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Enforcement of Settlement Contracts: The Problem of the Attorney Agent

GRACE M. GIESEL*

INTRODUCTION

A large percentage of litigation matters settle.¹ Unfortunately, upon occasion, one or the other of the supposedly settling parties later disputes the validity of a settlement and a court, ironically, must resolve the collateral matter of whether to enforce the settlement agreement.² Because the parties in litigation usually act through their lawyers, the analysis of the enforceability of the settlement agreement becomes complicated. The representative action of the lawyers very often includes negotiation and discussion of settlement and intimate involvement in the ultimate settlement agreement. Typically, the attorney for one party states orally or in writing to the attorney for the other party that their client agrees and that action comprises the settlement agreement. Often, one or both attorneys inform the relevant court of the settlement so that trial or other proceedings can be averted. Only later do the attorneys and parties develop more formal, detailed, and complete documents of agreement.

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1. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77 (1997) (stating that 90 to 95% of filed cases settle); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 & n.2 (1996) (noting that one study suggests that of all cases filed, only 2.9% go to trial). See also Marc Galanter & Mia Cahill, "Most Cases Settle:" *Judicial Promotion and Regulation of Settlements*, 46 STAN L. REV. 1339, 1339-40 (1994) (acknowledging that most cases do settle, but noting that often the judicial system has an impact in the form of a substantive decision or otherwise); George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) (stating that 95% of filed cases settle); Donald G. Gifford & David J. Nye, *Litigation Trends in Florida: Saga of a Growth State*, 39 U. FLA. L. REV. 829, 855 (1987) (noting a below two percent trial rate in Florida in 1979-1985); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985) (stating that over 90% of all cases settle).

2. Courts agree, as a basic theoretical matter, that contract law governs settlement agreements. See, e.g., *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) (applying contract law to a FTC consent order); *Village of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982) (applying contract law to a Department of Justice settlement contract); *Dacanay v. Mendoza*, 573 F.2d 1075, 1078-80 (9th Cir. 1979) (supporting a minor's challenge to a settlement agreement based on capacity to contract); *Clark v. Mitchell*, 937 F. Supp. 110, 112 (D.N.H. 1996) (holding a settlement agreement to be invalid because there was no meeting of the minds under contract law); *Robbie v. City of Miami*, 468 So. 2d 1384, 1385 (Fla. 1985) (upholding a settlement agreement under contract law). See also Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 9 (1996) (grouping settlement agreements as part of contract law); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988) (describing the limited judicial involvement in settlements due to their contractual nature).

The possible scenarios for a settlement challenge span a wide spectrum. Perhaps a renegade attorney agrees to a settlement on behalf of a client even though the client gave the attorney explicit instructions not to so act. Perhaps an attorney in good faith believes the client has authorized a settlement and thus the attorney agrees to the settlement only to discover that the client did not authorize the action. Perhaps an attorney agrees to a settlement on behalf of the client when the client has, in fact, authorized the attorney, yet the client later has second thoughts and disputes the agreement. Perhaps the attorney has, in addition, informed the court of the settlement and the court responded by taking the matter off of the trial docket. Because attorneys act as agents³ when entering into settlement agreements on behalf of clients, agency principles regarding power and authority provide necessary augmentation for analyzing whether a settlement is binding on the parties.

As an initial matter, any analysis of settlement-agreement enforceability must recognize the strong U.S. public policy in favor of settlement. Any decision about the validity of a settlement must consider the effect the decision will have on this public policy. In situations in which the court system has become involved and perhaps relied upon a settlement agreement, the policy must be given special consideration. While the pro-settlement public policy should not control, many courts' analyses of particular settlement agreement disputes explicitly or implicitly include consideration of the public policy.

In dealing with the all-too-common settlement challenges, the courts generally have recognized the applicability of contract and agency principles to settlement agreements. The courts have taken many paths, however, in applying those principles to specific situations. The variety of treatment settlement agreements have received sometimes results from differences of opinion based on a balancing of policies, including the policy in favor of settlement. Some differences in treatment reflect errors of understanding and application regarding the underlying basic agency principles of actual and apparent authority.

Perhaps the greatest befuddlement results from the best of intentions. In an effort to harmonize principles of law with ethical precepts and duties applicable to attorneys, many courts follow a faulty logic. These courts note that the rules of ethics clearly place the control of the settlement decision with the client. Because of this ethics role division, courts say, a client cannot be held to have delegated this control to an agent attorney by the sole act of retaining the attorney. While such a stance is not wrong, the ethics principle to which courts link it does not demand it. In addition, some courts have refused to apply traditional agency doctrines such as that of apparent authority, relying again on the ethics principle

3. See RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 1, cmt. c (1958) [hereinafter AGENCY RESTATEMENT] (stating that attorneys are agents); HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 21, at 53 (2d. ed. 1989) (explaining how the law of agency generally governs the attorney-client relationship).

that a client controls settlement and concluding that the apparent authority doctrine too easily allows that control to reside with the attorney. Yet, no ethics or fiduciary standard demands that the settlement decision always remains with the client even if the client chooses to delegate it or acts in a way that reasonably indicates delegation. Further, agency law clearly allows a principal to revoke previously delegated authority.⁴ Thus, the client can recover the authority to settle even if the client delegates it. In an attempt to protect the client in the context of the attorney-client relationship, some courts have trod inappropriately upon the rights and expectations of the other party to the contract. The third party's rights and expectations of sanctity of contract deserve no less protection than that afforded by traditional agency law to third parties in general contexts.

Of course, principles of legal ethics and fiduciary concepts touching upon a lawyer's conduct in this context cannot be forgotten. The law ought to be consistent with and supportive of ethics principles. The fact that the agent in the settlement context is an attorney guided by and subject to fiduciary duties and ethics rules must inform any analysis involving the reasonable beliefs of the actors, attorneys and parties alike. While some courts have allowed these legal ethics principles to cloud, and sometimes control, the analysis of contract and agency, the proper analysis applies the law of agency with due respect for and in the context of these legal ethics and fiduciary concepts.

After examining the public policy in favor of settlement in Part I, this Article discusses the legal ethics principles that relate to settlement in Part II, followed by a discussion of the fiduciary nature of the attorney-client relationship in Part III. In Part IV, this Article explains the agency concepts of actual and apparent authority and the related notion of inherent power, as well as how these concepts mesh properly with the rules of lawyer ethics. In Part V, this Article attempts to provide a survey and critical analysis of how courts in the United States have dealt with challenges to settlement agreements. In addition, the Article, in Part VI, compares how the courts of England, Australia, and Canada have dealt with the same issue. Part VII examines the treatment the issue receives from the *Restatement (Third) of the Law Governing Lawyers (Restatement)*. Part VIII concludes that courts of the United States can improve the morass into which they wade when they deal with challenges to settlement contracts by returning to the basic principles of actual and apparent authority as courts apply those principles in other contract settings not involving attorneys or settlements. Further, courts should recognize that the rules of legal ethics do not demand that the analysis begin with the proposition that retention of an attorney cannot alone support a finding of actual or apparent authority. In a few states, as well as in England, Australia, and Canada, retention can support such findings. Courts of the United States should recognize that they may choose such a beginning

4. AGENCY RESTATEMENT, *supra* note 3, at § 118 & cmt. b.

assumption for purposes of the analysis, but no logical or moral imperative demands it. Nor do principles of ethics require any other divergence from the application of traditional agency law.

Finally, having advocated a return to traditional agency principles in the settlement context, this Article makes one suggestion of divergence from tradition. An attorney has ethical and fiduciary obligations to be honest, trustworthy, and to act in the best interest of the client. Arguably, this makes the attorney an agent with a higher trust index than another agent who is not an attorney. Thus, clients, courts, and other third parties who deal with the attorney should be able to trust such an agent to behave appropriately. Perhaps in recognition of this trustworthy agent status, some courts have applied a presumption that an attorney agent has authority to enter into a settlement and these courts require the challenger to shoulder the burden of contradicting that presumption. Some courts may shift the entire burden of proof to the client challenger.⁵ Traditionally, the person claiming the existence of the authority has the burden of proving the authority without benefit of presumption.⁶ A presumption of attorney authority may be a more appropriate and workable stance and may send a message of trust for future settlement discussions.

I. THE PUBLIC POLICY IN FAVOR OF SETTLEMENT OF DISPUTES

The explicit public policy in the United States in favor of private settlement over public dispute resolution must be the backdrop to any discussion of the enforcement of settlement agreements.⁷ Long ago, the United States Supreme Court stated in *St. Louis Mining & Milling Co. v. Montana Mining Company*,⁸ that “settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored.”⁹ Both federal and state courts have repeated and reinforced this position over the years.¹⁰ A good example is *Scott v.*

5. See discussion *infra* Part V.B. (discussing the presumption that attorneys have the authority to settle and the resulting shift in burden of proof).

6. REUSCHLEIN & GREGORY, *supra* note 3, § 11, at 28; *Schoonover v. Carpet World, Inc.*, 588 P.2d 729, 733 (Wash. 1978).

7. See Korobkin & Guthrie, *supra* note 1, at 139 & n.233 (noting that the preference for settlement is “pervasive”); Gross & Syverud, *supra* note 1, at 2 (“We prefer settlements and have designed a system of civil justice that embodies and expresses that preference in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of our trial judges.”); Cordray, *supra* note 2, at 9 (discussing the policy in favor of settlement in light of recent Supreme Court opinions). See generally E. ALLAN FARNSWORTH, CONTRACTS § 2.12, at 102 (2d ed. 1990) (stating that “[t]he law favors settlement by the parties of disputed claims”).

8. 171 U.S. 650 (1898).

9. *Id.* at 656.

10. See, e.g., *Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (stating that “[c]ompromises of disputed claims are favored by the courts”); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (noting that federal policy favors settlement); *Justine Realty Co. v. American Nat’l Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992) (“Settlement agreements are generally encouraged and favored by the courts.”); *Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988) (declaring that “the law strongly favors settlement of litigation, and there is a

Randle,¹¹ in which the Indiana Court of Appeals stated, “[t]he judicial policy of Indiana strongly favors settlement agreements.”¹²

The courts have several explanations for the policy. One basis commonly noted is that settlements contribute to efficient court operation.¹³ As the Florida Court of Appeals stated in *Long Term Management, Inc. v. University Nursing Care Center, Inc.*,¹⁴ “[s]ettlements are highly favored as a means to conserve judicial resources, and will be enforced when it is possible to do so.”¹⁵ In addition, courts note that settlement reduces the substantial financial and psychic costs to the parties created by the process of litigation.¹⁶ Finally, some courts note that settlement allows the parties to enjoy the freedom to fashion the remedy and therefore creates a more pleasing result than the result reached by litigating. In *Natare Corp. v. Aquatic Renovation Systems Inc.*,¹⁷ the United States District Court for the Southern District of Indiana stated: “Settlements allow our courts to operate more efficiently and, equally important, allow the parties to fashion the outcome of their disputes through mutual agreement.”¹⁸

compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into”); *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482, 483 (Minn. Ct. App. 1990) (stating that settling “is greatly favored and such settlements will not be set aside lightly by the courts”); *In re Condemnation of Lands, Easements and Rights-of-Way in West Pennsboro Township v. Big Spring School Dist.*, 699 A.2d 1331, 1334 (Commw. Ct. Pa. 1997) (“Settlement agreements are highly favored.”).

11. 697 N.E.2d 60 (Ind. Ct. App. 1998).

12. *Id.* at 65.

13. *See* U. S. Bancorp Mort. Co. v. Bonner Mall Partnership, 513 U.S. 18, 28 (1994) (noting judicial economy); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994) (“We favor and encourage settlements in order to conserve judicial resources.”); *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991) (“Settlement is generally favored because it conserves scarce judicial resources.”); *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 n.5 (D.C. Cir. 1986) (noting that “settlements produce a substantial savings in judicial resources and thus aid in controlling backlog in the courts”); *Hallock v. State of New York*, 474 N.E.2d 1178, 1180 (N.Y. 1984) (establishing that enforcement encourages “efficient dispute resolution” and “is essential to the management of court calendars and integrity of the litigation process”); *Interior Credit Bureau, Inc. v. Bussing*, 559 P.2d 104, 106 (Alaska 1977) (declaring that settlement is favored because it simplifies and shortens litigation without using valuable court resources); *see also* Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 48 (1992) (adding that settlement may assist in controlling the backlog in the federal system); *Cordray, supra* note 2, at 36 (noting that settlements relieve the burden on the courts and therefore conserve judicial resources). But *see generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (questioning any benefit); *Gross & Syverud, supra* note 1 (questioning the benefit of our preference for settlement).

14. 704 So. 2d 669 (Fla. Dist. Ct. App. 1997).

15. *Id.* at 673.

16. *See, e.g.*, *Village of Kaktovik v. Watt*, 689 F.2d 222, 231 (D.C. Cir. 1982) (citing the *Autera* proposition that settlement allows the parties to avoid the expense and delay of litigation); *Autera v. Robinson*, 419 F.2d 1197, 1199, n.7 (D.C. Cir. 1969) (stating that “the parties avoid the expense and delay incidental to litigation of the issues”); *see also* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 (1983) (discussing the financial burden of litigation); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 9 (1986) (discussing the psychic costs). David S. Luban has summed up the costs as follows: “Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming.” David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995).

17. 987 F. Supp. 695 (S.D. Ind. 1997).

18. *Id.* at 700. *See also* *Scott v. Randle*, 697 N.E.2d 60, 65–66 (Ind. Ct. App. 1998) (citing the same

Formal rules applicable to the resolution of disputes reflects the policy in favor of settlement. For example, Rule 26(f) of the *Federal Rules of Civil Procedure* requires attorneys to discuss “the possibilities for a prompt settlement or resolution of the case.”¹⁹ Rule 16(a)(5) lists facilitation of settlement as one of the objectives of the pretrial conference procedure.²⁰ Rule 16(c) specifies that a court may require parties or representatives with settlement authority to be “present or reasonably available by telephone in order to consider possible settlement of the dispute.”²¹ A comment to Canon 3B(8) of the *ABA Model Code of Judicial Conduct*, which governs judicial conduct in many states, notes that the judge’s role in the pretrial settlement process is to “encourage and seek to facilitate settlement,” but also warns that “parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.”²² The public policy in general and the formal rules in particular have created an environment in which judges have become deeply involved in making settlements happen.²³

II. SETTLEMENT IS THE CLIENT’S DECISION

A. ETHICS RULES

In the United States, a basic legal ethics principle is that the client, not the attorney, controls the decision to settle and the terms of settlement. Rule 1.2 of the *ABA Model Rules of Professional Conduct (Model Rules)*, the ethics standards in effect in most jurisdictions in the United States,²⁴ provides, in part, that “[a] lawyer shall abide by a client’s decision whether to accept an offer of

principle); see generally Carrie Menkel-Meadow, *supra* note 1, at 502–05 (noting the legitimacy added when a solution is agreed to by both parties); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 653–60 (1976) (discussing, generally, the advantages of private negotiation over adjudication).

19. FED. R. CIV. P. Rule 26(f).

20. *Id.* Rule 16(a)(5).

21. *Id.* Rule 16(c). See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989) (discussing the rules in light of the trend toward judicial involvement in settlement). See also Korobkin & Guthrie, *supra* note 1, at 139 n.233 (noting the policy of judicial involvement of the court in the rules).

22. MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(8), cmt. (1990) (stating that judges should encourage settlement without being coercive).

23. Some commentators question the wisdom of judicial involvement. See Bundy, *supra* note 13, at 58–78 (describing the dangers of Rule 16 settlement); Menkel-Meadow, *supra* note 1, at 491–514 (examining the disadvantages of judicial involvement in settlements); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982) (describing the detrimental effects of judicial case management); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 752–65 (1989) (outlining the effect of judicial intervention in settlements on the quality of justice). But see ABA Commission on Ethics and Professional Responsibility Formal Op. 93–370 (1993) (stating that a lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer’s settlement authority or the lawyer’s advice regarding the settlement; the judge is free to inquire).

24. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, Preface vii

settlement of a matter.”²⁵ Rule 1.4 of the *Model Rules* supplements Rule 1.2 by stating that an attorney has a general duty to communicate appropriately with the client and to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁶ Thus, with regard to settlement, an attorney must inform the client of decisions to be made and explain the amounts and issues involved. Generally, attorneys do much more in their role as advisor. Attorneys persuasively present settlement matters to clients in ways that convince the clients to act as the attorney suggests.²⁷

The *Model Rules*’ position that settlement is a client’s decision accords with Rule 1.2’s general division of control that provides that it is the client who decides “objectives” while the attorney, in consultation with the client, decides “means.”²⁸ Comment one to Rule 1.2 states that “the lawyer should assume responsibility for technical and legal tactical issues.”²⁹ If a client insists on a path with which the attorney is uncomfortable, the *Model Rules* allow withdrawal from representation for a host of reasons that would encompass a discomfort with client instructions.³⁰ And, of course, the *Model Rules* prohibit an attorney from assisting a client in crime or fraud.³¹

The older *ABA Model Code of Professional Responsibility (Model Code)*, still followed by a few jurisdictions,³² does not deal with the matter as explicitly as does the *Model Rules*, but takes the same position that the settlement decision is originally the client’s. Ethical Consideration 7–7 states:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client [I]t is for the client to decide whether he will accept a settlement offer”³³

Ethical Consideration 7–8 states that a lawyer “should exert his best efforts to insure that decisions of his client are made only after the client has been informed

3rd ed. (1996) (stating that the rules are adopted by more than two-thirds of the jurisdictions; originally created in 1983).

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) [hereinafter MODEL RULES].

26. *Id.* Rule 1.4.

27. See generally JONATHAN HARR, A CIVIL ACTION (1996) (detailing a particular litigation and the settlement discussions which were a part of the litigation); Korobkin & Guthrie, *supra* note 1 (discussing the effect of the attorney in this setting).

28. MODEL RULES Rule 1.2(a).

29. *Id.* Rule 1.2(a), cmt.1.

30. *Id.* Rule 1.16(b) (permitting withdrawal “if [it] can be accomplished without material adverse effect on the interests of the client” or if there is “good cause”).

