5.10H **AGENCY** (Approved 04/2002; Revised 08/2011)[1]

A. Employer/Employee

An employee is a person (or other entity) engaged to perform services for another, the employer, and who is subject to the employer's control or right to control the physical conduct required to perform such services. In determining whether a person or entity performing services is an employee, rather than an independent contractor or other relation, the following aspects may be considered:

(1) the extent of control which, by agreement, expressed or implied, the entity for which the services are performed has the right to exercise over the details of the services performed;

(2) whether one performing such services is engaged in an occupation or business distinct from that of the entity for which services are performed;

(3) whether the services rendered are usually done under the direction of the employer in the particular locality, or whether such services are usually done by a specialist without such direction;

(4) the skill required in performing the services;

(5) whether the entity for which the services are performed supplies the instrumentalities, tools and place of work, or whether the entity performing the services supplies those items;

(6) the length of time anticipated for the performance of the services;

(7) the method of payment;

(8) whether the services to be performed are part of the regular business of the entity for which the services are performed;

[1] This charge was formerly designated as 5.10I.

(9) whether the parties believe they are in the relationship of employer and employee;

(10) whether the entity for which services are to be performed is in business; and

(11) such other factors as may be reasonably considered in determining whether the entity for which the services are being performed controls, or has the right to control, the entity performing the services.

Cases:

Miklos v. Liberty Coach Co., 48 *N.J. Super*. 591 (App. Div. 1958); *Gilborges v. Wallace*, 153 *N.J. Super*. 121 (App. Div. 1977), *rev'd. in part on other grounds*, 78 *N.J*. 342 (1978).

Ordinarily the existence of an employer-employee relationship, in the past sometimes referred to as a master-servant relationship, is a matter of fact for a jury rather than law for a judge. *Bennett v. T. & F. Distributing Co*., 117 *N.J. Super*. 439 (App. Div. 1971), *certif. denied*, 60 *N.J*. 350 (1972); *Gilborges v. Wallace*, *supra*. However, if there are no disputed facts or disputed inferences which may be drawn from undisputed facts concerning the relationship, the judge should determine whether or not there is an employer/employee relationship as a matter of law. *Marion v. Public Service Electric and Gas Co*., 72 *N.J. Super*. 146 (App. Div. 1962); *Cf. Miller v. United States Fidelity and Guaranty Co*., 127 *N.J. Super.* 37 (App. Div. 1974).

In *Frazier v. P.T.C. Excavations, et als.*, 2011 *N.J. Super*., Unpub. LEXIS 1155 (App. Div., May 6, 2011), the Appellate Division noted that "… control by the master over the servant is the essence of the master-servant relationship on which the doctrine of respondeat superior is based." *Carter v. Reynolds*, 175 *N.J.* 402, 410 (2003) (quoting *Wright v. State,* 169 *N.J.* 422, 436 (2001). Frazier, *supra*, further cited *Galvao v. G.R. Robert Constr. Co.*, 179 *N.J.* 462 (2004), for the following: "The traditional 'essence' of vicarious liability based on respondeat superior relies on the concept of employer 'control' over an employee." "Under the control test, 'the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.'"

The Committee reported that the use of "master and servant" is anachronistic and sees no reason to refrain from using "employer and employee" in lieu of the older expression.

B. Respondeat Superior

1. When Agency is in Issue:

A principal, such as defendant *[name]* may act only through natural persons who are its officers, employees or agents [*choose appropriate term*]. Generally, any officer, employee or other agent [*choose appropriate* term] of an entity may bind that entity by acts and declarations made while acting within the scope of the authority delegated to the officer, employee, or agent [*choose appropriate term*] by the principal, or by acts and declarations made within the scope of the duties assigned to the officer, employee or other agent[*choose appropriate term*] of the principal.

So, if you find that an officer, employee or agent [*choose appropriate* term] of defendant *[name]* acted negligently while in the scope of his/her duties or authority, that negligence is as a matter of law charged to the principal, here defendant *[name]*. If you so find, defendant *[name]* will be deemed negligent for the wrongdoing to the same extent as the officer, employee or agent.

2. When Agency Is Not an Issue:

Here, it is admitted that defendant *[individual defendant's name]* was at the relevant time acting as an officer, employee or agent [*choose appropriate term*] of defendant *[defendant entity's name]*, and that the agent was acting within the scope of his/her agency or employment. A principal or employer is legally responsible for the negligence of an officer, agent, or employee [*choose appropriate* term] while the officer, agent, or employee [*choose appropriate term*] acts within the scope of his/her employment.

Therefore, if you find defendant *[individual defendant's name]* negligent, you must find his/her principal, defendant *[defendant entity's name]*, negligent to the same extent.