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Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship

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I. INTRODUCTION

In the 1962 decision of *Link v. Wabash Railroad Co.*,[1] the United States Supreme Court reviewed a district court's *sua sponte* dismissal of a diversity negligence action. Six years after the plaintiff filed the matter, the district court scheduled a pretrial conference and gave counsel two weeks notice of the scheduled conference. On the day of the conference, plaintiff's counsel called the court to say that he would be unable to attend the conference, giving the impolitic reason that he was busy preparing some documents for the state supreme court. The attorney did not attend the conference, and the district court dismissed the matter for failure to appear and prosecute the claim. In reviewing the district court dismissal, the Supreme Court stated the following:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."[2]

When discussing the attorney-client relationship, the legal community and society at large commonly refer to attorneys as "representing" clients. Such statements informally recognize the formal relationship lawyers and clients have as agents and principals. There

1. 370 U.S. 626 (1962).
2. *Id.* at 633–34 (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)).

is no disagreement on this basic premise.[3] In the usual and customary manner of legal reasoning, identifying lawyers as the agents of their client-principals invokes the established body of agency law that has developed from—and applies to—other agent-principal relationships. This body of law generally leads to the result reached by the Supreme Court in *Link*: that the client is responsible for the attorney's actions in the context of the representation.

Yet, some modern courts have not found the client responsible for the attorney's actions. These courts do not treat the attorney-client relationship as they do other agent-principal relationships. For example, courts often do not apply the standard agency concepts in addressing whether the client should be responsible for the attorney's tortious actions. Likewise, courts often do not apply standard agency doctrine, or they do so very conservatively, when the question is whether a settlement agreed to by the attorney binds the client. Finally, some courts seem to apply a modified agency doctrine to the question of whether an attorney has waived the attorney-client privilege. In each of these settings, courts disregard traditional agency principles, breaking the link between client and attorney and insulating the client from responsibility for the attorney's actions.

These contexts may not be the only ones in which agency principles are given cramped application when the agent and principal are an attorney and a client.[4] These examples are, however, significant because each setting involves important countervailing interests. The interest of an innocent third party is at issue in the tort scenario. In the settlement context, the interest of the innocent third party as well as the systemic interest in encouraging settlements are both at play. Further, in the attorney-client privilege setting, the systemic interest

3. *See, e.g.*, Wentland v. Wass, 25 Cal. Rptr. 3d 109, 117 (Cal. Ct. App. 2005) ("'The relationship of attorney and client is one of agent and principal.'" (quoting Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 131 Cal. Rptr. 2d 777, 788 (Cal. Ct. App. 2003))); Daniel v. Moore, 596 S.E.2d 465, 469 (N.C. Ct. App. 2004), *aff'd*, 606 S.E.2d 118 (N.C. 2004) ("'North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency.'" (quoting Johnson v. Amethyst Corp., 463 S.E.2d 397, 400 (N.C. Ct. App. 1995))); McBurney v. Roszkowski, 875 A.2d 428, 437 (R.I. 2005) ("'The relationship [between an attorney and client] is essentially one of principal and agent.'" (quoting State v. Cline, 405 A.2d 1192, 1199 (R.I. 1979))). *See also* discussion *infra* section II.A.

4. For example, courts may not be dealing with lawyers' procedural errors as traditional agency law would dictate. *See, e.g.*, Shea v. Donohoe Constr. Co., 795 F.2d 1071, 1078 (D.C. Cir. 1986) ("We look disfavorably upon dismissals as sanctions for attorney misconduct or delay unless the client himself has been made aware of the problem, usually through notice from the trial court." (emphasis omitted)). *See also* William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733, 737–39 (1988) (discussing the procedural error setting).

in favor of disclosure of relevant information is present. One would expect courts to protect these countervailing interests. Yet, courts repeatedly sacrifice these interests along with agency principles in order to reach a result that protects the client.

Courts' reluctance to apply agency doctrine in the traditional manner appears to be motivated by a desire either to limit—or to eliminate entirely—a client's responsibility for an attorney's actions. The minimization of client responsibility is not an unintended consequence. The courts seemingly seek to protect clients from their own lawyers' actions—even at the expense of innocent third parties and the judicial system. While courts may be acting with great intentions, such special treatment for clients is misguided. The attorney-client relationship needs no special rules that apply only to it. The client neither needs nor deserves special protection. The wronged client has the protection of both the attorney discipline system and a malpractice action. One must also recognize that clients in today's legal services market are often sophisticated users of legal services and in control not only of global decisions relating to the representation, but also of more instrumental or ministerial decisions. These clients should be held accountable for their agent's actions. There is no unfairness in doing so.