31. *Id.* Rule 1.2(d) (establishing that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

32. ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS, backcover (1997) (detailing which states still refer to the MODEL CODE).

33. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE], EC 7–7 (1980).

of relevant considerations.”³⁴ Apparently, even the earliest standards of ethics in the United States viewed settlement as largely a client’s decision.³⁵

To say that the decision to settle is the client’s as a matter of ethics is not to say, however, that the client does not or should not have the ability to bestow upon the attorney the authority to settle on the client’s behalf as an agent of the client. Since an agent’s authority is generally revocable,³⁶ a client can revoke the authority to settle and thus, the settlement decision ultimately remains with the client, as the rules of ethics provide.³⁷

B. THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS

Consistent with the legal ethics stance, the *Restatement (Third) of the Law Governing Lawyers (Restatement)* clearly places the settlement decision, as an initial matter, with the client along with other matters of utmost importance to the client.³⁸ The *Restatement*, however, explicitly recognizes that this position is a starting point only. Section thirty-three of the *Restatement* states that the decision to settle and other such decisions “are reserved to the client except when the client has validly authorized the lawyer to make the particular decision.”³⁹ To protect the client’s interest in the settlement decision, Section thirty-three clarifies that any authority a client bestows upon an attorney with regard to settlement

34. *Id.* E.C. 7–8.

35. See Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 105 n.12 (1984) (referring to David Hoffman’s Fifty Resolutions in Regard to Professional Deportment of 1835, Resolution XIX, which stated:

Should my client be disposed to compromise, or to settle his claim, or defense; and especially if he be content with a verdict or judgment, that has been rendered; or having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interest.

Hoffman’s Fifty Resolutions in Regard to Professional Deportment, in 2 D. HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed. 1836). Maute notes that the first formal Code of Ethics placed only two situations under the client’s control: the decision to add extra counsel and the course to be pursued when joint counsel disagreed on an important matter. See Maute, *supra*, at 1054 (discussing ALA. CODE OF ETHICS ¶30, found in H. Drinker, LEGAL ETHICS App. F at 359–61 (1953)).

36. AGENCY RESTATEMENT, *supra* note 3, § 118.

37. See, e.g., *Beverly v. Chandler*, 564 So. 2d 922 (Ala. 1990) *First Fed. Sav. & Loan of Walla v. C.P.R. Constr., Inc.*, 689 P.2d 981 (Or. Ct. App. 1984) (discussing an engagement letter which bestowed authority to settle on attorney). But see *In re Lansky*, 678 N.E.2d 1114 (Ind. 1997) (discussing the discipline of an attorney when he improperly attempted to limit the client’s decision-making authority by obtaining the authority to settle from the client in a retainer agreement). Note that, typically, individuals impair the decision-making authority regarding settlement when they obtain liability insurance. The insurance company commonly agrees to defend and the individual agrees to allow the insurer to control the defense and settlement. See, e.g., ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* app. J § (1)(a)(2), at 1149 (1988) (“We may investigate and settle any claim or ‘suit’ at our discretion”).

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33(1) (Am. L. Inst. Proposed Final Draft No.1, 1996) [hereinafter RESTATEMENT]. Other decisions that are the clients’ include, in criminal matters, the plea and waiver of the right to a jury trial and, in civil matters, whether to appeal. *Id.*

39. *Id.* See also *id.* § 38 (stating that a lawyer has actual authority when client has expressly or impliedly authorized the act).

may be revoked “[r]egardless of any contrary agreement with a lawyer.”⁴⁰ Section 31(1) of the *Restatement* notes the lawyer’s general duty to “keep a client reasonably informed about the matter” and to “consult with a client to a reasonable extent concerning decisions to be made by the lawyer.”⁴¹ In addition, Section 31(3) specifically enunciates a duty to “notify a client of decisions to be made by the client” and the duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴²

As to other decisions not involving settlement or other matters of utmost importance, the *Restatement* provides that a lawyer, absent contrary instruction, may take “any lawful measure within the scope of representation that is reasonably calculated to advance a client’s objectives” with consultation if appropriate.⁴³ Further, the *Restatement* provides that the lawyer has the authority “to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal.”⁴⁴ This standard, says the commentary, recognizes that an attorney cannot consult with a client about every decision in a representation and grants the attorney “inherent authority” to act for clients “when the legal system requires an immediate decision without time for consultation.”⁴⁵ Finally, consistent with the *Model Rules*, the *Restatement* reserves for the attorney the right to refuse to further any action the attorney reasonably believes to be unlawful.⁴⁶

C. THE GENERAL VIEW OF THE COURTS

Courts have consistently applied the “means” and “ends” model of attorney-client decision-making regardless of whether the case involves a claim of legal malpractice or a breach of fiduciary duty or whether the matter is an action to bind the client to the attorney’s conduct.⁴⁷ Frequently, courts and commentators

40. *Id.* § 33(3).

41. *Id.* § 31(1).

42. *Id.* § 31(3).

43. *Id.* § 32(3) & cmt. e.

44. *Id.* § 34(2).

45. *Id.* § 34 cmt. d.

46. *Id.* § 34(1).

47. *See, e.g.*, *U.S. v. Beebe*, 180 U.S. 343, 350–53 (1901) (holding that a district attorney did not have the power to compromise since no authority was given and that power does not rest with the attorney); *Fennell v. TLB Kent Co.*, 865 F.2d 498, 501–02 (2d Cir. 1989) (holding that plaintiff’s failure to make manifestations to defendants’ counsel that plaintiff’s attorney was authorized to settle the case meant that apparent authority was not created and plaintiff’s consent to settle was required). *See generally* Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473, 479–91 (1990) (describing the distinctions courts use to define the limits of a lawyer’s authority); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 51–52 (1979) (describing how cases citing the subject-matter/procedure rule fall into two categories: that of malpractice cases and those where clients assert lawyers’ lack of authority to escape third party liability).

discuss this distinction as the difference between substance (which remains within the client's decision) and procedure (the attorney's decision).⁴⁸ For example, settling a civil action is always an "ends" matter.⁴⁹ Trial tactics such as whom to call as witnesses and general objections to raise constitute "means" decisions.⁵⁰

III. THE FIDUCIARY NATURE OF THE ATTORNEY-CLIENT RELATIONSHIP

While the applicable ethical codes govern, define, and regulate the attorney-client relationship, substantive law also delineates appropriate parameters of attorney-client dealings of all sorts. In particular, the law of fiduciaries and the law of agency apply to and define the attorney-client bond.

Fiduciary responsibility can arise as a matter of status or as a matter of fact when a relationship reflects a trust situation, though this type of relationship is not one traditionally recognized as fiduciary.⁵¹ Unfortunately, the parameters of the fiduciary relationship are far from obvious.⁵² Generally, "[a] fiduciary is one who

48. See Siegel, *supra* note 47, at 479-80 (describing the substance/procedure distinction which is used to limit an attorney's authority as an agent); Spiegel, *supra* note 47, at 50 (describing how some cases resolve questions of an attorney's authority by distinguishing between the subject matter of the action and the procedure and tactics). See also *Linsk v. Linsk*, 449 P.2d 760, 762 (Cal. 1969) (stating "the attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself").

49. See, e.g., *Midwest Fed. Sav. Bank v. Dickinson Econo-Storage*, 450 N.W.2d 418, 422 (N.D. 1990) (stating that some secondary works hold that it is universal that an attorney has no implied power to compromise or settle his or her client's claim of action); see also Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 318 (1987) (stating that "the client determines such 'ends' as whether to settle a civil suit"); Siegel, *supra* note 47, at 480 (stating that clients generally have the power to decide whether or not to accept settlements); Spiegel, *supra* note 47, at 56 (stating that attorneys do not have the authority to compromise his client's cause of action).

50. See, e.g., *Thomas v. Poole*, 282 S.E.2d 515 (N.C. Ct. App. 1981) (holding that the withdrawal of a defense is lawyer's call); *Nahhas v. Pacific Greyhound Lines*, 13 CAL. RPTR. 299, 300 (1961) (holding that the attorney has complete charge and supervision of which witnesses to call); see also Strauss, *supra* note 49, at 318 (describing various decisions that fall within the authority of the attorney since they involve "means"); Siegel, *supra* note 47, at 488-89 (describing the scope of tactical decisions which the attorney has the authority to decide); Spiegel, *supra* note 47, at 50-51 (stating that cases tend to affirm a lawyer's authority to make tactical/procedural decisions).

51. See *Liebergessell v. Evans*, 613 P.2d 1170, 1176 (Wash. 1980) (describing how some relationships are fiduciary as a matter of law while others simply arise from the nature of the particular relationship); *Mobil Oil Corp. v. Rubenfield*, 339 N.Y.S.2d 623, 632 (1973) (stating that a fiduciary relationship is comprised of "technical fiduciary relationships and those informal relationships which exist whenever one man trusts in and relies upon another"); see also Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. OF LEGAL STUD. 285, 301 (1989) (describing the broad range of relationships that may be considered fiduciary, including fact-based fiduciary relationships).

52. See *LAC Minerals Ltd. v. Int'l Corona Resources Ltd.*, [1989] D.L.R. 14 which states:

There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law."

See also Flannigan, *supra* note 51, at 322 (describing the difficulties of defining a fiduciary relationship).

acts primarily for the benefit of another.”⁵³ Fiduciaries must “act only in the interest of their beneficiaries and . . . [must] forego personal advantage aside from compensation in the exercise of their tasks.”⁵⁴ A fiduciary has a duty to communicate,⁵⁵ a duty of loyalty,⁵⁶ and a duty of obedience.⁵⁷ The extent of the fiduciary obligation varies according to the context and type of the relationship.⁵⁸

All attorney-client relationships are fiduciary in nature.⁵⁹ The fiduciary obligations that accompany the attorney-client relationship appear to be quite onerous.⁶⁰ Courts have referred to an attorney as a “trustee of the highest order,”⁶¹ and

53. REUSCHLEIN & GREGORY, *supra* note 3, § 4, at 11; AGENCY RESTATEMENT, *supra* note 3, § 13, cmt. a; Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949). *See generally* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991) (discussing the definition of fiduciary relationships and the economic consequences generated by such trusts and duties); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879 (1988) (discussing the erroneous equation of fiduciary obligations with contract law); Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995) [hereinafter Frankel, *Fiduciary Duties*] (discussing the status of fiduciary rules as default rules); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983) [hereinafter Frankel, *Fiduciary Law*] (discussing the nature of fiduciary relations and the policies that govern them).

54. REUSCHLEIN & GREGORY, *supra* note 3, § 4, at 11.

55. *Id.*

56. *Id.* § 68, at 127–28.

57. *Id.* § 69, at 128–29.

58. Deborah A. DeMott has stated:

Fiduciary obligation is one of the most elusive concepts in Anglo-American law. Applicable in a variety of contexts, and apparently developed through a jurisprudence of analogy rather than principle, the fiduciary constraint on a party's discretion to pursue self-interest resists tidy categorization. Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of parties and relationships. Recognition that the law of fiduciary obligation is situation specific should be the starting point for any further analysis.

DeMott, *supra* note 53, at 879; *see* Flannigan, *supra* note 51, at 310–11 (“Generally speaking, the obligation is defined by whatever rules are required in order to maintain the integrity of the particular relationship.”); Scott, *supra* note 53, at 541 (discussing how some fiduciary relationships are “more intense” and thus the duties are more significant). *See generally* Frankel, *Fiduciary Law*, *supra* note 53, at 795 (discussing the variety of treatments given different types of fiduciaries); Frankel, *Fiduciary Duties*, *supra* note 53, at 1209 (discussing contracting around fiduciary principles).

59. Olsen & Brown v. Englewood, 889 P.2d 673, 675 (Colo. 1995) (describing the attorney-client relationship as “a distinct fiduciary affiliation which arises as a matter of law”). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 145–46 (1986) (describing the lawyer-client relationship as one that is surely fiduciary in nature); Roy Ryden Anderson & Walter W. Steele, Jr., *Ethics and the Law of Contract Juxtaposed: A Jaundiced View of Professional Responsibility Considerations in the Attorney-Client Relationship*, 4 GEO. J. LEGAL ETHICS 791, 792 (1991) (describing how attorney-client relationships have historically been considered fiduciary in nature); DeMott, *supra* note 53, at 908 (including attorney-client relationships as those involving fiduciary obligations); Flannigan, *supra* note 51, at 293–94 (listing the solicitor-client relationship as one normally described as a fiduciary relationship); Scott, *supra* note 53, at 541 (describing that usual fiduciary relationships include attorney-client relationships).

60. *See generally* Anderson & Steele, *supra* note 59 (discussing how courts hold attorneys to different standards than other fiduciaries in contracting with clients).

61. *See, e.g.,* Wolfe v. Bass Furniture & Carpet Co., 3 P.2d 895, 903 (Okla. 1930) (stating that the attorney is a trustee of the highest order for his client under established rule of law).

have referred to the duty owed to the client as “uberrima fides”⁶² or the duty of “utmost good faith.”⁶³ The following statement is typical: “Since the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client’s interest.”⁶⁴

A manifestation of this high standard is that courts apply a presumption of undue influence to contracts between an attorney and a client.⁶⁵ In contrast, courts do not encumber a non-attorney agent, also a type of fiduciary,⁶⁶ with a presumption of undue influence in contracting with the principal.⁶⁷ Robert Flannigan has noted that an attorney-client relationship constitutes an agency relationship in that the attorney performs tasks directed by the client principal. Flannigan explains the disparate treatment attorneys receive by noting that attorneys not only act for the client, but also participate significantly in the

62. For example, in *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. Ct. App. 1991), the Texas Court of Appeals stated:

[T]he relationship between attorney and client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny as a transaction between trustee and beneficiary. . . . Specifically, the relationship between attorney and client has been described as one of uberrima fides, which means “most abundant good faith,” requiring absolute and perfect candor, openness and honesty, and the absence of any concealment or deception.

Id. at 265.

63. See, e.g., *In re Lansky*, 678 N.E.2d 1114, 1116–17 (Ind. 1997) (describing that the confidence involved in attorney-client relationships makes it necessary for the lawyer to act in the utmost good faith).

64. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978). In *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), the Kentucky Supreme Court quoted the *Daugherty* passage and termed the attorney’s status as that of “‘superior’ agency status.” *Id.* at 575. See also *State ex rel. Montgomery v. Goldstein*, 220 P. 565, 567 (Or. 1923) (“The relation between an attorney and his client, in the conduct of the business of the client, imposes upon the attorney the most sacred trust that can exist in a business way between individuals.”); 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY, § 2188, at 1769–70 (1914) (stating that attorneys are bound to the “highest degree of honor, integrity[,] and fidelity”). Mechem stated that “[t]he relation is one of trust and confidence and the rules which govern the conduct of other persons standing in fiduciary relations, apply with special force to the dealings of the attorney with his client.” *Id.* at 1770.

65. For example, in *In re Smith*, 572 N.E.2d 1280 (Ind. 1991), the Indiana Supreme Court stated:

Indiana case law recognizes that transactions entered into during the existence of a fiduciary relationship are presumptively invalid as the product of undue influence. Transactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof. . . . Such transactions during the confidential relationship are closely scrutinized by the courts and are regarded with suspicion; they are presumptively invalid as the product of undue influence.

Id. at 1285. See also Flannigan, *supra* note 51, at 313 (discussing the presumption of undue influence). See generally Anderson & Steele, *supra* note 59 (discussing the extremely restrictive stance courts take regarding contracts between attorneys and their clients).

66. AGENCY RESTATEMENT, *supra* note 3, § 13. See REUSCHLEIN & GREGORY, *supra* note 3, § 4, at 11 & § 67, at 125–126 (stating an agent is a fiduciary); WOLFRAM, *supra* note 59, § 4.1, at 146 (noting lawyer-client relationship possesses fiduciary nature).

67. Flannigan, *supra* note 51, at 313.

decision-making process with regard to matters of great import to the client and matters often involving issues in which the client has no expertise. The attorney not only does what the client directs, but also participates in the decision-making regarding very important matters.⁶⁸ An attorney is more than simply an agent fiduciary. The attorney has a heightened obligation when dealing with the principal as a result of this unique role.

Given the attorney's special role, it is logical that the attorney would be held to a high standard and subject to substantial scrutiny when dealing with the client. When the issue is the enforceability of a settlement agreement that an attorney enters into with the third party's attorney on behalf of the client, the "super fiduciary" status should not be relevant. Traditional principles of agency and contract law applicable in other settings should apply because those doctrines have developed to protect the interests of those dealing with an agent and to protect the general policy in favor of the certainty of contracting and the particular policy in favor of settlement. Only after a court finds the settlement agreement binding on the client principal should the "super fiduciary" status become important, for then the attorney's actions must be analyzed in light of the client's instruction and interests. The "super fiduciary" status becomes integral to any determination of breach of fiduciary duty or legal malpractice but is superfluous to the decision whether to enforce the settlement which is a decision with ramifications touching third parties to the contract and the court system itself.

IV. ATTORNEYS AS AGENTS

A. GENERAL PRINCIPLES

Attorneys are agents of their clients for many types of actions.⁶⁹ The *Agency Restatement* defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."⁷⁰ Due to the consensual nature of the relationship, the principal may revoke the authority of

68. Flannigan, *supra* note 51, at 294–97 & 313. See generally Korobkin & Guthrie, *supra* note 1 (discussing the effect of attorneys on client settlement decisions).

69. See, e.g., *United States v. Miller*, 997 F.2d 1010, 1018 (2d Cir. 1993) (arguing attorneys acted as agents for their clients); *United States v. International Bd. of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993) (noting lawyer-client relationship is one of agent-principal in settlement context); *Garn v. Garn*, 745 P.2d 604, 608 (Ariz. Ct. App. 1987) (discussing application of agency law to attorney-client relationship in context of divorce settlement); see also AGENCY RESTATEMENT, *supra* note 3, § 1, cmt. e (stating that an agent is one authorized by another to act on his account); REUSCHLEIN & GREGORY, *supra* note 3, § 21, at 53 (discussing same); WARREN A. SEAVEY, HANDBOOK ON THE LAW OF AGENCY § 31 (1964) (discussing same); 2 MECHEM, *supra* note 64, § 2150, at 1726 (discussing same); Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1037 (1998) (discussing same).

