his behalf by the person purporting to act for him."\textsuperscript{379} It may apply when the agent exceeds his authority or was not really an agent at all. An excellent description of the concept was given by the court in the AAA Tire opinion:

The concept of apparent authority only comes into play when the agent has acted beyond his actual authority and has no permission whatsoever from his principal to act in such a manner. The principal will be bound for such actions if he has put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has authority to act for the principal. The facts and circumstances of each case must be examined to determine the reasonableness of the third party’s belief. One must look from the viewpoint of the third person to determine whether an apparent agency has been created. In transactions between


\textsuperscript{378} Restatement, supra note 194, § 8.

\textsuperscript{379} Id. § 27. According to the comments to the Restatement, the information relied upon by the third person can come directly from the principal, from authorized statements of the agent, from documents or other indicia of authority given to the agent by the principal, or even from other third persons who received information as to the agent’s authority from authorized or permitted channels. Indeed, apparent authority can be created by the principal’s acquiescence in acts of the agent that establish a community reputation for having authority, and in some cases by the mere appointment of the agent to a position that carries with it certain widely recognized duties, such as a manager or treasurer. See id. § 27 cmt. (a).
businessmen, the nature of the business and the customs and the usages within the trade can be important factors to be considered.\textsuperscript{380}

While the one-sentence commentary to article 3021 makes no reference to the point,\textsuperscript{381} it seems beyond peradventure that article 3021 was intended to provide a civilian-minted analogue to the jurisprudentially adopted common-law concept of apparent authority. The strength of this analogy remains to be seen.

b. Putative Mandate: New Concept, New Questions; “Good Faith”

The text of article 3021 raises at least two questions as to its reach. First, it states that it imposes contractual liability on a person whose actions cause a third person to believe that someone is the person’s agent, provided the third person contracts with the putative mandatary “in good faith.”\textsuperscript{382} Obviously, the key question is what “good faith” means in this context. As previously noted, the Restatement applies apparent authority on the basis of the third person’s reasonable belief in the agent’s authority, based on the manifestations made by the principal.\textsuperscript{383} In this regard, reasonableness is an objective standard. As the comments to the Restatement indicate, apparent authority requires that the third person have both an actual and reasonable belief in the agent’s authority.\textsuperscript{384} If an individual has an actual, but unreasonable, subjective belief then apparent authority is not created. As the quoted passage from the AAA Tire opinion demonstrates, many Louisiana courts have recognized the reasonableness of the third person’s belief as a necessary element of apparent authority.\textsuperscript{385}

Thus, the crucial issue is whether “good faith” in article 3021 is to be interpreted objectively or subjectively. The one-sentence comment under article 3021 is, of course, as silent on this question as it is on any other of the many questions that might arise under this article.\textsuperscript{386} It may well be that the drafters thought it unnecessary to

\textsuperscript{380} AAA Tire, 385 So. 2d at 429.
\textsuperscript{381} The comment says only that the article is new and is based on article 2163 of the Quebec Civil Code. Nothing is said about the Louisiana jurisprudence on apparent authority. See LA. CIV. CODE ANN. art. 3021 cmt. (West Supp. 1999).
\textsuperscript{382} See id.
\textsuperscript{383} See supra text accompanying notes 378-379.
\textsuperscript{384} See RESTATEMENT, supra note 194, § 8 cmt. (c).
\textsuperscript{385} See, e.g., Boulos v. Morrison, 503 So. 2d 1, 3-4 (La. 1987) (refusing to apply the apparent authority doctrine because the third persons could not have reasonably believed the alleged “agent” was authorized).
\textsuperscript{386} See LA. CIV. CODE ANN. art. 3021 cmt. (West Supp. 1999).
address the question of good faith because that term is supposed to have a well-defined and well-understood meaning in the Louisiana Civil Code. However, this question deserves more attention than it received from the drafters for two reasons.

First, because the law of mandate overlaps with commercial law, there is an understandable tendency to superimpose on the former terms borrowed from the latter. It so happens that in the area of commercial law, good faith is defined in subjective terms.\(^{387}\) Second, even within the Civil Code there are different definitions of good faith for different purposes.\(^{388}\) For example, Civil Code article 487 provides that "\textit{for purposes of accession}, a possessor is in good faith when he \ldots \textit{does not know} of any defects in his ownership."\(^{389}\) On the other hand, Civil Code article 3480 provides that "\textit{for purposes of acquisitive prescription}, a possessor is in good faith when he \textit{reasonably believes, in light of objective considerations}, that he is \textit{the} owner \ldots ."\(^{390}\) The latter article makes it clear that two elements are necessary for a person to be in good faith: (1) that a person must have a subjective belief that a certain state of affairs exists and (2) that person's belief must reasonable by objective standards. If either one of these elements is missing, there cannot be good faith.\(^{391}\)