70. AGENCY RESTATEMENT, *supra* note 3, § 1.

the agent to act on behalf of the principal even if an agreement says otherwise.⁷¹ In the context of representation of a client, the client retains the attorney to represent the client with regard to some matter. The retention of the attorney along with instruction about what the client would like the attorney to achieve creates an agency relationship in that the client manifests that the attorney shall act on the client's behalf, and, one assumes, the attorney consents to so act. Attorneys are agents, yet they are independent contractors, as the *Agency Restatement* uses that term, in that the principal does not have the right to control the physical actions of the agent attorney.⁷²

The *Agency Restatement* also defines two types of agent: general and special.⁷³ A general agent is "authorized to conduct a series of transactions involving a continuity of service."⁷⁴ A comment to the *Agency Restatement* states that most general agents are servants such as "managers, sales clerks[,] and persons of that type."⁷⁵ A special agent is "authorized to conduct a single transaction or a series of transactions not involving continuity of service."⁷⁶ Courts seem to have assumed that attorneys are special, not general, agents,⁷⁷ although that determination should be fact-specific. Some attorneys may, in fact, be general agents.

The law of agency provides standards governing when an agent may bind a principal by entering into an agreement with a third party on behalf of the principal. Because a settlement agreement disposing of litigation or possible litigation is a contract,⁷⁸ agency principles apply to delineate the circumstances

71. *Id.* § 118 & cmt. b.; REUSCHLEIN & GREGORY, *supra* note 3, § 47, at 98.

72. AGENCY RESTATEMENT, *supra* note 3, § 14N, cmt. a.

73. *Id.* § 3.

74. *Id.* § 3(1).

75. AGENCY RESTATEMENT, *supra* note 3, § 3, cmt. c.

76. AGENCY RESTATEMENT, *supra* note 3, § 3(2) (1958). See *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 898 P.2d 347, 352 (Wash. Ct. App. 1995) (quoting *Agency Restatement* section 3(2) regarding general and special agents); REUSCHLEIN & GREGORY, *supra* note 3, § 7, at 15 (discussing the difficulty of determining whether the agent is general or specific).

77. See, e.g., *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1305 (Ind. 1998) (noting attorney was a special agent in that attorney was employed only to pursue workers' compensation lien); see also *Firemen's Fund Ins. Co. of Newark, N.J. v. Pugh*, 686 So. 2d 281, 283 (Ala. Civ. App. 1996) (stating attorney is a special agent for his client); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 633 (Tex. Ct. App. 1983) (showing that contract law governs settlement agreement).

78. See *supra* note 3 (discussing agency and the attorney-client relationship). A settlement need not be in writing unless it is otherwise within the statute of frauds or a specific statute or rule requires a writing. As an Illinois Appellate court stated in *Lumpe v. O'Toole*, 685 N.E.2d 423 (Ill. App. Ct. 1997), "A proper oral settlement agreement is enforceable." *Id.* at 424. See also *Seal Products v. Mansfield*, 705 So. 2d 973, 976 (Fla. Dist. Ct. App. 1998) (finding that settlement was a contract); *Griego v. Kokkeler*, 543 P.2d 729, 730 (Colo. Ct. App. 1975) (finding oral settlement agreement to be binding); *Heese Produce Co. v. Lueders*, 443 N.W.2d 278, 283 (Neb. 1989) (discussing same); *Kaiser Foundation Health Plan of the Northwest v. Doe*, 903 P.2d 375, 378-379 (Or. Ct. App. 1995) (stating that settlement is as binding as a judgment on the merits); *Silkey v. Investors Diversified Services, Inc.*, 690 N.E.2d 329, 333 (Ind. App. 1997) (stating settlement agreement is binding); *Byrd v. Liesman*, 825 S.W.2d 38, 39 (Mo. App. 1992) (finding settlement is enforceable).

Some states have specific writing requirements for settlements. See, e.g., ARIZ. R. CIVIL P., Rule 80(d) ("No agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or

under which an attorney, as agent, may bind a client, as a disclosed principal,⁷⁹ to a settlement agreement with a third party. A disclosed principal is a party to a valid contract with a third party⁸⁰ and is responsible for any breach if the agent entering into the contract on behalf of the principal had actual or apparent authority⁸¹ to enter into the contract on behalf of the principal.⁸²

B. ACTUAL AUTHORITY

If a client bestows actual authority upon the attorney to settle, the client principal is bound to a settlement entered into by the attorney agent.⁸³ Actual authority to settle exists when the client indicates to the attorney through words or conduct that the attorney may agree with the third party or third party's attorney to settle the matter.⁸⁴ If the client indicates the authority "clearly, in express and explicit language, to the agent," then "express authority" exists.⁸⁵ For example, the client may write, "I give you authority to settle the matter on my behalf for \$15,000." If the client indicates authority not expressly, but in a way that can be proven circumstantially, then actual authority exists, but is sometimes called implied authority.⁸⁶ When the client, by "reasonably inter-

made orally in open court, and entered in the minutes."); MICH. C. R., Rule 2.507(H) (1997) (providing that a settlement denied by a party is not enforceable "unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney"); NEB. STAT. 7-107 (1997) (providing that an oral settlement agreement is enforceable but only if proved by testimony of the attorney, a written agreement signed and filed with the clerk or an entry of the settlement agreement in the record of the court).

79. A disclosed principal exists when the third party knows that the agent acts as an agent for an identified principal. AGENCY RESTATEMENT, *supra* note 3, § 4. See also REUSCHLEIN & GREGORY, *supra* note 3, § 6, at 13 (discussing same).

80. When the third party knows the identity of the principal, the agent is not a party to any third-party contract but the principal is. REUSCHLEIN & GREGORY, *supra* note 3, § 6, at 13. See also AGENCY RESTATEMENT, *supra* note 3, § 144 (providing for principal's liability when agent has actual authority), § 159 (providing for principal's liability when agent has apparent authority).

81. Apparent authority is sometimes called ostensible authority. *Miotk v. Rudy*, 605 P.2d 587, 591 (Kan. Ct. App. 1980); REUSCHLEIN & GREGORY, *supra* note 3, § 23, at 57; 1 MECHEM, *supra* note 64, § 57, at 37 (discussing actual and ostensible agencies).

82. *Dillon v. City of Davenport*, 366 N.W.2d 918, 924 (Iowa 1985) (noting anything an agent does within its authority binds the principal). "An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself." AGENCY RESTATEMENT, *supra* note 3, § 12. See also REUSCHLEIN & GREGORY, *supra* note 3, § 95, at 162-63 (discussing actual authority), § 96, at 167 (discussing apparent authority).

83. AGENCY RESTATEMENT, *supra* note 3, § 144; see also REUSCHLEIN & GREGORY, *supra* note 3, § 95, at 162-63 (discussing same); *Housatonic Valley Publishing Co. v. Citytrust*, 463 A.2d 262, 264 (1983) (stating that the principal is liable for the contracts of the agent).

84. See AGENCY RESTATEMENT, *supra* note 3, § 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.").

85. REUSCHLEIN & GREGORY, *supra* note 3, § 14, at 37.

86. "Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question and includes such incidental authority as is necessary, usual and proper as a means of effectuating the purpose of the employment." *Stevens v. Frost*, 32 A.2d 164, 168-169 (Me. 1943). See also REUSCHLEIN & GREGORY, *supra* note 3, § 15 (discussing same); AGENCY RESTATEMENT, *supra* note 3, § 35, cmt. b (discussing same).

preted" words or conduct, causes the attorney to believe that the client has bestowed authority on the attorney to settle on the principal client's behalf, the client is bound to the settlement and has no recourse against the attorney who acts appropriately within the scope of the "reasonably interpreted" authority.⁸⁷

A third party who has dealt with an agent in contracting with a principal and who seeks to enforce the contract against the principal may find proving actual authority difficult because the proof necessarily will involve dealings between the agent and the principal to which the third party was not privy. Because the party claiming the existence of authority must bear the burden of proving it,⁸⁸ the lack of information can prove fatal to the third party's action. This is especially true with regard to communications between attorney and client because of the possible application of the attorney-client privilege⁸⁹ and the implications of the attorney's ethical duty of confidentiality.⁹⁰

C. APPARENT AUTHORITY

A third party seeking enforcement of a contract against a principal often has a better basis for establishing the authority of the agent to bind the principal in the doctrine of apparent authority. The Agency Restatement section 27 describes apparent authority as follows:

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words

87. AGENCY RESTATEMENT, *supra* note 3, § 26, § 144. *See also* REUSCHLEIN & GREGORY, *supra* note 3, § 95, at 162-63 (discussing same).

88. *See* Edmund J. Flynn Co. v. La Vay, 431 A.2d 543, 548 (D.C. App. 1981) ("The burden of proving an agency relationship rests with the party asserting the relationship."); Schoonover v. Carpet World, Inc., 588 P.2d 729 (Wash. 1978) (stating that the burden of establishing apparent authority rests on the one asserting its existence). *See also* REUSCHLEIN & GREGORY, *supra* note 3, § 11, at 28 (discussing same).

The question of whether the claimant has established the existence of authority is often a jury question, though it may be treated as a mixed question of law and fact. *See* Kavaros Compania Naviera S.A. v. Atlantica Export Corp., 588 F.2d 1, 9 n.15 (2d Cir. 1978) (stating existence of authority is a mixed question of law and fact); Costo Wholesale Corp. v. World Wide Licensing Corp., 898 P.2d 347, 352 (Wash. App. 1995) ("Whether an agent has apparent authority to make a contract depends upon the circumstances and is to be decided by the trier of fact." (quoting Barnes v. Treece, 549 P.2d 1152, 1158 (1976))); Joyner v. Harleysville Ins. Co., 574 A.2d 664, 668 (Pa. Super. Ct. 1990), *appeal denied*, 588 A.2d 510 (Pa. 1990) (holding nature and extent of an agent's authority is a question of fact for the trier).

89. The attorney-client privilege protects communications between attorney and client which were for the purpose of legal advice, assistance, or service and which were confidential. *See* United States v. United Shoe Machinery.

Some authority indicates that the privilege would not apply. *See, e.g.,* Moyer v. Moyer, 602 A.2d 68 (Del. 1992) (holding that privilege does not extend to a statement made by a client to his attorney with the intent that it be communicated to others); *see also* RESTATEMENT § 130 (1)(b) (stating that if the client asserts that the lawyer's assistance was "ineffective, negligent, or . . . [otherwise] wrongful" the privilege was waived).

90. *See* MODEL RULES Rule 1.6 (stating that obligation of lawyer to keep information confidential facilitates proper representation).

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.⁹¹

91. AGENCY RESTATEMENT, *supra* note 3, § 27; *see* AGENCY RESTATEMENT, *supra* note 3, § 8, (“Apparent authority is 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.”).

Courts often confuse the doctrine of apparent authority with the doctrine of estoppel. The *Agency Restatement*, in defining estoppel, states in pertinent part:

- (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.

AGENCY RESTATEMENT, *supra* note 3, § 8B. *See also* REUSCHLEIN & GREGORY, *supra* note 3, § 25 (noting that courts confuse estoppel with apparent authority); Walter W. Cook, *Agency by Estoppel*, 5 COLUM. L. REV. 36, 36 (1905) (stating that the difference between apparent authority and real authority is nothing more than an application of estoppel by misrepresentation); John S. Ewart, *Agency by Estoppel*, 5 COLUM. L. REV. 354, 355 (1905) (stating man is not bound by his intentions at all); Walter W. Cook, *Agency by Estoppel: A Reply*, 6 COLUM. L. REV. 34, 35 (1906) (clarifying that a person is bound to a contract in accordance with the intention he has manifested to the other party).

The estoppel theory has two major differences from the traditional apparent authority theory. First, estoppel requires that the third party rely detrimentally on the belief in the agent’s authority. This requirement means that estoppel applies to a narrower category of cases than that to which apparent authority would apply. Second, the estoppel doctrine holds the principal responsible for a failure to correct a third party’s misapprehension even though the principal may not have said or done anything to create the misapprehension. This characteristic of estoppel creates a situation in which the theory can apply in cases to which apparent authority would not apply.

See Warren A. Seavey, *Agency Powers*, 1 OKLA. L. REV. 1, 7 (1948) (stating that a principal can create apparent authority by causing an agent to acquire a reputation of having authority). *See also* REUSCHLEIN & GREGORY, *supra* note 3, § 25, at 68 (stating that there are cases where there is no apparent authority in the strict sense). Thus, estoppel is a narrower doctrine in one respect and a broader doctrine in another. *See* Tedesco, III v. Gentry Dev., Inc., 540 So.2d 960, 963 (La. 1989) (discussing the two doctrines).

Courts, however, have not relied upon estoppel as a theory independent of apparent authority. Some courts apply the changed position reliance approach and the lesser manifestation approach of estoppel, yet call the doctrine apparent authority. *Earl v. St. Louis University*, 875 S.W.2d 234 (Mo. Ct. App. 1994). The *Earl* court stated:

To establish a purported agent’s apparent authority, the person relying on such authority must show that (1) the principal manifested his consent to the exercise of such authority or knowingly permitted the agent to assume the exercise of such authority; (2) the person relying on this exercise of authority knew of the facts and, acting in good faith, had reason to believe, and actually believed, the agent possessed such authority; and (3) the person relying on the appearance of authority changed his position and will be injured or suffer loss if the transaction executed by the agent does not bind the principal.

Id. at 238. A few cases discuss the estoppel theory as distinct from the apparent authority theory, yet do not rely on one as distinct from the other. For example, in *Crawford’s Auto Center, Inc. v. Commonwealth of Pennsylvania State Police*, 655 A.2d 1064 (Pa. 1995), the court discussed the estoppel theory as a theory distinct from apparent authority, yet the court stated that both apparent authority and estoppel applied. *Id.* at 1067–68. And in *Tedesco*, 540 So.2d at 962, the Louisiana Supreme Court noted that “Louisiana decisions have sometimes used language of estoppel, but have not distinguished between the concepts of apparent authority and agency by estoppel.” *Id.* at 963. After discussing the differences between the doctrines the *Tedesco* court concluded that it need not “consider adopting a distinction between the doctrines of apparent authority and agency by estoppel” because the facts before the court supported neither. *Id.* at 965. *See also* Nelson v. Boone, 890 P.2d 313, 320 (Haw. 1995) (stating that apparent authority requires a changed position by the third party).

Third parties find apparent authority more useful for contract enforcement against a principal because the third parties base the claim on the statements and conduct of the principal known by the third party.

If the third party reasonably is misled, the rationale of the doctrine requires that the principal must be the one responsible for misleading. Thus, traditionally, the trier of fact must consider only the principal's words and conduct, not conduct or statements of the agent.⁹² The principal does not shoulder all of the risk of the situation, however, because the principal is responsible only if a third party honestly and reasonably interprets the principal's statements and conduct as exhibiting the principal's consent that the agent has authority to bind the principal.⁹³ As the Pennsylvania Superior Court in *Bolus v. United Penn Bank*⁹⁴ stated:

The third party is entitled to believe the agent has the authority he purports to exercise only where a person of ordinary prudence, diligence and discretion would so

Commentators and the *Agency Restatement* take the position that the basis of apparent authority is the manifestation of consent by the principal that the agent has the authority to bind the principal. If the principal manifests, in accordance with the objective theory of contracts, consent to be bound, then the contract is valid and binding on the principal and the third party. According to this view, the estoppel theory's reliance analysis is a creature of tort and irrelevant to apparent authority and agency analysis in general. *See* Seavey, *supra* note 69, § 8D, E, at 13–14 (distinguishing between apparent authority and estoppel); AGENCY RESTATEMENT, *supra* note 3, § 8, cmts. c & d (affirming that estoppel is essentially a principle in the law of torts developed in order to prevent loss to an innocent person); Warren A. Seavey, *The Rationale of Agency*, 29 YALE L. J. 859, 874–75 (1920) (stating that an agent may only exercise rights and duties to the extent that the agent believed that the principal intended for him to act); Michael Conant, *The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 678, 680–82 (1968) (noting that it is established law that unauthorized representations of an agent to third parties have no legal standing); Oliver W. Holmes, *Agency II*, 5 HARV L. REV. 1, 1 (1891) (stating that a man is not bound by his servant's contracts unless they are made under his authority).

92. *Goldman v. First National Bank of Boston*, 985 F.2d 1113, 1121 (1st Cir. 1992) (“It is a ‘fundamental rule that apparent authority cannot be established by the putative agent’s own words or conduct, but only by the principal.’ ” (quoting *Sheinkopf v. Stone*, 927 F.2d 1259, 1269 (1st Cir. 1991))); *see also* *Ottawa Charter Bus Serv. v. Mollet*, 790 S.W.2d 480, 483–84 (Mo. Ct. App. 1990) (holding apparent authority cannot be created by the acts of the supposed agent alone; the principal must have created the appearance of authority in order to be held liable for the acts of the agent); *see generally* REUSCHLEIN & GREGORY, *supra* note 3, § 23, at 61 (asserting that apparent authority rests on the appearance created by the principal); AGENCY RESTATEMENT, *supra* note 3, § 168 (stating a principal isn’t subject to liability because of untrue representations as to the extent of his authority).

93. *See* *Mohr v. State Bank of Stanley*, 734 P. 2d 1071, 1076 (Kan. 1987) (stating that an agent’s “[a]pparent agency is based on intentional actions or words of the principal toward third parties which reasonably induce or permit third parties to believe that an agency relationship exists”); 99 Commercial St., Inc. v. Goldberg, 811 F. Supp. 900, 906 (S.D.N.Y. 1993) (holding that an agent has apparent authority when conduct by the principal leads a third party to believe that the agent has authorization to act on behalf of the principal); *Greene v. Hellman*, 412 N.E.2d 1301, 1306–07 (N.Y. 1980) (stating that “apparent authority is dependent on verbal or other acts by a principal, [of which the third party is aware,] which reasonably give an appearance of authority to conduct the transaction”); *Turner Hydraulics, Inc. v. Susquehanna Const. Corp.*, 606 A.2d 532, 534 (Pa. Super. Ct. 1992) (stating that “[a]pparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent authority he or she purports to exercise”); *Goldman v. First Nat. Bank of Boston*, 985 F.2d 1113, 1121 (1st Cir. 1992) (stating that “[a]pparent or ostensible authority ‘results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent’ ”).

94. 525 A.2d 1215 (Pa. Super. Ct. 1987).

believe. Thus, a third party can rely on the apparent authority of an agent when this is a reasonable interpretation of the manifestations of the principal.⁹⁵

In analyzing what the third party thought regarding the agent's authority and in analyzing the reasonableness of those thoughts, courts focus not only on express statements by the principal known to the third party, but also on all of the circumstances surrounding the situation. For example, courts consider the principal's actions regarding the transaction at issue as well as any course of dealing between the parties. Courts reason that prior dealings are important because "by allowing an agent to carry out prior similar transactions, a principal creates the appearance that the agent is authorized to carry out such acts subsequently."⁹⁶

Many courts use a loose interpretation of the requirement that the third party must base the reasonable belief on the principal's own manifestations indicating that the agent had authority to act. For example, these courts find apparent authority on the basis of the position in which the principal puts the agent. With regard to a position analysis, the Missouri Court of Appeals in *Earl v. St. Louis University*⁹⁷ stated:

If a principal allows an agent to occupy a position which, according to the ordinary habits of people in the locality, trade or profession, carries a particular kind of authority, then anyone dealing with the agent is justified in inferring that the agent has such an authority.⁹⁸

If a court finds apparent authority, the contract binds the principal and, thus, the principal is responsible to the third party.⁹⁹ The principal has a very different stance, however, when compared to the agent. If the agent did not have actual authority to bind the principal to the contract, the principal can pursue the agent for acting contrary to authority even though apparent authority existed.¹⁰⁰

With regard to the settlement context, if the client principal did or said

95. *Id.* at 1222. See also *Hill v. State*, 585 A.2d 252, 255 (Md. Ct. Spec. App. 1991) (stating that a third party must use "reasonable diligence and prudence").

96. *Earl v. St. Louis University*, 875 S.W.2d 234, 238 (Mo. Ct. App. 1994). See also *Edart Truck Rental Corp. v. B. Swirsky and Co.*, 579 A.2d 133, 136 (Conn. App. Ct. 1990) (stating that the trier of fact is to evaluate the conduct of the parties in light of all the circumstances in determining the existence of apparent authority); *Bills v. Wardsboro School Dist.*, 554 A.2d 673, 675 (Vt. 1988) (showing that apparent authority may be derived from a course of dealing or a single transaction); *Szymkowski v. Szymkowski*, 432 N.E.2d 1209, 1211 (Ill. App. Ct. 1982) (asserting that apparent authority can be demonstrated by surrounding circumstances).

97. *Earl*, 875 S.W.2d at 238.

98. *Id.* The *Agency Restatement* describes this approach as follows: "apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent." AGENCY RESTATEMENT, *supra* note 3, § 27 cmt. a. See also *Hamilton Hauling, Inc. v. GAF Corp.*, 719 S.W.2d 841, 847-48 (Mo. Ct. App. 1986) (stating that Missouri courts have held that "position" and "prior acts" could also be the basis of implied authority).

99. AGENCY RESTATEMENT, *supra* note 3, § 159; REUSCHLEIN & GREGORY, *supra* note 3, § 96.

100. AGENCY RESTATEMENT, *supra* note 3, § 383.

anything that the opposing party or the opposing party's counsel reasonably interpreted as a bestowal of authority on the attorney to enter into the settlement agreement, then apparent authority would operate to bind the client to the contract. Even so, if the attorney acted contrary to the client's instruction, reasonably interpreted, the client might have an action against the attorney.¹⁰¹

D. INHERENT POWER

Finally, the *Agency Restatement* suggests a non-traditional policy-oriented basis for binding a principal to a contract. This basis, called inherent agency power, binds the principal to a contract regardless of the consent or manifestations of the principal. Defining inherent agency power the *Agency Restatement* states:

Inherent agency power is a term used in the restatement of this subject to indicate the power of an agent which is derived not from authority, apparent authority[,], or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.¹⁰²

Because courts have historically concluded that attorneys are special agents,¹⁰³ the inherent power doctrine has very limited applicability to the settlement context. This is because under the *Agency Restatement* formulation, the doctrine applies to special agents only in a limited sense.¹⁰⁴ For example, the *Agency Restatement* states:

A special agent for a disclosed or partly disclosed principal has no power to bind his principal by contracts or conveyances which he is not authorized or apparently authorized to make, unless the principal is estopped, or unless:

- (a) the agent's only departure from his authority or apparent authority is
 - i. in naming or disclosing the principal, or
 - ii. in having an improper motive, or

101. "The practical difference between actual and apparent settlement authority is that, while in both instances the client is bound, in the latter case he may seek a remedy against his attorney for breach of contract." *Johnson v. Tesky*, 643 P.2d 1344, 1347 (Or. Ct. App. 1982). See generally *Terrain Enterprises, Inc. v. Mockbee*, 654 So. 2d 1122 (Miss. 1995) (finding attorney not liable on claim of malpractice based on unauthorized settlement). The *Terrain* settlement, itself, was found valid on the basis of apparent authority in *Terrain v. Western*, 774 F.2d 1320 (5th Cir. 1985), cert. denied, 475 U.S. 1121 (1986).

102. AGENCY RESTATEMENT, *supra* note 3, § 8A (explaining that the inherent power doctrine arises in four situations: when a servant commits a tort by faulty conduct; in contract when an agent acts for his own purposes; in contract when an agent departs from an authorized method of disposal of goods; and in contract when the agent "does something similar to what he is authorized to do, but in violation of orders").

103. See *supra* note 77 and accompanying text (listing cases where courts have assumed attorneys were special agents).

104. See AGENCY RESTATEMENT §§ 161, 194 & 195 (applying only to general agents).

105. AGENCY RESTATEMENT, *supra* note 3, § 161A.

- iii. in being negligent in determining the facts upon which his authority is based, or
 - iv. in making misrepresentations; or
- (b) the agent is given possession of goods or commercial documents with authority to deal with them.¹⁰⁵

The doctrine suffers other significant negatives as well. First named in the 1958 version of the *Agency Restatement*,¹⁰⁶ the courts have not used the inherent power doctrine often, regardless of context, as an independent basis of responsibility.¹⁰⁷ In addition, even when courts mention the doctrine, the discussion reveals courts' lack of understanding on how to use it.¹⁰⁸ As one commentator has noted:

The further adoption of inherent agency power by courts should be avoided The doctrine of inherent agency power does not provide sufficient benefits to outweigh the confusion which has resulted from its application and the potential broadening of the principal's liability.¹⁰⁹

While this doctrine has been suggested for use in the attorney-settlement context,¹¹⁰ and at least one court has done so explicitly,¹¹¹ the better approach is to refrain from imposing a novel, amorphous, and ill-fitting doctrine into an area of law already confused and rife with misunderstanding. This is especially so given that by the doctrine's own terms, it is largely inapplicable to the special agent context.

V. COURTS AND SETTLEMENT CONTRACTS

In dealing with the attorney-settlement scenario, some courts have fashioned special rules that are not a part of traditional agency law. One court has used the inherent power doctrine. Other courts have created presumptions of authority. Many courts have attempted to apply traditional concepts of actual and apparent

106. Fishman, *supra* note 76, at 2–3 (stating that inherent power was, in part, created to explain court decisions that did not fit within actual or apparent authority).

107. *Id.* at 27–29, 39. See also Browne v. Maxfield, 663 F. Supp. 1193, 1196 n.6 (E.D. Pa. 1987) (quoting Agency Restatement § 8A).

108. Fishman, *supra* note 76, at 27–29, 39. A good example of this is Koval v. Simon Telelect, Inc., 693 N.E. 2d 1299, 1305 (Ind. 1998), in which the court applied the doctrine to the attorney settlement context even though it recognized that attorneys have been categorized as special agents and inherent agency power was, in general, not designed for special agents.

109. Fishman, *supra* note 76, at 56. See also DeMott, *supra* note 69, at 1046 (stating that the “term inherent agency power appears to have generated considerable and perhaps unnecessary confusion”).

110. See Dean C. Harvey, Settling in New York: Abdicating Traditional Agency Principles in the Context of Settlement Disputes, 9 Touro L. Rev. 449 (1993) (stating that inherent agency power is capable of fully accommodating the unique aspects of the attorney-client relationship).

111. See, e.g., Koval v. Simon Telelect, Inc., 693 N.E. 2d 1299 (Ind. 1998) (acting as example of a court using the doctrine).

authority, but often have not done so consistently or appropriately. Much of the disparity of treatment results from a lack of understanding of agency principles and the nuances of terminology.¹¹² For example, in *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*,¹¹³ the New Mexico Supreme Court stated that “an attorney’s authority to settle must be expressly conferred.”¹¹⁴ In traditional agency law, requiring express authority would mean that apparent authority and actual implied authority would not be applicable because these forms of authority, by definition, are not express.¹¹⁵ Yet, the court found apparent authority later in the opinion.¹¹⁶ Some disparity of treatment of settlement agreements, however, reflects a confusion in integrating agency law and legal ethics principles as well as the disparity of opinion about the nature of attorney client relationship, the courts’ role in protecting the client within that relationship, and also the weight given to the policy in favor of settlement. The jurisdictions of United States courts truly present a full spectrum of approaches.

A. RECOGNITION OF INHERENT AGENCY POWER

In *Koval v. Simon Telelect, Inc.*,¹¹⁷ the Indiana Supreme Court took a novel approach to the attorney-settlement confusion. The *Koval* court clarified the application of traditional agency doctrine by noting that an attorney may bind the client to a settlement if the attorney has “express, implied[,] or apparent authority” but that retention of the attorney alone does not “give the attorney the implied or the apparent authority” to bind the client to a settlement agreement.¹¹⁸ The *Koval* court went further, however, by finding that an attorney has “inherent power to bind a client to the results of a procedure in court” and that mediation procedures qualified for this treatment. Only if the client principal communicated a lack of authority would this inherent agency power be defeated.¹¹⁹ Though recognizing that the *Agency Restatement* formulation of inherent power applied to general agents, and that attorneys, in general, and the particular attorney in *Koval* are special agents, the court stated that “attorneys present a unique circumstance where, although they are special agents, some inherent power is found.”¹²⁰

Paying tribute to “Indiana’s strong judicial policy in favor of settlement

112. See, e.g., *Tiernan v. DeVoe*, 923 F.2d 1024, 1033–35 (3d Cir. 1991) (discussing what Pennsylvania courts might mean when discussing authority).

113. 749 P.2d 90 (N.M. 1988).

114. *Id.* at 92.

115. See discussion in Section IV, B& C *supra* (discussing actual and apparent authority).

116. *Navajo Tribe of Indians*, 749 P.2d at 92–93.

117. 693 N.E. 2d 1299 (Ind. 1998).

118. *Id.* at 1301.

119. *Id.*

120. *Id.* at 1305.

agreements,”¹²¹ the *Koval* court noted that “[a] rule that did not enable an attorney to bind a client to in court action would impede the efficiency and finality of courtroom proceedings and permit stop and go disruption of the court’s calendar.”¹²² While this court’s approach is a way to protect settlement when the court is involved, and thus protects the judicial system and the general public policy in favor of settlement, the use of inherent power to do so is fraught with difficulty, not only because inherent power is not generally available to special agents, but also because of the lack of understanding and acceptance of the doctrine.¹²³

B. PRESUMPTIONS AND BURDENS OF PROOF

Sharing the *Koval* court’s concern about settlements involving courts, some courts have presumed that an attorney who settles in court or who states the existence of a settlement in court, has authority to settle.¹²⁴ These courts seem to treat such authority not as a shift of the burden of proof,¹²⁵ but rather as a true legal presumption that can be rebutted by the client, and lose strength as a result.¹²⁶ Whereas traditional agency principles require that the person claiming that authority exists bears the burden of proving the authority without the benefit

121. *Id.* at 1307.

122. *Id.* at 1306.

123. See discussion Section IV D. *supra*.

124. See, e.g., *Howard v. Boyce*, 118 S.E.2d 897, 903–04 (N.C. 1961) (recognizing that when a settlement has become a part of a court judgment, the judgment “is presumed to have been rightfully entered until the contrary is made to appear, and one who undertakes to assail such a judgment has the burden of making good his impeaching averments”) (quoting *Chavis v. Brown*, 93 S.E. 471, 472 (N.C. 1917)); *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 749 P.2d 90, 92 (N.M. 1988) (stating that “it is presumed that an attorney of record who settles his client’s claim in open court has authority to do so unless rebutted by affirmative evidence to the contrary”); see also *Brewer v. National R.R. Passenger Corp.*, 649 N.E.2d 1331, 1334 (Ill. 1995) (observing that existence of express authority in open court is presumed absent affirmative evidence to contrary); *Sakun v. Taffer*, 643 N.E.2d 1271, 1278 (Ill. Ct. App. 1994) (finding that attorney had apparent authority to settle case where clients acknowledged attorney’s authority to enter settlement negotiations, negotiations were conducted for almost one year during which attorney had authority to negotiate, defendants received communications and copies of proposed settlement agreements, and trial court was continually apprised of pendency of settlement negotiations); *Knisley v. City of Jacksonville*, 497 N.E.2d 883, 886 (Ill. Ct. App. 1986) (acknowledging presumption of attorney authority to settle in open court absent rebuttable evidence); *Szymkowski v. Szymkowski*, 432 N.E.2d 1209, 1211 (Ill. Ct. App. 1982) (noting that while an attorney’s authority to settle “must be expressly conferred,” the authority to settle in open court is a presumption that may be rebuttable).

125. See, e.g., *Brewer*, 649 N.E.2d at 1334. But see *Snyder v. Tompkins*, 579 P.2d 994, 998 (Wash. App. 1978) (noting public policy favoring settlements, court agreed with “the principle that a person attempting to dislocate an in-court settlement of a claim has the burden of showing that the agreement was a product of fraud or overreaching”).

126. A presumption requires the opposing party to rebut or meet the presumption with contrary evidence. See FED. R. EVID. 301. The presumption does not shift the burden of proof entirely. *Id.* Once the presumption is rebutted, the party with the original burden of proof must go forward with evidence. *Id.*

of a presumption,¹²⁷ these courts presume that attorney agents have the authority to settle in court settings absent evidence that rebuts the presumption.¹²⁸

Some courts presume attorney authority in all settlement contexts, not simply when the court is intimately involved.¹²⁹ Some of these courts apply a formal legal presumption.¹³⁰ Others, including federal courts, may use the presumption of authority to shift the burden entirely onto the client to disprove authority,¹³¹ often referring to the public policy favoring settlement.¹³² For example, in *In re Artha Management*,¹³³ the Second Circuit rationalized the presumption and the shifted burden of proof, stating that "because of the unique nature of the attorney-client relationship, and consistent with the public policy favoring

127. See *supra* note 88 and accompanying text (discussing agency principles and burdens of proof).

128. See *supra* note 124 (discussing cases).

129. See, e.g., *Shields v. Keystone Cogeneration Sys., Inc.*, 620 A.2d 1331, 1335 (Del. Super. 1992) (stating that "[a]n agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement," where parties sought approval of stipulation of settlement, settlement reached out of court, and court notified by telephone call); see also *In re Artha Management, Inc. v. Sonia Holdings, Ltd.*, 91 F.3d 326, 329 (2d Cir. 1996) (stating that actual authority may be inferred from words or conduct that attorney reasonably knows indicates to client that attorney will perform an act); *Dillon v. City of Davenport*, 366 N.W.2d 918, 923-24 (Iowa 1985) (finding that attorney may bind municipality to same extent he or she may bind client, where settlement negotiations were held in closed city council meeting).

Maryland courts have considered a presumption but have refused to apply it. See *Mitchell Properties, Inc. v. Real Estate Title Co., Inc.*, 490 A.2d 271, 276 (Md. Ct. App. 1985) (declining to extend to settlement prima facie presumption in Maryland that attorney has authority to bind client by litigation-related conduct); *Kinkaid v. Cessna*, 430 A.2d 88, 90 (Md. Ct. App. 1981) (same). Similarly, Missouri courts do not apply the presumption. See *Barton v. Smellson*, 735 S.W.2d 160, 163 (Mo. Ct. App. 1987) (criticizing the presumption as inconsistent with agency law); *Rosenblum v. Jacks or Better of America West Inc.*, 745 S.W.2d 754, 760 (Mo. Ct. App. 1988) (stating that the presumption is a "mutation of the general principles of agency").

130. See, e.g., *Dillon*, 366 N.W.2d at 923-24 (stating that "[w]hile an attorney is presumed to act with authority, this presumption is not conclusive and may be rebutted"); *Howell v. Reimann*, 288 P.2d 649, 651 (Idaho 1955), (finding authority of attorney was rebuttable presumption); *Muncey v. Children Home Finding and Aid Soc'y of Lewiston*, 369 P.2d 586, 589 (Idaho 1962) (stating that "[w]hile it is recognized that generally an attorney is presumed to be duly authorized to act for a client, when a question of his authority is raised . . . his actual authority must be established").

131. See, e.g., *In re Artha Management, Inc.*, 91 F.3d 326, 329 (2d Cir. 1996) (placing burden on client to prove attorney did not have authority to settle case); *Greater Kansas City Laborers Pension Fund v. Paramount Indus., Inc.*, 829 F.2d 644, 646 (8th Cir. 1989) (stating that where it is shown that attorney entered into agreement to settle case, party denying attorney's authority to settle has burden of proving such authorization was not given); *Mid South Towing v. Har-Win, Inc.*, 733 F.2d 386, 392 (5th Cir. 1984) (stating that "[o]ne who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity . . .") (quoting *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948)).

132. See, e.g., *Hanover Ins. Co. v. Travellers Indem. Co.*, 239 F.2d 37, 40 (D. Conn. 1965) ("All parties to an action, their counsel, and the court are entitled to assume defense counsel possess full authority to settle all issues in any given lawsuit, unless there is an express disclosure of limited authority. If it were to be otherwise, in every case involving an insurer nothing less than a pro se appearance by the insurer as well as an appearance by their counsel would suffice."). See also *United States v. International Bhd. of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993) (stating that "'actual authority may be inferred from words or conduct which the principal has reason to know indicates to the agent that he is to do the act.'" (quoting *Edwards v. Born, Inc.*, 792 F.2d 387, 391 (3d Cir. 1986)).