For a variety of reasons, the latter definition, which requires an objective test, should be adopted for purposes of interpreting article 3021. Among these reasons are the fact that this has been the position of pre-Revision jurisprudence on mandate, the fact that 3480 is the more recent and more complete expression of legislative will on the meaning of good faith, and the fact that the objective test is the one followed in the common law states.

c. Putative Mandate and Agency by Estoppel

A second question raised by article 3021 is its effect, if any, on the status of the doctrine of "agency by estoppel" in Louisiana.\(^{392}\) In
the older common law, differences of opinion existed as to whether apparent authority was conceptually founded on an objective contract theory or an estoppel theory requiring change of position. In the Restatement, however, the objective theory prevailed, and agency by estoppel was defined separately in Section 8B.

As the commentary to the Restatement makes clear, while superficial similarities may exist between the two theories, apparent authority and agency by estoppel are conceptually distinct. Agency by estoppel is fundamentally a tort theory, arising as a result of a misrepresentation or, in some circumstances, a failure to reveal facts. It requires a change of position, however, to trigger liability, and compensates the third person only to the extent of his loss, defined as “payment of money, expenditure of labor, suffering a loss or subjection to legal liability.” Apparent authority, as previously described, creates a contract binding upon the principal immediately upon offer and acceptance, without regard to fault or change of position.

As to the Louisiana jurisprudence, however, confusion with regard to the two concepts reigned until relatively recently. An early

393. See generally Reuschlein & Gregory, supra note 180, § 23; Seavy, supra note 194, § 8; Wogan, supra note 340, at 112-16. As these authorities suggest, it is easy to see how confusion about the doctrine arose. Both apparent authority and estoppel are based upon outward expressions of the principal and the reasonable interpretations thereof by a third person. In addition, in many cases involving apparent authority, the third person may have suffered a detrimental change of position. Thus, the two are frequently intertwined in the case law.

394. See Restatement, supra note 194, § 8B.

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
   (a) he intentionally or carelessly caused such belief, or
   (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.
(2) An owner of property who represents to third persons that another is the owner of the property or who permits the other so to represent, or who realizes that third persons believe that another is the owner of the property, and that he could easily inform the third persons of the facts, is subject to the loss of the property if the other disposes of it to third persons who, in ignorance of the facts, purchase the property or otherwise change their position with reference to it.
(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

395. See id. § 8B cmts. (a)-(c).
396. Id § 8B (3).
397. See Holmes, supra note 377, at 578-79.
Louisiana Supreme Court decision, *Interstate Electric Co. v. Frank Adam Electric Co.*, while applying an objective apparent authority theory, also spoke in terms of "estoppel." Eventually, Louisiana courts commonly described apparent authority as a species of estoppel, drawing no distinctions between the two. In the 1989 *Tedesco* case, however, the supreme court made a limited reversal and suggested, without actually holding, that it would recognize a distinction between the two theories, relying upon the *Restatement*. At least one post-*Tedesco* appellate case has applied that analysis. However, in a 1995 decision, *Independent Fire Insurance Co. v. Able Moving and Storage Co.*, the supreme court reverted to old habits, stating:

Apparent authority is an estoppel principle which operates in favor of third persons seeking to bind a principal for unauthorized acts of an agent. When the apparent scope of an agent's authority, the indicia of authority, is relied upon by innocent third parties to their detriment, the principal is liable.

The *Independent Fire* case thus reinjected a note of uncertainty into this aspect of Louisiana law. As one of the authors noted, one cannot determine whether the court was repudiating *Tedesco*, or merely citing the older jurisprudence in "loose dictum." Further clarification has not yet come.

The comments to article 3021 are silent on this question. Nonetheless, it seems clear that, if courts desire to do so, estoppel-based delictual recovery can still be recognized consistent with the new articles. Just as a master's vicarious liability for torts committed by a servant in the course and scope of his employment arises from a tort basis rather than the law of mandate, agency by estoppel can

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398. 136 So. 283 (La. 1931).
399. See Holmes, supra note 377, at 576 & n.33 (citing cases).
400. See *Tedesco v. Gentry Dev., Inc.*, 540 So. 2d 960, 964-65 (La. 1989); *see also* R.G. Pastler, *Tedesco v. Gentry Development, Inc.: Apparent Authority Without Detrimental Reliance Equals No Sale*, 64 Tul. L. Rev. 976 (1990) (providing commentary on the case). For more discussion, see Holmes, supra note 377, at 577-79. Briefly stated, the plaintiff's apparent authority claim failed, according to the court, because the contract was for the sale of an immovable and the agent lacked written authority. *See id.* at 577-78 nn.35-38. Had the court applied an agency by estoppel theory, the plaintiffs would have lost because they did not change position. *See id.* at 577-79. Thus, the court did not have to take a definitive position on the theory. *See id.*
402. 650 So. 2d 750, 752 (La. 1995) (citing *Restatement, supra note 194, §§ 8, 88*). For a discussion and critique of this case, see Holmes, supra note 377.
403. See Holmes, supra note 377, at 579.
404. *See supra* notes 115-122 and accompanying text.
also be justified as a particularized application of general tort principles.  