133. 91 F.3d 326 (2d Cir. 1996).

settlements, we presume that an attorney-of-record who enters into a settlement agreement, . . . had authority to do so.”¹³⁴

Other courts are not so clear as to whether the effect of the presumption is to shift the burden of proof entirely, though they are clear on the presumption of authority. In *Aiken v. National Fire Safety Counsellors*,¹³⁵ the court explained that the presumption was the law of Delaware, and that “[s]uch a rule of law is a compromise between the practical necessity of according substantial weight to representations made by members of the Bar and the agency rule that attorneys have no implied or apparent power to compromise an action solely by virtue of their employment.”¹³⁶ In *Southwestern Bell Yellow Pages, Inc. v. Dye*,¹³⁷ the court recognized that “in cases where an attorney represents that he or she has authority from the client to accept a settlement offer, and did reach an agreement with the other party’s counsel to settle, Missouri courts have placed a substantial burden on the client to disprove his own attorney’s authority if the client wishes to avoid the settlement.”¹³⁸ And in *In re Condemnation of Lands, Easements and Rights of Way*,¹³⁹ the court explained the use of the presumption aptly as follows:

This presumption is fundamental to the effective functioning of our adversary system which is grounded, in part, upon two interrelated understandings: (1) that attorneys speak for their clients, both to the court and to opposing counsel, and (2) that attorney-client communications are privileged. Being able to rely upon counsels’ representations of their clients’ positions serves the salutary purpose of avoiding intrusion into the attorney-client relationship. Of course, there will be occasional situations where an attorney, by mistake or otherwise, will misrepresent a client’s position. This can easily be determined and addressed by a fact-finding exercise, once the client has come forward to deny the attorney’s representations. Otherwise, no inquiry into the conversations or understandings between clients and their counsel is warranted. Clearly, any diminution of the presumption that the attorney speaks for the client would have a tendency to prompt such intrusion as a matter of course to “verify” uncontroverted statements before they are relied upon.¹⁴⁰

Use of any version of a presumption is a recognition that, in the context of settlement agreements, the traditional agency rule would require the third party with whom the attorney is dealing to prove the existence of authority, and that party may be far removed from the proof of actual authority. Use of the presumption is also recognition of the special status, ethical and fiduciary, of an

134. *Id.* at 329.

135. 127 A.2d 473 (Del. Ch. 1956).

136. *Id.* at 475–76.

137. 875 S.W.2d 557 (Mo. Ct. App. 1994).

138. *Id.* at 561.

139. 699 A.2d 1331 (Pa. Commw. Ct. 1997).

140. *Id.* at 1334.

attorney. The presumption, of course, also honors the public policy in favor of settlements and the finality of the judicial process.

C. RETENTION-BASED AUTHORITY

Regardless of their stance on the presumption issue, most courts maintain that retention of the attorney alone does not bestow actual or apparent authority on the attorney to settle.¹⁴¹ In contrast, courts of several jurisdictions are willing to find authority where the client retains the attorney and the attorney appears as counsel of record.¹⁴²

Georgia courts have repeatedly held that an attorney of record has apparent authority to settle a client's litigation unless a client has limited that authority and communicated the limitation to the third party with whom the attorney is dealing.¹⁴³ The Supreme Court of Georgia stated this position as the law of Georgia:

Under Georgia law an attorney of record has apparent authority to enter into an agreement on behalf of his client and the agreement is enforceable against the client by other settling parties. . . . This authority is determined by the contract between the attorney and the client and by instructions given the attorney by the

141. See, e.g., *In re Artha Management, Inc.*, 91 F.3d at 329 (stating that "a client does not automatically bestow the authority to settle a case on retained counsel"); *Cross v. District Court In and For First Judicial Dist.*, 643 P.2d 39, 41 (Colo. 1982) (recognizing that attorney has no implied authority, merely because of his general retainer, to settle client's claim); *Liquori v. Giordano*, 603 A.2d 782, 783 (Conn. Super. Ct. 1991) (discussing case law from other states holding that attorney's power to settle client's case does not derive from a "bare general retainer"); *Nehleber v. Anzalone*, 345 So. 2d 822, 823 (Fla. Dist. Ct. App. 1977) (applying rule of law that "mere employment of an attorney does not of itself give the attorney the implied or apparent authority to compromise his client's cause of action"); *Clark v. Burden*, 917 S.W.2d 574, 576 (Ky. 1996) (recognizing almost universal rule that, without more than authority arising from relationship with client, attorney has no implied power to settle client's case); *Lane v. Maine Cent. R.R.*, 572 A.2d 1084, 1084-85 (Me. 1990) (restating principle that attorney with no more authority than that arising from employment in that capacity has no authority to settle client's case); *Midwest Fed. Savings Bank v. Dickinson Econo-Storage*, 450 N.W.2d 418, 421 (N.D. 1990) (discussing court's past holding that attorney employed to represent client in litigation does not have authority to compromise client's rights); *Garnett v. D'Alonzo*, 422 A.2d 1241, 1242 (Pa. Cmmw. Ct. 1980) (stating general rule that "ordinary employment of an attorney to represent a client with respect to litigation does not of itself give the attorney the implied or apparent authority" to bind client to settlement); *Johnson v. Tesky*, 643 P.2d 1344, 1347 (Or. Ct. App. 1982) (discussing weight of authority indicating that employment of attorney does not itself create apparent authority to settle); *Cohen v. Goldman*, 132 A.2d 414, 416 (R.I. 1957) (agreeing with cases that hold that mere engagement of attorney does not "ipso facto imply authority to compromise his client's case"); *Federal Land Bank of Omaha v. Sullivan*, 430 N.W.2d 700, 701 (S.D. 1988) (discussing general rule that attorney with authority arising only from employment has no authority to settle client's claim); *Humphreys v. Chrysler Motors Corp.*, 399 S.E.2d 60, 62 (W. Va. 1990) (discussing earlier holding that attorney "clothed with no other authority than that arising from his employment as attorney" has no authority to settle client's claim).

142. See, e.g., *Nelson v. Consumers Power Co.*, 497 N.W.2d 205, 208 (Mich. Ct. App. 1993) (holding that "when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter").

143. *Pembroke State Bank*, 471 S.E.2d 187 (Ga. 1996); *Tranakos v. Miller*, 470 S.E.2d 440 (Ga. App. 1996); *Ballard v. Williams*, 476 S.E.2d 783 (Ga. App. 1996); *Green v. Lanford*, 474 S.E.2d 681 (Ga. App. 1996).

client, and in the absence of express restrictions the authority may be considered plenary by the court and opposing parties. . . . The authority may be considered plenary unless it is limited by the client and that limitation is communicated to opposing parties. . . . Therefore, from the perspective of the opposing party, in the absence of knowledge of express restrictions on an attorney's authority, the opposing party may deal with the attorney as if with the client, and the client will be bound by the acts of his attorney within the scope of his apparent authority.¹⁴⁴

This rule applies to oral settlement agreements as well as to agreements for which there is written evidence.¹⁴⁵

Georgia courts have applied this rule even in cases where the authority issue is not simply a matter of good faith and negligent misunderstandings between attorney and client, but also in cases in which the attorney is an affirmative wrongdoer in that the attorney forges the client's signature on settlement documents and checks.¹⁴⁶ The position of the courts in these cases is that if the client selected the attorney, then the client should bear the burden of the attorney agent's misfeasance.¹⁴⁷ The third party is an innocent who the courts must protect, assuming he or she has no reason to know of the true nature of the attorney's actions.¹⁴⁸ The courts recognize that the client of the settling attorney may be seriously harmed by this approach and point out that the client's appropriate recourse is against the client's attorney.¹⁴⁹

Georgia courts, in applying this approach, are simply applying traditional

144. *Brumbelow v. Northern Propane Gas Company*, 308 S.E.2d 544, 546 (Ga. 1983). The Georgia Supreme Court reaffirmed *Brumbelow* as the law of the state in *Pembroke State Bank*. Several Georgia courts have criticized the *Brumbelow* approach, mainly on the basis that a third party has no right to expect a settlement to be binding without a client's approval, and thus reliance on an attorney's approval is unreasonable. *See, e.g., Lord v. Money Masters, Inc.*, 435 S.E.2d 247 (Ga. App. 1994), which states:

It puts the burden on the client to prove his attorney breached his trust and sacrifices the delicate relation of trust between client and lawyer, merely to give the opponent a bonus in the form of a settlement he had no right to expect in the first place. . . . Attorneys should expect that an agreement to settle depends on the client's approval, and offers and acceptances are generally made on that basis.

Id. at 249.

145. Georgia requires written evidence of the agreement if there is a dispute regarding whether the attorney entered into the agreement but not if the only dispute is whether the attorney had authority to enter into the settlement agreement. *See Tranakos*, 470 S.E.2d at 444 (finding that oral settlement agreements are enforceable; if the existence of the agreement is in dispute, written evidence is necessary); *Ballard*, 476 S.E.2d at 785 (stating that written evidence necessary if there is a dispute as to terms).

146. *See Dickey v. Harden*, 414 S.E.2d 924 (Ga. Ct. App. 1992) (holding client bound in attorney forgery case); *Hynko v. Hilton*, 401 S.E.2d 324 (Ga. Ct. App. 1991) (holding client bound in attorney forgery case).

147. *Supra* note 146.

148. *See Dickey*, 414 S.E.2d at 924 (holding client bound in attorney forgery case); *Hynko*, 401 S.E.2d at 324 (holding client bound in attorney forgery case).

149. *See, e.g., Green v. Lanford*, 474 S.E.2d 681, 682 (Ga. Ct. App. 1996) (holding client bound by attorney's settlement of case, and client's remedy is against attorney if attorney overstepped authority). But see *Vandiver v. McFarland*, 346 S.E.2d 854, 855 (Ga. Ct. App. 1986) (discussing remedy of pursuing attorney as "an empty one").

agency theory. Regardless of actual authority of the attorney to settle the client principal's matter, the acts of the agent bind the principal if the principal manifests to a third party that the attorney has authority to settle. Georgia courts are willing to hold that a client, by retaining an attorney and allowing that attorney appear as the attorney of record, has manifested to a reasonable third party that the attorney has authority to settle. Thus, though not possessing express or implied — that is, actual — authority, the attorney has apparent authority based on the retention and appearance as attorney of record.

Similarly, in *Nelson v. Consumers Power Company*,¹⁵⁰ the court stated that “the general rule in Michigan is that an attorney has no authority by virtue of his general retainer to settle a lawsuit on behalf of a client.”¹⁵¹ The court then indicated that such a statement referred only to actual authority:

Generally, when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter. . . . Thus, a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice.¹⁵²

150. 497 N.W.2d 205 (Mich. Ct. App. 1993).

151. *Id.* at 206.

152. *Id.* at 208–09 (quoting *Capital Dredge & Dock Corp. v. Detroit*, 800 F.2d 525, 530–31 (6th Cir. 1986)). Note that a settlement disputed by a party is enforceable in Michigan only if stated in court or in writing. *Mich. Civ. R.* 2.507(H). See also *Rhealt v. Lufthansa Germany Airlines*, 899 F. Supp. 325, 329 (E.D. Mich. 1995) (indicating more than retention was necessary for creation of apparent authority).

South Carolina courts hold that an attorney of record may settle on behalf of a client and the settlement binds the client absent fraud or mistake. *Crowley v. Harvey & Battey*, 488 S.E.2d 334, 334 (S.C. 1997); *Shelton v. Bressant*, 439 S.E.2d 833, 834 (S.C. 1993); *Arnold v. Yarborough*, 316 S.E.2d 416, 417 (S.C. Ct. App. 1984). In *Shelton v. Bressant*, the court stated:

When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney. In such cases, any remaining dispute is purely between the party and his attorney.

Shelton, 439 S.E.2d at 834 (quoting *Petty v. The Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988)). Though the South Carolina courts do not state clearly that the authority of the attorney is a matter of apparent authority as opposed to actual authority, the mention of action against the attorney seems to indicate that apparent authority binds the client since the client would have no action against the attorney under traditional agency law if actual authority had been bestowed.

New Hampshire also seems to take a very pro-settlement enforcement position. See *Manchester Housing Auth. v. Zyla*, 385 A.2d 225, 226–27 (N.H. 1978) (recognizing that the authority of attorneys regarding settlement is never questioned); *Bossi v. Bossi*, 551 A.2d 978, 980 (N.H. 1988) (stating that “‘authority of attorneys to make [settlement] agreements . . . is essential to the orderly and convenient dispatch of business, and necessary for the protection of the rights of parties’ ”) (quoting *Beliveau v. Amoskeag Co.*, 40 A.2d 734, 734 (N.H. 1894)). A recent federal court has characterized New Hampshire's treatment as “one of the most liberal in the country.” *Clark v. Mitchell*, 937 F. Supp. 110, 114 (D.N.H. 1996). The Clark court stated that “[a]n

The retention-based approach does not conflict with the ethical standard that settlement is a client's decision. The approach simply recognizes that the client can authorize the agent attorney to settle, and goes so far as to accept that it is reasonable for a third party to assume that, absent contrary indication, the client has authorized the attorney of record retained by the client to settle on the client's behalf. The courts do not say that retention and appearance create authority to settle, but they do hold that those facts create the appearance of authority. Perhaps this approach is in accord with the idea that attorneys are honest and trustworthy and also in accord with the experience of the courts as to how settlements commonly occur.

D. OTHER FORMS OF APPARENT AUTHORITY

Some courts stop short of finding that a client's retention of an attorney creates apparent authority to settle, yet recognize, consistent with traditional apparent authority doctrine, that apparent authority is possible in this context if a client's reasonably interpreted manifestations are sufficient. In contrast to the relatively light client manifestation requirement of Georgia courts and similar jurisdictions is *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*,¹⁵³ in which the New Mexico Supreme Court found apparent authority by applying a more rigorous approach.¹⁵⁴ The Court stated that the public policy in favor of enforcement of settlements "compel[led] [the Court] to enforce in-court settlement agreements entered into by attorneys clothed with apparent authority to settle the case."¹⁵⁵ Because the client principal clearly stated approval of the settlement in open court and allowed the attorney to negotiate the settlement with no objection, the client had manifested apparent authority.¹⁵⁶ Obviously, the involvement of the judicial system in the settlement process and the client's own actions were vital to the Court's finding of apparent authority.¹⁵⁷

In *Rosenblum v. Jacks or Better of America West Inc.*,¹⁵⁸ the involvement of the judicial system was less significant. There the court reviewed a situation presenting the question of the attorney's authority to rescind the settlement, not the attorney's authority to bind the client to a settlement.¹⁵⁹ Attorneys for the parties conducted the settlement negotiations with no conversation between the

attorney's testimony regarding his or her authority, if believed, is sufficient to support a finding of authority to bind — even in the face of contrary client testimony." *Id.*

153. 749 P.2d 90 (N.M. 1988).

154. *Id.* at 92.

155. *Id.*

156. *Id.* at 92–93. *But see* *Chavez v. Primus Automotive Fin. Serv.*, 1997 WL 634090 (10th Cir. Oct. 15, 1997) (applying New Mexico law and finding no apparent authority on facts similar to *Navajo Tribe*).

157. The Supreme Court of Alabama also deemed those factors to be significant in establishing apparent authority. *See Jones v. Blanton*, 644 So. 2d 882, 884 (Ala. 1994) ("[B]ecause [the client] was present when the settlement agreement was announced in open court and failed to object to it [the lawyer] had apparent authority to settle the dispute with the contestants.").

158. 745 S.W.2d 754 (Mo. Ct. App. 1988).

159. *Id.* at 758.

parties.¹⁶⁰ Noting that neither attorney inquired of the other's authority, the court stated, "as befitting able and experienced counsel, each attorney proceeded on the assumption that his opposite number had whatever authority that was necessary to accept or reject a settlement."¹⁶¹ During the settlement discussions, the attorney whose authority was questioned rejected some offers summarily and, though he consulted with the client on the final offer, he negotiated other important matters "without any appearance of further consultation with or instructions from his client."¹⁶² The Court found that the record supported a finding that opposing counsel reasonably believed that the attorney "had full authority to negotiate a settlement, reject any proposal the attorney deemed unacceptable, and accept proposals on material issues as he saw fit."¹⁶³ Having found this reasonable belief, the court then established that it resulted from the client principal's manifestations of knowingly allowing her attorney to serve as "exclusive negotiator in the settlement process," and allowing him "to reject offers and accept major provisions of a settlement without any indication of consultation with her."¹⁶⁴

While many courts acknowledge that the apparent authority doctrine can apply to the attorney settlement context,¹⁶⁵ very few have followed the path of

160. *Id.* at 757.

161. *Id.* But see *Barton v. Snellson*, 735 S.W.2d 160, 163–64 (Mo. Ct. App. 1987) ("[N]o basis for a third person to reasonably believe an attorney has the final authority to settle a claim [existed] just because he negotiates with the third party. . . . No client perceives or understands this when he hires an attorney, nor should those who deal with the attorney reasonably believe the contrary.").

162. *Rosenblum v. Jacks or Better of America West Inc.*, 745 S.W.2d 754, 757 (Mo. Ct. App. 1988).

163. *Id.*

164. *Id.* at 763. A similar situation existed in *Kaiser Found. Health Plan of the Northwest v. Doe*, 903 P.2d 375 (Or. Ct. App. 1995), modified on other grounds, 908 P.2d 850 (Or. Ct. App. 1996). In *Kaiser*, the court found apparent authority present in a mediation scenario. *Id.* at 379–80. The client and the attorney were present at the mediation but had no contact with the opposing party or the opposing party's counsel. *Id.* at 377. After developing a settlement offer, the client's attorney told opposing counsel that he would call within a few hours with the client's answer. *Id.* The attorney then called back with concerns of the client and then finally accepted. See *id.* at 377–78. In finding apparent authority, the court stated:

[T]he record shows that from the time [opposing counsel] first contacted [client's attorney], and especially during mediation, [the client] permitted [client's attorney] to do all the negotiating regarding the case on her behalf, and in turn, he kept her apprised of his negotiations and made counteroffers on her behalf. The offer itself was conveyed to [the client] through [client's attorney], and [the client's] and [client's attorney's] conduct indicated that an acceptance or rejection would be conveyed to [the opposing party] through [client's attorney], which in fact happened. When [client's attorney] accepted the settlement, [the opposing party] had no reason to believe that he was not authorized to accept all of the terms. In sum, [the client's] conduct was reasonably interpreted by the [opposing party] as having given [client's attorney] authority to accept the entire offer.

Id. at 379–80. The manifestations of the client to the third party seem slight in this case. Importantly, the *Kaiser* court also found that the client had actually authorized the attorney to accept the settlement offer, *id.* at 380, which undoubtedly influenced the apparent authority discussion and holding.

165. See, e.g., *Warner v. Pony Express Courier Corp.*, 675 So. 2d 1317, 1320–21 (Ala. Civ. Ct. App. 1996) (concluding that authority must be express and special but also recognizing apparent authority as applicable); *Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 837 P.2d 750, 753 (Ariz. Ct. App. 1992) (applying

Rosenblum and Navajo Tribe and actually found an attorney to have apparent authority to settle. More typical is the treatment of the apparent authority doctrine *Auvil v. Grafton Homes, Inc.*¹⁶⁶ In *Auvil* the court reviewed a situation in which the attorney may have had actual authority to settle,¹⁶⁷ but the court focused on apparent authority because it was on that basis that the lower court had enforced the settlement.¹⁶⁸ Attorneys for both sides of the litigation met before a deposition and agreed to a settlement proposal to present to the clients.¹⁶⁹ The attorney whose authority was questioned then met with the clients and the clients left the office.¹⁷⁰ The attorney reported to opposing counsel waiting in the deposition room that the clients had agreed to settlement and a court reporter put the settlement terms on the record.¹⁷¹ After receiving the settlement papers, the clients directed the attorney to inquire regarding additional terms.¹⁷²

The Court of Appeals found that the clients had not done or said anything to the opposing counsel or the opposing party to lead those parties to conclude reasonably that the attorney agent had the authority to settle.¹⁷³ The court so concluded although the client clearly had retained the attorney and given the attorney authority to negotiate settlement.¹⁷⁴ In addition, the clients stated to opposing counsel that the client's attorney might propose a settlement.¹⁷⁵ Though the opposing counsel may have acted reasonably in concluding that the attorney had authority to settle, that belief did not result from the requisite manifestations of the client principal.¹⁷⁶

apparent authority but finding it lacking in the case before the court); *Walker v. Stephens*, 626 S.W.2d 200, 203-04 (Ark. Ct. App. 1981) (recognizing apparent authority as viable doctrine); *Sakun v. Taffer*, 643 N.E.2d at 1277-78 (finding apparent authority); *Amatuzzo v. Kosmiuk*, 703 A.2d 9, 12 (N.J. Super. Ct. 1997) (discussing prospect of apparent authority); *Hallock v. State*, 474 N.E.2d 1178, 1182 (N.Y. 1984) (finding apparent authority); *Parrillo v. Chalk*, 681 A.2d 916, 919 (R.I. 1996) (applying apparent authority); *Southwestern Bell Tel. Co. v. Vidrine*, 610 S.W.2d 803, 806 (Tex. Civ. App. 1980) (finding apparent authority possible but not present); see also *I.C.C. v. Holmes Transp., Inc.*, 983 F.2d 1122, 1129 (1st Cir. 1993) (applying Massachusetts law in discussing apparent authority); *Terrain v. Western*, 774 F.2d at 1322 (finding apparent authority applying Mississippi law).

In California, apparent authority is available despite the availability of a summary procedure for enforcement of settlements. See *Blanton v. Womancare Inc.*, 696 P.2d 645, 649 (Cal. 1985) (finding that, although agreement for judicial arbitration was available to client, question of apparent authority considered where client did nothing to consent to agreement beyond retention of authority). The summary procedure is available only if the parties sign outside the presence of the court or orally before the court. See Cal. Civ. Pro. Code § 664.6 (1999); *Levy v. Superior Court*, 896 P.2d 171, 878-79 (Cal. 1995) (finding that California code requires that written stipulation for settlement requires signature of litigant).

166. 92 F.3d 226 (4th Cir. 1996) (applying West Virginia law).

167. *Id.* at 230-31.

168. *Id.*

169. *Id.* at 228.

170. *Id.*

171. *Id.* at 222.

172. *Id.*

173. *Id.* at 230.

174. *Id.*

175. *Id.*

176. *Id.*

Likewise, in *New England Educational Training Service, Inc. v. Silver Street Partnership*,¹⁷⁷ the Vermont Supreme Court found that the plaintiff's attorney lacked apparent authority, stating, "the fatal flaw with the plaintiff's apparent authority argument is that there is absolutely no evidence . . . on the part of the principal which could reasonably have been relied on by plaintiff as a manifestation of the authority of its agent to conclude a binding settlement agreement."¹⁷⁸ The court so concluded despite the attorney's authority to negotiate settlement and the client's authorization of the attorney to make a settlement offer earlier for a lesser amount.¹⁷⁹ The court was unwilling to rely on the "atmosphere of offers being made by [defendant's] attorney."¹⁸⁰

To the extent that these cases, by failing to find apparent authority, suggest that opposing counsel must inquire as to the attorney's authority, significant problems arise. In *Johnson v. Tesky*,¹⁸¹ the Oregon Court of Appeals failed to find apparent authority, though the client had given the attorney authority to negotiate settlement.¹⁸² In finding "no evidence that plaintiff did or said anything that would reasonably convey the impression to defendant's attorney" that the attorney had authority to settle,¹⁸³ the court stated, "[t]he only effect this decision need have is to encourage attorneys negotiating settlements to confirm their or their opponents' actual extent of authority to bind their respective clients."¹⁸⁴ A similar statement was made in *Brewer v. National R.R. Passenger Corp.*,¹⁸⁵ in which Illinois Supreme Court found that "opposing counsel is put on notice to ascertain the attorney's authority. If opposing counsel fails to make inquiry or to demand proof of the attorney's authority, opposing counsel deals with the attorney at his or her peril."¹⁸⁶

177. 528 A.2d 1117 (Vt. 1987).

178. *Id.* at 1120-21.

179. *Id.* at 1121. *See also* Amatuzzo v. Kosmiuk, 703 A.2d 9, 12 (N.J. Super. Ct. 1997) (finding authority to negotiate settlement inadequate absent express authorization or voluntary action by client).

180. *New England Educ. Training Serv., Inc.*, 528 A.2d at 1121. Later, the Vermont Supreme Court in *Smith v. Osmun*, 676 A.2d 781 (Vt. 1996), stated that "the settlement is valid only if defendant was found to have granted express authority to settle on those terms." *Id.* at 784. One could conclude that the Court was narrowing the possible authority doctrines to recognition of only the express authority doctrine. However, the citation of *New England* without any statement that apparent and implied authority theories are no longer valid probably indicates that those theories are still valid in Vermont but that the *Smith* court, which ultimately found that the client bestowed express authority, did not need to delve further. *Id.* at 784.

181. 643 P.2d 1344 (Or. Ct. App. 1982).

182. *Id.* at 1347-48.

183. *Id.* at 1348.

184. *Id.* at 1347 n.2.

185. 649 N.E.2d 1331 (Ill. 1995).

186. *Id.* at 1334. *See also* Townsend v. Square, 643 So. 2d 787, 790 (La. Ct. App. 1994) (requiring client's clear and express consent for attorney authority to negotiate settlement; third parties "are presumed to be aware of these requirements of the law and assume the risk of their failure to determine that such requirements have been met").

In *Miotk v. Rudy*, 605 P.2d 587 (Kan. Ct. App. 1980), two attorneys negotiated a settlement and the defense counsel sent checks and a release to plaintiff's counsel. *Id.* at 588. Plaintiff's counsel eventually informed the

Yet, ethics rules prevent an attorney from contacting an opposing party represented by counsel.¹⁸⁷ Also, agency law gives no value to an attorney's statement of his own authority.¹⁸⁸ Perhaps because attorneys have significant fiduciary responsibilities¹⁸⁹ and because the rules of ethics for attorneys demand honesty and trustworthiness,¹⁹⁰ everyone should presume an attorney speaks honestly regarding the authority to settle. It is certainly odd to create an environment in which an attorney cannot trust another as a matter of law. As one attorney has stated that "My experience . . . is that, if a lawyer doesn't have authority to talk to you and to do what he agrees to do, he doesn't talk or he tells you he doesn't have such authority or else he doesn't make an agreement with you."¹⁹¹

E. AN ESTOPPEL OR DETRIMENTAL RELIANCE THEORY OF APPARENT AUTHORITY

The Kentucky Supreme Court has refused to apply traditional apparent authority principles.¹⁹² In *Clark*, the court concluded that in light of the rule that the attorney does not have "power" to settle a client's matter, "in ordinary circumstances, express client authority is required. Without such authority, no

court of the settlement and the court dismissed the case. *Id.* at 589. Plaintiff's counsel forged the plaintiff's signature on the checks, taking the money for himself. *Id.* Though opposing counsel argued that as a matter of public policy the dismissal should not be set aside, the court found no manifestations by the client other than retention of the wayward attorney, and that was insufficient to establish apparent authority. *Id.* at 591. The court stated, "Kansas law is in accord on the general agency principle that those who deal with an agent whose authority is limited to special purposes are bound at their peril to know the extent of his authority." *Id.* Thus, even the public policy in favor of settlement and the intimate involvement of the courts in rendering the dismissal order did not sway the decision.

187. Rule 4.2 of the *Model Rules* states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES Rule 4.2.

188. See *Brewer*, 649 N.E.2d at 1331. The client must create the impression of authority. See *supra* note 93 and accompanying text. In *Blanton v. Womancare Inc.*, 696 P.2d 645 (Cal. 1985), the California Supreme Court stated:

It is, of course, accepted practice within the legal profession, and one that is commendable, for attorneys to rely upon representations made by other attorneys with respect to the scope of their authority. As in the case of any other agency, however, apparent authority is created, and its scope defined, by the acts of the principal in placing the agent in such a position that he appears to have the authority which he claims or exercises. If authority is lacking, then nothing the agent does or says can serve to create it.

Id. at 651. The court then quoted several opinions of other courts that effectively found that the party dealing with opposing counsel must ascertain whether opposing counsel has authority to settle, and the party assumes the risk if counsel does not have that authority. *Id.* at 652.

189. See *supra* Part III.

190. The *Model Rules* state in pertinent part: "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation." MODEL RULES Rule 8.4(c).

191. *Southwestern Bell Tel. Co. v. Vidrine*, 610 S.W.2d 803, 806 (Tex. Civ. Ct. App. 1980).

192. *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996).

enforceable settlement agreement may come into existence.”¹⁹³ The court continued by noting that “[a]ctive participation [by the client] in the particulars of settlement may be deemed to create implied authority.”¹⁹⁴ Finally, the court observed that if “rights of third parties might be substantially and adversely affected by an attorney possessing apparent authority but who lacked actual authority, . . . a court of equity would be empowered to fix responsibility where it belonged to prevent injustice.”¹⁹⁵ The courts of Kentucky have recognized traditional apparent authority in other contexts.¹⁹⁶ Yet, in *Clark* the Court refused to apply the doctrine of apparent authority to settlement contract scenarios absent a substantial detrimental effect on the third party.¹⁹⁷

Similarly, in *Dixie Operating Co. v. Exxon Co.*,¹⁹⁸ a Florida appeals court stated that a settlement agreement is enforceable “only when it has been determined that the attorney was given ‘clear and unequivocal’ authority by the client to compromise the claim.”¹⁹⁹ Of course, the burden of proof is on the one claiming the authority exists,²⁰⁰ a party not generally present when a client might bestow “clear and unequivocal” authority on the attorney. In clarifying that express authority is required, the *Dixie* court noted that a good faith belief of authority on behalf of the attorney will not establish authority.²⁰¹ Thus, the court rejected the possibility of implied authority as that concept is known in agency law.²⁰²

The *Dixie* court then rejected the apparent authority doctrine for the attorney settlement context by a comparison with the authority doctrines available to a nonlawyer agent.²⁰³ The *Dixie* facts presented not only the issue of the authority of the attorney, but also the issue of whether a corporate employee had the

193. *Id.* at 576.

194. *Id.* at 576–77.

195. *Id.* at 577.

196. *See, e.g.*, *Mill St. Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. Ct. App. 1990) (finding apparent authority applied as basis for creation of employment relationship); *Williams v. St. Clair Med. Ctr.*, 657 S.W.2d 590, 595 (Ky. Ct. App. 1983) (same).

197. *Clark*, 917 S.W.2d at 576. *See also* *Federal Land Bank of Omaha v. Sullivan*, 430 N.W.2d 700, 701 (S.D. 1988) (discussing and rendering inapplicable form of apparent authority that resembles estoppel by requiring that third party part with value or incur liability in reliance on settlement agreement). Ultimately, the authority issue in *Sullivan* was decided on the basis of actual authority. *Id.* at 702.

198. 490 So. 2d 61, 63 (Fla. Ct. App. 1986).

199. *Id.* at 63. *See also* *Linardos v. Lilley*, 590 So. 2d 1064, 1064 (Fla. Ct. App. 1991) (holding settlement unenforceable due to lack of clear and unequivocal authority); *Weitzman v. Bergman*, 555 So. 2d 448, 449 (Fla. Ct. App. 1990) (holding settlement unenforceable where attorney had only conditional authority to settle); *Nehleber v. Anzalone*, 345 So. 2d 822, 823 (Fla. Ct. App. 1985) (stating that authority given attorney to settle cause of action must be “clear and unequivocal”).

200. *Weitzman*, 555 So. 2d at 449–50.

201. *Dixie Operating Co.*, 490 So. 2d at 63. *See also* *Vantage Broad. Co. v. WINT Radio Inc.*, 476 So. 2d 796, 798 (Fla. Ct. App. 1985) (stating that “unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.”)

202. *Dixie Operating Co.*, 490 So. 2d at 63.

203. *Id.* at 62–63.

authority to authorize the attorney to settle such that the settlement would bind the corporation.²⁰⁴ The court then noted that the apparent authority doctrine does not apply to the attorney settlement authority issue, stating:

The relationship between [the employee] and the corporate client is not the one governed by the “clear and unequivocal authority” rule. If [the employee] has the actual or apparent authority to bind the corporation, the issue is whether he communicated to the attorney clear and unequivocal authority to settle the case.²⁰⁵

The *Dixie* court then followed with a statement very similar to that in the Kentucky case of *Clark*: “Adherence to this rule does not preclude the application of principles of equity when a party has relied to its irreparable detriment on the representations of the opposing attorney.”²⁰⁶

This approach places the risk of an invalid settlement almost entirely on the innocent third party, regardless of the reasonableness of that third party, and regardless of the actions and words of a principal that would lead a reasonable third party to believe that the client’s attorney had authority to settle. Such a position protects the client’s control of settlement above all else. Interestingly, such a position also has the effect of freeing attorneys from adversarial claims of clients such as malpractice in all cases in which the third party cannot prove grievous injury. To the extent that the potential for attorney liability encourages care on the part of attorneys to follow carefully the client’s instructions, the Kentucky and Florida position provides little incentive for attorney care.

F. NO APPARENT AUTHORITY ALLOWED

The apparent authority doctrine does not apply at all in Wisconsin. In *Pokorny v. Stastny*,²⁰⁷ the Wisconsin Supreme Court stated that “Even assuming the defendant had established a compromise in fact, and apparent authority as a matter of law, it would be of no avail, since the defendant must establish that the plaintiff’s attorney had express authority to compromise his client’s claim.”²⁰⁸ This approach provides little protection to the reasonable third party but much protection to the client principal’s rights vis-a-vis the attorney.

204. *Id.*

205. *Id.* at 64. See *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1485–86 (11th Cir. 1994) (applying Florida law and finding that the party seeking to compel enforcement of settlement agreement had burden of proof and did prove “clear and unequivocal authority”).

206. *Dixie Operating Co. v. Exxon Co.*, 490 So. 2d 61, 63–64 (Fla. Ct. App. 1986); *Clark v. Burden*, 917 S.W.2d 574, 577 (Ky. 1996).

207. 186 N.W.2d 284 (Wis. 1971).

208. *Id.* at 290. See also *Adelmeyer v. Wisconsin Elec. Power Co.*, 400 N.W.2d 473, 475 (Wis. Ct. App. 1986) (applying Wisconsin statute requiring that, to be enforceable, agreement must be made in writing and subscribed by client or client’s attorney).

G. APPLICATION OF APPARENT AUTHORITY UNCLEAR

Unfortunately, courts may give conflicting messages regarding the applicability of apparent authority to the attorney settlement context. Yet, when a court not only requires that a client must have “specifically authorized” a settlement, but also applies the apparent authority doctrine,²⁰⁹ one can logically conclude that the court recognizes the apparent authority doctrine in the settlement context.

When different courts in a jurisdiction give conflicting messages, the availability of the apparent authority doctrine is a cloudier question. For example, in several Illinois cases, the courts have stated that an enforceable settlement requires a client’s “express” authority.²¹⁰ Yet, at least one other Illinois court has applied the apparent authority doctrine.²¹¹ The situation in Pennsylvania is confused as well. The Pennsylvania Supreme Court in *Rothman v. Fillette*,²¹² stated that “[t]he law in this jurisdiction is quite clear that an attorney must have express authority to settle a cause of action of the client.”²¹³ An earlier Pennsylvania opinion, *Sustrik v. Jones & Laughlin Steel Corporation*,²¹⁴ acknowledged that the general rule regarding settlement requires “prior specific authority” or ratification of authority to settle.²¹⁵ Yet, the court noted that an attorney, dealing with a third person “in accordance with his principal’s manifestations of consent although without special authority, may bind his principal or client.”²¹⁶ The *Sustrik* court relied upon this apparent authority notion in its holding.²¹⁷ In *Tiernan v. Devoe*,²¹⁸ the Third Circuit Court of Appeals attempted to determine the import of these cases and concluded that the Pennsylvania Supreme Court “might allow implied actual or apparent authority,”²¹⁹ although such authority was not present in the facts before the court in *Tiernan*.²²⁰

209. See, e.g., *Amatuzzo v. Kozmiuk*, 703 A.2d 9, 12 (N.J. Super. 1997) (discussing general rule that client consent to settle is necessary absent specific authority, and recognizing possibility of apparent authority); *Seacoast Realty Co. v. West Long Branch Borough*, 14 N.J. Tax 197, 202–03 (N.J. Tax 1994) (stating that “express” authority can be in form of actual or apparent authority).