Art. 3022. Disclosed mandate or principal; third person bound

A third person with whom a mandatary contracts in the name of the principal, or in his own name as mandatary, is bound to the principal for the performance of the contract.

Art. 3023. Undisclosed mandate or principal; obligations of third person

A third person with whom a mandatary contracts without disclosing his status or the identity of the principal is bound to the principal for the performance of the contract unless the obligation is strictly personal or the right non-assignable. The third person may raise all defenses that may be asserted against the mandatary or the principal.

In general, articles 3022 and 3023 complete the disclosed-undisclosed agency puzzle discussed in connection with articles 3016-3018 from the standpoint of the liability of the third person. Consistent with the common law, article 3022 gives a disclosed or partially disclosed principal the right to enforce the contract made by his mandatary against the third person with whom the mandatary dealt. Article 3023 gives a corresponding right to an undisclosed principal, unless, under general obligations law, the obligation is strictly personal or the right is nonassignable. It should be noted that each of these articles makes a crucial unstated assumption—that the mandatary in each case was acting within his authority.

Of course, following the supreme court’s recognition of undisclosed agency in Woodlawn Park Limited Partnership v. Doster Construction Co., neither of these articles comes as any surprise. Perhaps the most important future issue relates to article 3023: Whether the jurisprudence interpreting that article may recognize exceptions beyond the two explicitly incorporated therein. For example, at common law, a contract made for an undisclosed principal

407. Id. art. 3023.
408. See supra notes 290-329 and accompanying text.
409. Cf. Restatement, supra note 194, § 292 (stating the common law with respect to a disclosed or partially disclosed principal).
410. Cf. id. § 302 (stating the common law with respect to an undisclosed principal).
412. See id. art. 1984.
413. 623 So. 2d 645 (La. 1993). For discussion, supra notes 304-308 and accompanying text.
is subject to rescission if (1) the third person was induced to contract by a representation that the agent was not acting for a principal and (2) either the principal or agent had notice that the third person would not have dealt directly with the principal. 414 Likewise, the principal may not be able to demand performance if performance to him would subject the third person to "a substantially different liability" from performance to the agent. 415 It remains to be seen whether the jurisprudence will treat the exceptions in article 3023 as exclusive or will, as has been past experience, continue borrowing from the common law.

IV. CONCLUSIONS

The above discussion attempted to provide the first assessment of Louisiana’s new law of Representation and Mandate. During this discussion, disagreements with some of the new law’s choices of policy or language have been noted. Some of these disagreements are minor, others are not so minor. Nonetheless, as stated at the beginning, the overall assessment of the new law remains decidedly positive. Indeed, the new law represents a vast improvement over the outdated provisions of the Louisiana Civil Code of 1870 and an effective refinement of the jurisprudence interpreting, or ignoring, these provisions.

At the same time, the new Louisiana law is a significant contribution to modern civil law in general and to the law of mixed jurisdictions in particular. While being faithful to Louisiana’s civilian heritage, the new law recognizes the realities of contemporary transactional practice as well as the need for some uniformity with the law of the surrounding common law states. To that end, the new law has appropriately chosen to sanction certain useful common-law

414. See Restatement, supra note 194, § 304. This exception was noted in the Woodlawn Park opinion. See Woodlawn Park, 623 So. 2d at 647 n.7.

It should be emphasized that the common law distinguishes between “better terms” and “no contract.” The third person cannot rescind simply on the basis that, had he known of the existence and identity of the principal, he would have held out for better terms. See Restatement, supra note 194, § 304 cmt. (c). Thus, the landowner who contracts to sell part of his property to an agent whose undisclosed principal was a governmental agency cannot escape liability on this theory, whereas he probably could if the undisclosed principal was a hazardous waste disposal facility. See id.

415. See Restatement, supra note 194, § 310. Thus, a person agreeing to act as a surety for an obligation of the agent cannot be forced to act as surety for the principal if the principal undertakes performance instead of the agent. See id. § 310 cmt. (b). Of course, it is possible that a similar result could be reached by concluding that the right involved was nonassignable as a result of the nature of the contract. See La. Civ. Code Ann. art. 1984 (West 1987).
institutions such as apparent authority or undisclosed agency and to recast them in terms compatible with a civil code. Other civil-law or mixed jurisdictions that recognize the same need would benefit from a careful examination of the new Louisiana law.