210. *Brewer v. National R.R. Passenger Corp.*, 649 N.E.2d 1331, 1334 (Ill. 1995).

211. *Sakun v. Taffer*, 643 N.E.2d 1271, 1278 (Ill. Ct. App. 1994) (finding apparent authority where attorney had authority to negotiate and did for almost a year, and clients received updates regarding the negotiations).

212. 469 A.2d 543 (Pa. 1983).

213. *Id.* at 545. See also *Austin J. Richards, Inc. v. McClafferty*, 538 A.2d 11, 15 (Pa. Super. 1988) (requiring “special authority” for attorney to settle case); *Garnet v. D’Alonzo*, 422 A.2d 1241, 1242 (Pa. Cm.w. 1980) (holding “express authority” necessary to settle litigation). The *Rothman* court required that no authority be shown to enforce the settlement contract when the attorney had perpetrated a fraud on both the innocent client and innocent third party. The innocent client, said the court, must “bear the brunt of his counsel’s errant behavior.” *Rothman*, 469 A.2d at 544.

214. 149 A.2d 498 (Pa. Super. 1959).

215. *Id.* at 500.

216. *Id.*

217. *Id.* at 500–501 (reasoning that attorney consulted with client and returned to judge’s chambers to report settlement).

218. 923 F.2d 1024 (3d Cir. 1991).

219. *Id.* at 1035.

220. *Id.* at 1037–38. Other jurisdictions have conflicting signals as well. Compare *Grimes v. CIBA-GEIGY*

Some jurisdictions make no judicial mention of apparent authority in the settlement context, but only statements regarding special or express authority. Given the confusion surrounding these terms, it is not clear whether apparent authority is available. For example, in *Midwest Federal Savings Bank v. Dickinson Econo-Storage*,²²¹ the court stated that “express authority” and “special authority” were required.²²² However, the court seemed to distinguish those requisites of proof from the situation of allowing retention of the attorney to create the authority, and perhaps was not intending to eliminate apparent authority as a possibility.²²³

A few states have statutes that touch upon the settlement enforcement issue. Hawaii’s statute requires the attorney’s authority, not just the settlement agreement, to be in writing.²²⁴ Several Hawaii cases have toyed with the question of whether apparent authority is an implied exception to the statute but no court has decided the issue.²²⁵ Other states have statutes dealing with requirements for the

CORP., 684 So. 2d 1159, 1160 (La. Ct. App. 1996) (requiring “clear and express consent”) with *Townsend v. Square*, 643 So.2d 787, 790–791 (La. Ct. App. 1995) (requiring “clear and express consent” and rejecting apparent authority on grounds that no reasonable basis existed for third party to believe that attorney had authority to compromise without obtaining client’s acquiescence and approval); compare *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 39 (Va. 1995) (requiring “special authority or acquiescence”) with *Dawson v. Hotchkiss*, 169 S.E. 564, 567 (Va. 1933) (holding that attorney had neither actual nor apparent authority to bind clients); compare *Dillon v. City of Davenport*, 366 N.W.2d 918, 923–24 (Iowa 1985) (holding that “agency principles guide our determination of authority” and, applying actual authority, refusing to “discuss issues concerning apparent authority”) with *Strong v. Rothamel*, 523 N.W.2d 597 (Iowa Ct. App. 1994) (requiring special authority) and *Starlin v. State*, 450 N.W.2d 257, 258 (Iowa App. 1989) (holding “special authority” necessary for attorney to settle client’s claim).

221. 450 N.W.2d 418 (N.D. 1990).

222. *Id.* at 421–22. See also *Loraas v. Connolly*, 131 N.W.2d 581, 584 (N.D. 1964) (stating that “[o]rdinarily, in the absence of express authority, an attorney has no power to compromise his client’s claims”).

223. See also *Saxton v. Spletstoezer*, 557 P.2d 1126, 1127 (Alaska 1977) (holding that authority must be explicit); *Kimball v. First National Bank of Fairbanks*, 455 P.2d 894, 897 (Alaska 1969) (requiring special authority); *Cross v. District Court In and For First Judicial Dist.*, 643 P.2d 39, 41 (Colo. 1982) (ruling that attorney does not have authority without the knowledge and consent of the client; “special authority” or ratification necessary); *Griego v. Kokkeler*, 543 P.2d 729, 730 (Colo. Ct. App. 1975) (holding that “express authority” is necessary); *Aiken v. National Fire Safety Counsellors*, 127 A.2d 473, 475–76 (Del. Ch. 1956) (finding that retainer of the attorney failed to establish authority but that, rather, “special authority” was required for an attorney to bind a client); *Bronson v. Borst*, 404 A.2d 960, 962 (D.C. 1979) (requiring “specific and explicit authority”); *Cameron Sales, Inc. v. Klemish*, 463 P.2d 287, 291 (Idaho 1970) (discussing actual authority but not addressing apparent authority); *Garrison v. Daytonian Hotel*, 663 N.E.2d 1316, 1318 (Ohio App. 1995) (holding that “[a]bsent specific authorization, an attorney has no implied or apparent authority to compromise and settle his client’s claims”); *National Valve & Mfg. Co. v. Wright*, 240 P.2d 766, 768 (Okla. 1955) (requiring specific authority); *Absar v. Jones*, 833 S.W.2d 86, 89 (Tenn. Ct. App. 1992) (holding, in attorney forgery case, that attorney “cannot surrender substantial rights of a client . . . without the express authority of the client”); *State v. Musselman*, 667 P.2d 1061, 1067 (Utah 1983) (requiring “express authority”); *Graves v. P.J. Taggares Co.*, 616 P.2d 1223, 1227 (Wash. 1980) (requiring “special authority”).

224. HAWAII REV. STAT. ANN. 605–7 (1997).

225. See *Cook v. Surety Life Ins. Co.*, 903 P.2d 708, 715 (Hawaii Ct. App. 1995) (holding that even if apparent authority possible, it is not present); *Nelson v. Boone*, 890 P.2d 313, 319–21 (Hawaii 1995) (raising issue of apparent authority, but not deciding it).

settlement agreement itself.²²⁶ Courts often disagree as to whether such statutes create an automatic enforcement mechanism requiring no authority inquiry or whether authority must be proved as well.²²⁷

VI. THE CANADIAN, ENGLISH, AND AUSTRALIAN EXPERIENCE

Interestingly, the courts of Canada, England, and Australia take a different approach from the majority of United States courts by holding that retention of an attorney creates actual or apparent authority. Canadian courts have long begun their analysis of attorney authority with the rule that hiring a lawyer to handle a litigation matter bestows on the attorney actual or apparent authority to settle the matter.²²⁸ Those courts have decided some cases on the basis that retention of the attorney created actual authority. In *Sign-O-Lite v. Bugeja*,²²⁹ an Ontario court stated, "A solicitor as between herself and her client, has implied authority to settle a lawsuit without reference to the client for instructions."²³⁰

Other courts have applied traditional apparent authority, recognizing that unless the third party to the settlement agreement knew or had reason to know of a limitation on the attorney's authority, apparent authority would bind the client to the settlement, regardless of the existence of actual authority.²³¹ Canada shares the general proposition accepted in the United States that the settlement decision

226. See, e.g., MINN. STAT. ANN. 481.08 (1997) (providing that "an attorney may bind a client, at any stage of an action or proceeding, by agreement . . . made in writing and signed by such attorney"); IDAHO CODE 3-202 (1997) (providing that agreement must be registered with clerk or made part of minutes of court); ARIZ. R. CIV. PRO. 80(d) (1997) (providing that "[n]o agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes").

227. In Minnesota, two courts of appeal have so disagreed. In *Austin Farm Ctr., Inc. v. Austin Grain Co.*, 418 N.W.2d 181 (Minn. Ct. App. 1988), the court determined that Minnesota Statute 481.08 allowed for automatic enforcement without actual or apparent proof of authority, even where an agreement is not in writing. *Id.* at 184. In *Triple B & G, Inc. v. City of Fairmount*, 494 N.W.2d 49 (Minn. Ct. App. 1992), the court interpreted the statute to require proof of authority. *Id.* at 52.

228. See, e.g., *In re Rose*, [1943] 4 D.L.R. 122, 128 (stating that it is clear that counsel has "general authority to compromise an action on behalf of his client"); *Besenski v. Besenski* [1982] 21 Sask. R. 54, 59 (restating the principle that a client, "having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained, . . . the solicitor is the client's authorized agent. . ."); see generally Linda Vincent, *Compromising Positions-The Unauthorized Settlement of Lawsuits by Lawyers*, 15 MAN. L.J. 1, 1 (1985) (recognizing that "[a] lawyer who has been retained to conduct a matter of litigation has authority to compromise that action; indeed, this appears to be beyond controversy").

229. No. 302834/87, 1994 LEXIS 1047 (Ont. C.J. June 15, 1994).

230. *Id.* at *5.

231. See, e.g., *Vigneault v. Campeau-Fleury*, No. A-4699/93, 1995 LEXIS 1118, *4 (Ont. Ct. March 31, 1995) (stating that "[counsel] whose retainer is established in a particular action may bind his client by a compromise of those proceedings unless . . . the opposing side has knowledge of the limitation . . .") (citing *Scherer v. Paletta* [1966] 2 O.R. 524, 527 (Ont. C.A.)); *Sign-O-Lite*, 1994 Ont. C.J. LEXIS 1047, at *7 (same); *Marcel Equip. Ltd. v. Les Equipments Benoit D'Amours et Fils Inc.* [1995] No. 19012/94, 1995 LEXIS 757, *39 (Ont. Ct. March 15, 1995) (same); *Scherer v. Paletta* [1966] w. O.R. 524, 527 (Ont. C.A.) (same); *Belanger v. Southwestern Insulation Contractors, Ltd.* [1993] 16 O.R.3d 457, 466 (Ont. Ct.); *Nova Scotia v. Begg* [1986] 33 D.L.R.4th 239, 244-46 (N.S. S. Ct.); *Cambrian Ford Sales Ltd. v. Horner* [1989] 69 O.R.2d 431, 437 (Ont. High Ct. J.) (same).

ultimately rests with the client and the recognition of the client's power to restrict an attorney's settlement authority affirms the client's power to control the settlement decision.²³²

In taking the position that retention can be the basis for finding attorney authority, the courts of Canada are particularly cognizant of the collateral effects of a contrary position.²³³ After concluding that the attorney in *Belanger* had authority to settle the matter at issue,²³⁴ the Ontario court declined to exercise its discretion to refuse enforcement of the settlement, noting that such refusal would create an environment in which solicitors could not trust each other.²³⁵ The court noted that, "If litigants were not bound by settlements made by their lawyers acting within the scope of their actual or apparent authority the legal profession could not function as there could never be certainty that a settlement reached by their lawyers on their behalf was final and unimpeachable."²³⁶ And in *Pineo v. Pineo*, a Nova Scotia court stated that "from a practical point of view, litigants must be bound by the settlements made by their counsel acting within the scope of their apparent authority; otherwise, the legal profession could not function."²³⁷

Canadian courts also are respectful of the public policy in favor of settlement. As one Ontario court has stated:

It is the policy of the court and it is public policy to encourage the settlement of actions. Where solicitors have entered into settlement agreements on behalf of their clients, it would be contrary to both court and public policy to foster secondary litigation to overturn those settlements. This would create chaos in the settlement process.²³⁸

The courts of England and Australia follow the same path as Canadian courts.

232. As the court in *Marcel Equipment Ltd.* stated, "Clients who wish to restrict the authority of their solicitors may do so." 1995 LEXIS at *43. See also *Belanger*, 16 O.R. 3d at 466 (noting no evidence that client had instructed attorney not to accept offer of settlement and attorney had no other indication that she did not have client's authority to settle); *Begg*, 33 D.L.R.4th at 244-45 (finding that authority may be limited); *Scherer*, 57 D.L.R. 2d at 534-35 (stating that authority may be limited by agreement). For a discussion of the general ethics framework applicable in the Canadian provinces, see GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 240-260 (4th ed. 1995).

233. See *Belanger*, 16 O.R.3d at 470 (stating that the legal profession could not function if clients were not bound by settlements made by their attorneys, because of uncertainty that settlement reached on clients' behalf were final and unimpeachable); *Pineo v. Pineo* [1981] 45 N.S.R.2d 576, 583 (stating that "[f]rom a practical point of view, litigants must be bound the settlements made by their counsel acting within the scope of their apparent authority; otherwise, the legal profession could not function").

234. *Belanger*, 16 O.R.3d at 466.

235. *Id.* at 469-70.

236. *Id.*

237. *Pineo*, 45 N.S.R. 2d at 583.

238. *Marcel Equip. Ltd. v. Les Equipments Benoit D'Amours et Fils Inc.* No. 19012/94, 1995 LEXIS 757, *42 (Ont. Ct. March 15, 1995). In *Vigneault v. Campeau-Fleury*, No. A-4699/93, 1995 LEXIS 1118 (Ont. Ct. Mar. 31, 1995), the court stated that "[w]here the settlement agreed upon is fair, the discretion not to enforce an agreement will rarely be exercised, since it is the policy of the court to promote settlement." *Id.* at *4-5.

Some courts in these jurisdictions seem to accept the position that retention of a solicitor bestows actual authority to settle on the solicitor.²³⁹

Other courts apply the apparent authority doctrine in the manner outlined in *Scherer*. An Australian court in *Gaymark Inv. Pty Ltd. v. Tsangaris and Gera-kios*,²⁴⁰ stated that:

[I]t is clear law that a solicitor or counsel retained by a client to represent him in proceedings in the court has, as between himself and his opponent, ostensible authority to compromise the proceedings on behalf of his client, provided that the compromise does not involve matter collateral to the proceedings, and is not contrary to, or in excess of, some express limitation imposed on his authority by his client, and communicated to his opponent.²⁴¹

In evaluating the situation of a solicitor who settled a matter contrary to instructions of the client, though the attorney was unaware of the instructions, an English court discussed the history of attorney's authority to settle and stated:

So many compromises are made in court, or in counsel's chambers, the solicitor but not the client being present. This is inevitably so where a corporation is involved. It is highly undesirable that the court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record Of course it is incumbent on the solicitor to make certain that he is in fact authorised by his corporate or individual client to bind his client to a compromise. In a proper case he can agree without specific reference to his client. But in the great majority of cases, and certainly in all cases of magnitude, he will in practice take great care to consult his client, and I think that his client would be much aggrieved if in an important case involving large sums of money he relied

239. See, e.g., *Field Glen Pty Ltd. v. Condux Pty Ltd.*, No. BC9302055, 1993 LEXIS 7817, *32-33 (S. Ct. N.S.W. Feb. 19, 1993) (observing that "[o]rdinarily, a solicitor is authorised to compromise proceedings as and between himself and his client"); *Waugh v. H.B. Clifford & Sons Ltd.* [1982] 1 All E.R. 1095, 1104-1105 (C.A.) (Brightman, L.J.) (concluding that "[t]he law [is] well established that the solicitor or counsel retained in an action has an *implied* authority as between himself and his client to compromise the suit without reference to the client"). Long ago in *Prestwich v. Poley*, 144 Eng. Rep. 662 (C.P. 1865), an English court stated:

The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary, to compromise. The authorities seem to . . . establish clearly that the attorney has power to compromise the action in a fair and reasonable manner.

Id. at 666.

240. Slip Op. 1987 Darwin, Lexis para. 19.

241. *Id.* See also *Field Glen*, 1993 N.S.W. LEXIS 7817, at *33 (stating that solicitor has "ostensible authority vis-à-vis the client's opponent to compromise without proof of actual authority"); *Benson v. Benson*, 1 Fam. 692, 703 (1996) (finding that solicitors had "ostensible authority").

on his implied authority. But that does not affect his ostensible authority vis-a-vis the opposing litigant.²⁴²

The court then found that the solicitor had apparent authority and bound the client to the settlement.²⁴³ Once again the statement clearly recognizes the client's ultimate control of the settlement decision, consistent with the stance of the courts of the United States and Canada, by noting the client's ability to withhold authority.²⁴⁴

VII. THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS VIEW OF ACTUAL AND APPARENT AUTHORITY TO SETTLE

The Restatement (Third) of the Law Governing Lawyers applies traditional actual and apparent authority doctrines to settlement contract scenarios.²⁴⁵ As discussed earlier in this Article, the *Restatement* confirms an accepted notion of legal ethics — that the client has the right to decide and ultimately control settlement issues.²⁴⁶ Yet, the *Restatement* clearly recognizes that a client can delegate the authority to settle to an attorney.²⁴⁷ Section 38 of the *Restatement* provides the three situations in which an attorney can generally be found to be acting with actual authority: (1) if “the client has expressly or impliedly authorized the act”; (2) if the client ratifies the act; or (3) if the act is an act for which a lawyer generally has authority.²⁴⁸ While actual settlement authority may be expressly or impliedly bestowed or ratified, the *Restatement* does not include settlement authority in the possible situations in which a lawyer generally has authority.²⁴⁹ This position is consistent with that of the majority of United States

242. Waugh, 1 All E.R. at 1095.

243. *Id.* at 1107. See also *Harford v. Birmingham City Council*, 66 P.P. & C.R. 468, 473 (Lands Tribunal 1993) (recognizing that “[t]he underlying principle, that a solicitor has the ostensible authority to compromise proceedings so as to bind his client, is long established”).

244. For a discussion of the English system, see Ross Cranston, *Legal Ethics and Professional Responsibility*, in *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 1* (Cranston ed. 1995); Anthony Thorton, *The Professional Responsibility and Ethics of the English Bar*, in *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 53*; Alison Crawley & Christopher Bramall, *Professional Rules and Principles affecting Solicitors (Or What has Professional Regulation to do with Ethics?)*, in *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 99*.

245. *RESTATEMENT* §§ 32-41.

246. *Id.* § 33.

247. Section 33 of the *Restatement* states in part: “(1) As between client and lawyer, . . . the following and comparable decisions are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim. . . . (3) Regardless of any contrary agreement with a lawyer, a client may revoke a lawyer’s authority to make the decisions described in Subsection (1).” *Id.*

248. *Id.* § 38. See also *id.* § 34 cmt a and § 38 cmt. a (discussing clients bound by attorneys through attorneys’ dealings with third persons).

249. Section 34 of the *Restatement* sets forth the general authority situations:

As between client and lawyer, a lawyer retains authority that may not be overridden by an agreement with or an instruction from the client: (1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful; (2) to make decisions or take actions in the representation that the lawyer reasonably believes to be required by law or an order of a tribunal.

RESTATEMENT § 34.

courts that retaining an attorney does not bestow authority to settle upon the attorney.²⁵⁰ If a client otherwise bestows actual settlement authority on the attorney, the client is bound to the agreement with the third party if the client fails to revoke that authority.²⁵¹

The *Restatement* also addresses apparent authority.²⁵² Section thirty-nine describes the traditional agency doctrine as applied to attorneys:

A lawyer's act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's, not the lawyer's, manifestations of such authorization.²⁵³

In discussing the creation of apparent authority by the client, the *Restatement* commentary specifically provides that the client can create apparent authority by "acquiescing, to the outsider's knowledge, in conduct of the lawyer so as to indicate authority to take certain action."²⁵⁴ Clearly a client's manifestation may take the form of what is said and done, and what is not said or done.

Consistent with the majority of United States opinions, the *Restatement* takes the position that retention of the attorney without more is not a sufficient manifestation by the client to create the authority to settle.²⁵⁵ Retention combined with other client actions or statements, however, may rise to the level of cognizable apparent authority.²⁵⁶ The *Restatement* illustrates an instance in which apparent authority to settle is necessitated, where the court orders counsel to appear at a settlement conference with authority to settle or have someone present with authority to settle.²⁵⁷ The client is in court and hears the order, yet leaves without comment as the settlement conference begins.²⁵⁸

If apparent authority exists, the client is bound to the settlement agreement but

Section 32 of the *Restatement* specifies that, unless there are contrary instructions, an attorney "may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client, consulting with the client as required by sec. 31." *Id.* § 32. This actual authority statement does not apply, however, to settlement agreement authority. See *id.* at cmt. a (stating that section governs authority of lawyer as between client and lawyer, not with respect to third persons); § 33 (listing settlement of claim as one of several decisions reserved to client absent valid authorization to attorney); § 39 cmt. a (stating that broad authority conferred upon attorney by retainer does not exist for settlement).

250. See *id.* § 33 cmt. c (pointing out that client may confer settlement authority on attorney).

251. *Id.*; see also *id.* § 38.

252. *Id.* § 39.

253. *Id.* See also *id.* § 32, cmt. a (stating that "[a] lawyer who has acted with apparent authority . . . to settle a case binds the client as against third persons).

254. *Id.* § 39 cmt. c. "Acquiesce" is generally defined as "to give an implied consent to a transaction, to the accrual of a right, or to any act, by one's mere silence, or without express assent or acknowledgement." BLACK'S LAW DICTIONARY 22 (5th ed. 1979).

255. RESTATEMENT § 39 cmt. a.

256. See *id.* (noting that more than simple retention necessary to create apparent authority).

257. *Id.* § 39 cmt. d, illus. 4.

258. *Id.* at cmt. d, illus. 5.

has recourse against the attorney.²⁵⁹ The *Restatement* thus affirms that actual and apparent authority apply to the attorney-settlement context and even provides a guide to the kinds of conduct, other than retention of the attorney, which might be sufficient for the creation of apparent authority. The *Restatement* does not specifically address burdens of proof, but seems to adopt the traditional agency approach that the third party must establish actual or apparent authority of the attorney.²⁶⁰

VIII. SUGGESTIONS FOR IMPROVEMENT

A. APPLY TRADITIONAL AGENCY DOCTRINE

Courts must return to the basics and ground their opinions and law in sound contract and traditional agency theory. Because the notion of inherent agency power is not well understood or accepted in general, courts should not apply it to the already murky attorney-settlement context.²⁶¹ A settlement agreement is a contract and an attorney is an agent of the client principal.²⁶² No court has ever seriously disputed these truths. From this accepted starting point, courts should apply traditional actual and apparent authority doctrine as those doctrines have been defined and applied in other contexts.

As an initial matter, terminology must be clear. The phrase “express authority” should return to its traditional meaning as a form of actual authority.²⁶³ Courts must refrain from requiring “express authority” unless those courts truly intend to eliminate the traditional accepted doctrine of apparent authority. If a court uses the term “special authority,” the court should define the term.

A reaffirmation that the traditional doctrine of actual authority applies in the context of settlement contracts entered into by attorneys should accompany this clarification of terminology. Clients certainly ought to have the right to bestow authority to settle on their attorneys by express statements or by implication from actions just as those individuals may bestow authority to enter into other types of

259. *Id.* § 39 cmt. f, § 42.

260. *Id.* § 39 cmt. b. The comment reasons that “[p]ermitting disavowal would allow clients at their convenience to ratify or disavow their lawyer’s acts despite the client’s inconsistent manifestation of the lawyer’s authority. It would also impose on the third person the burden of proving a fact better known to the client.” *Id.*

261. See discussion *supra* Part IV. D.

262. See discussion *supra* Part IV. A.

263. “Express authority” means that “the principal has made it clear, in express and explicit language” that the authority exists. REUSCHLIEN & GREGORY, *supra* note 3, § 14C, at 37. It is a form of actual authority and is in contrast to another form of actual authority, “implied authority.” REUSCHLIEN & GREGORY, *supra* note 3, § 14B, at 37. “Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question and includes such incidental authority as is necessary, usual and proper as a means of effectuating the purpose of the employment” *Stevens v. Frost*, 32 A.2d 164, 168–69 (Me. 1943). See also discussion *supra* Section IV. B.

contracts. While a client might claim that he or she intended no bestowal of authority, if a client's actions would lead a reasonable attorney to believe that the client had bestowed authority, the client ought to be held to the reasonable interpretation of those actions. Such a reasonableness standard is fair to the client while also providing the same measure of protection for the reasonable attorney acting in good faith as the law provides to any other agent.

The traditional doctrine of apparent authority must be available as well within the context of a settlement contract entered into by an attorney. Courts of the United States have not hesitated to recognize the doctrine in other contractual settings. Although the client may not have actually authorized the attorney to enter into a settlement agreement, the third party must be allowed to enforce the agreement against the client if the third party reasonably interprets the client's manifestations as bestowing the authority to settle on the attorney. The wariness expressed by some courts²⁶⁴ is based on the desire to protect a client within the attorney-client relationship but the result ignores fairness to the third party. There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs. The third party who has reasonably interpreted the client's manifestations as an indication that the attorney has authority to settle is indeed the innocent, and deserves the protection of the apparent authority doctrine.

Any desire by courts to protect the client from the wrongdoing attorney cannot be furthered at the expense of the third party. The client has other, more appropriate protections. Not only can a wronged client sue his attorney for malpractice,²⁶⁵ but the client can pursue professional discipline for the attorney,²⁶⁶ an avenue of recourse unavailable in most other agency settings.

Any protectionist desire to shield the attorney from malpractice liability by eliminating or severely limiting the doctrine of apparent authority certainly cannot be furthered at the expense of the third party. Allowing availability of the

264. See discussion *supra* Sections V. E. and F.

265. See, e.g., *Patrick v. Ronald Williams*, 402 S.E.2d 452 (N.C. Ct. App. 1991) (involving malpractice action against attorney for wrongful settlement).

266. See, e.g., *In re Nugent*, 624 A.2d 291, 291 (R.I. 1993) (ordering attorney suspended for 60 days for settling personal injury action without authority); *Cincinnati Bar Ass'n v. Wilson*, 603 N.E.2d 985, 985 (Ohio 1992) (affirming public reprimand of attorney for settling suit without client authorization); *In re Estes*, 212 N.W.2d 903, 910 (Mich. 1973) (affirming 60-day suspension of attorney for unauthorized settlement); *In re Stern*, 406 A.2d 970, 972 (N.J. 1970) (ordering attorney disbarred for secretly accepting settlement despite client's refusal of offer). Although many attorneys have been suspended or disbarred from the practice of law in cases in which the attorney entered into an unauthorized settlement, these cases often involve further bad acts such as forgery and keeping settlement proceeds. See Debra T. Landis, Annotation, *Conduct of Attorney in Connection with Settlement of Client's Case as Ground for Disciplinary Action*, 92 A.L.R.3d 288 (1979) (discussing cases involving forgery, misappropriation of settlement funds, and other wrongful conduct).

apparent authority doctrine to third parties in the settlement agreement setting does not render settlement agreements distinct from other contracts, but rather treats them alike.

B. CLIENT CONDUCT SUPPORTING A FINDING OF AUTHORITY

To say that apparent authority ought to exist as a viable doctrine in the settlement setting is not to say that apparent authority exists in every settlement situation. A court's view of the importance of the various interests vis-a-vis each other affects the path that a court takes at this stage of the analysis. As this Article has pointed out, some courts, intent upon ensuring the finality of settlement agreements and encouraging settlements, might hold that relatively little action on the part of the principal can manifest actual authority to the attorney agent or apparent authority to the third party.²⁶⁷ Other courts might require significant action by the principal before recognizing authority of the attorney agent to settle.²⁶⁸ No one approach is inherently superior or logically necessary. Each approach is simply a balancing of interests.

1. Retention of Attorney Creates Authority

One possible approach is to recognize actual or at least apparent authority as the result of retention of the attorney. Though most United States courts have treated such a proposition as untenable,²⁶⁹ several states²⁷⁰ along with Canada, England, and Australia²⁷¹ apply this approach. There are many reasons why this approach is commendable. Ethics and legal precedent agree that within the attorney-client relationship, the decision to settle a matter belongs to the client because the decision affects the client's ultimate rights. This division of roles within the attorney-client relationship means that an attorney settling without authority has acted wrongly with regard to his client. Such a rule does not prevent courts from concluding that the act of retaining an attorney bestows upon that attorney the actual or at least apparent authority to settle absent contrary indications. The client may clarify upon retaining the attorney that the client is withholding the authority to settle. Further, because in any agency relationship a principal may always revoke authority,²⁷² the client maintains ultimate control of the attorney's authority to settle. Thus, the client is not impermissibly robbed of the important settlement decision right. That right remains at all times a right of the client.

267. See discussion *supra* Section V. C.

268. See discussion *supra* Section V. D.

269. See *supra* note 143 & cases cited therein.

270. See discussion *supra* Section V. C.

271. See discussion *supra* Section VI.

272. See AGENCY RESTATEMENT, *supra* note 3, § 118 ("Authority terminates if the principal or the agent manifests to the other dissent to its continuance."). The comment to sec. 118 notes that this applies even if the contract says otherwise.

If the act of retaining an attorney bestows actual authority, the client, by exercising ultimate control of the settlement decision, may limit the attorney's settlement authority. Without such limitation, the client manifests to the attorney the authority to settle through mere retention. Even if the client limits the attorney's authority, unless the party dealing with the agent knows or reasonably should know of the limitation, the client's retention of the attorney manifests to the third party that the attorney has authority to settle. Thus, the attorney also has apparent authority to settle with regard to the third party.

While the party claiming the existence of the authority must prove it, the burden is made lighter by the weight of the presumption created by retention. The client, in an attempt to undermine the evidentiary value of the retention, must produce evidence that the client limited the authority and that the third party knew or should have known of the limitation. The rule itself would determine the reasonableness of the opposing party's or opposing counsel's beliefs with regard to the authority of the client's attorney. Because attorneys usually deal with other attorneys on the settlement issue and because attorneys should know a jurisdiction's position regarding attorney authority, the opposing attorney could reasonably rely upon the client's retention of the attorney as manifesting in the attorney the authority to settle.

The effect of this approach is that a third party need not question the attorney regarding his or her settlement authority, thereby avoiding an environment of distrust and doubt in what is usually an already contentious situation. In fact, the approach is consistent not only with the ethical rules governing lawyers that forbid attorney dishonesty, but also with what attorneys actually do now. In practice, attorneys deal with other attorneys regarding settlement and usually do not question each other's authority. Finally, the approach supports public policy in favor of settlements. More settlements will be upheld if courts start from the premise that the hiring of attorneys creates settlement authority.

Placing authority in the hands of the attorney unless the client limits that authority means that the client must know that a limitation is necessary. Attorneys must explain this requirement to clients as part of the ethical duty to communicate with the client²⁷³ and follow client instruction. There may be cases in which the client has limited the attorney's authority but cannot prove adequately that the third party knew or should have known of the limitation. Courts that choose a retention-based approach must view as more compelling the interest in protecting the innocent third party. For example, in the case of a truly heinous attorney who settles a client's case, forges the client's signature on the settlement check, and absconds with the money, the client is an innocent victim. Yet, the third party is innocent as well, as he or she did not retain the attorney, thus putting the attorney in the position to commit the wrongful acts. The third party should not have to relitigate the matter and perhaps pay the settlement twice.

273. See MODEL RULES Rule 1.4.

2. Retention Plus Further Client Manifestations Can Create Authority

Even if one starts from the position that retention of an attorney gives the attorney authority to make procedural or tactical decisions but not actual or apparent settlement authority, there is no logical reason why further statements or conduct by the client cannot create actual or apparent authority such that the settlement agreement binds the client. To allow retention alone to establish authority is to honor public policy in favor of settlement and the interests of the innocent third party. To establish that retention alone can never constitute a grant of authority is to place more value in the interest of the client. But how heavy is that interest? How much in the way of client conduct is enough to create actual or apparent authority? The more a court requires, the more protection there is for the client. Courts set aside more settlements and more third parties have to litigate matters they once thought were settled.

As in other agent-principal contexts, if the client reasonably manifests such authorization to the attorney, the attorney so authorized has actual authority to bind the client to a settlement contract involving a third party. A document clearly stating the grant of authority ought to be sufficient.²⁷⁴ There may be cases in which something short of a clear writing would be a reasonable manifestation to the attorney. Many facts, including the prior relationship of the attorney and client, would inform the evaluation of whether such manifestation exists.

Courts can rely on traditional agency concepts of reasonableness to reach a general balance of interest. Through words or conduct beyond simple retention of an attorney, a client may manifest in the attorney authority which can be reasonably interpreted to bind the client to a settlement agreement. The same rationale for finding apparent authority in a non-settlement setting applies with equal validity to settlements. If the client manifests consent that the attorney act to bind the client to a settlement agreement, that client ought to be held responsible for such manifestations as long as the third party honestly and reasonably interpreted the manifestation of authority. After the basic reasonableness determination, courts can evaluate the interests peculiar to the context at issue to determine whether they dictate a modified result.

C. THE IMPORT OF THE ATTORNEY AS AGENT

In determining the existence of apparent authority, courts must consider the effect their position will have on settlement conduct. A typical settlement scenario has attorneys reaching agreement on the eve of trial. Often the attorneys reach an agreement by phone, and then one or both call the judge's clerk to notify the judge that the matter is settled and that no trial will be needed. Courts must

274. See *Shields v. Keystone Cogeneration Systems, Inc.*, 620 A.2d 1335, 1335 (Del. Super. 1992) (stating that signed authority is a good idea but not required). A Hawaii statute requires that authority to settle be in writing. HAWAII REV. STAT. ANN. 605-07 (1997).

consider the effect of a rule that might mean that attorneys can no longer trust opposing counsel, and that courts and attorneys can no longer rely on an attorney's word. The environment in which attorneys practice may be detrimentally affected and court efficiency may suffer.

Rules that create situations in which attorneys' statements cannot be relied upon seem especially suspect for two reasons. First, an attorney has significant fiduciary responsibilities to the client to protect the client's interest.²⁷⁵ Second, an attorney has ethical duties of honesty and trustworthiness to clients, courts, and others.²⁷⁶ These obligations should present attorney agents as more trustworthy than other agents not subject to such strictures.

D. THE VALUE OF THE PRESUMPTION OF AUTHORITY APPROACH

The presumption by federal and state courts of an attorney's authority to settle²⁷⁷ is an excellent way to distinguish the attorney as a unique type of agent, and to lend value and recognition to the obligations and environment under which an attorney operates. This Article has argued that courts should use traditional substantive agency doctrine, which demands that the principal's manifestations, not the attorney's, be the basis of a finding of apparent authority. Use of the presumption does not disturb this pillar of the apparent authority doctrine. Rather, the presumption is but a procedural device that tilts the scales in recognition of the trustworthy nature of the attorney agent, thereby heightening respect for attorneys and their actions.

CONCLUSION

The issue of the enforceability of settlement agreements entered into by an attorney on behalf of a client is the subject of much confusing judicial comment. A return to traditional agency concepts, as suggested by the new *Restatement (Third) of the Law Governing Lawyers*, can greatly improve the law in this area.

Within the framework of traditional agency doctrine of actual and apparent authority, courts can consider the appropriate balance of competing policies of protection of the client and the client's right to control settlement, protection of the third party, and the sanctity of contract, particularly the settlement contract. While not widely accepted in the United States, the position that retention of an attorney creates authority should be viewed as a logical and viable position not inconsistent with other rules of law or ethics. A court might select such a rule in balancing interests, or it might choose a rule requiring more than mere attorney

275. See discussion *supra* Part III.

276. See MODEL RULES Rules 1.4 (communication with client); 3.3 (candor toward courts); 4.1 (truthfulness to others); 8.4 (ethical violation to engage in conduct involving dishonesty).

277. See discussion *supra* Part V.B.

retention to support a finding of authority. In so doing, the courts must always be aware of the effect such decisions can have on actual settlements.

Finally, some courts have presumed the authority of attorneys to settle. Such a presumption appropriately acknowledges the role of an attorney as agent, subject to fiduciary and ethical duties of loyalty and honesty. All courts should consider applying such a presumption in recognition of the unique attorney agent.