One must question the propriety of the balance struck by these courts in the situation of lawyer-agents and client-principals when the balance is different for other agent-principal situations. Agency law has developed so as to strike the proper balance between the interests of the principal, the interests of the agent, and the interests of third parties such as the judicial system or other individuals dealing with the agent. Protecting client interests by making the client less responsible for the attorney's actions no doubt protects the client's specific interest in the short run. In the long run, however, such a stance provides little incentive for client monitoring of attorney conduct and fewer consequences for substandard lawyer conduct. In addition, at least in the tort scenario, the court's current treatment of the lawyer-client relationship provides no encouragement for the client to urge the lawyer to pursue goals properly. In all settings, special rules protecting clients provide much room for mendacious and inappropriate client behavior. This protection of the client seems especially odd in light of the fact that attorneys are fiduciaries, and, unlike many other types of agents, are governed by a code of ethical conduct apart from the general duties of an agent.

In addition to the specific effects created by treating the attorney-client relationship differently from other agent-principal relationships, this special treatment creates great confusion in terms of the law that should apply to the attorney-client relationship in general. Attorneys are declared to be agents, and clients are declared to be

principals, but general agency principles may or may not apply to them. Additionally, the general law of agency becomes less clear as the cases involving attorneys are factored into the total body of agency law. Those doing the factoring may be unaware that a rule may be different for attorney-agents and client-principals than it would be for other agency relationships.

This Article begins with a discussion of the relevant agency law concepts. The Article then analyzes three situations to develop an understanding of how traditional agency doctrine might apply and to develop an understanding of how some courts diverge from traditional agency in specific situations. First, the Article examines the treatment of client liability for an attorney's tortious acts when those acts are closely related to the representation. Second, the treatment of client responsibility for settlements agreed to by the client's attorney will be explored. Third, the treatment of attorneys unilaterally waiving the client's attorney-client privilege will be evaluated. Finally, this Article concludes that special rules of agency for the attorney-client relationship adopted to protect the client are unnecessary, have significant negative consequences, and should be abandoned.

II. AGENCY CONCEPTS AS APPLIED TO ATTORNEYS

A. The Nature of Agency

Agency is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act."[5] Attorneys are agents.[6] The client retains the attorney to handle a matter and gives the attorney some degree of direction about the

5. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) [hereinafter "RESTATEMENT (THIRD)"].

6. "Legal representation saves the client's time and effort and enables legal work to be delegated to an expert. Lawyers therefore are recognized as agents for their clients in litigation and other legal matters." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (2000) [hereinafter "RLGL"]. *See also* RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a (1958) (attorneys are agents and independent contractors) [hereinafter "RESTATEMENT (SECOND)"]. *See generally* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 21 (3d ed. 2001) (attorneys are agents); James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 399–401 (2000) (historically agency law was the core of the lawyers' role); Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1037 (1998) (stating that lawyer-client relationships are agency relationships); Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301 (1998) (maintaining that "the lawyer-client relationship is a commonsensical illustration of agency"); Arnold I. Siegel, *Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes*, 69 NEB. L. REV. 473, 476 (1990) (stating that attorneys are agents); Paul R. Tremblay, *On*

matter. With regard to litigation, the client's instructions may be very general. For instance, the client may simply state that the attorney should seek to minimize the financial damage for the client. Alternatively, the client's instructions could be very specific, with the client directing the attorney on most, if not all, actions in the litigation. The engagement of the attorney, along with a client's instructions, creates the principal and agent relationship, assuming that the attorney agrees to act as the client's agent when requested to do so by the client.

Notably, the principal may terminate the agency even if the principal has agreed not to do so.[7] In the context of attorney and client, the courts always have valued the right of the client to end the relationship.[8] This right recognizes the sanctity of the attorney-client relationship in that the client can terminate the relationship whenever the client loses faith in the attorney. A client who loses faith in his or her attorney cannot have the trust and confidence in that attorney necessary for a properly working attorney-client relationship. Thus, the client cannot be forced to be represented by a particular attorney.[9]

B. Types of Agents

Historically, the category of agents has been divided into two subcategories on the basis of the type of control the principal has over the agent. If the principal has the right to control the physical attributes of the agent's actions, the agent has been viewed as a servant[10] agent

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Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH L. REV. 515, 515 (1987) (same).

7. *See* RESTATEMENT (THIRD), *supra* note 5, § 3.10(1); RLGL, *supra* note 6, § 31 cmt. b; *id.* at § 32(1). *See also* GREGORY, *supra* note 6, § 47, at 110 (stating that "authority as commonly conceived in an agency setting may always be revoked").
8. *See* Martin v. Camp, 114 N.E. 46 (N.Y. 1916) (holding that the client can terminate the attorney and reasoning that the rule was "calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential"). *See also* Joseph M. Perillo, *The Law of Lawyers' Contracts is Different,* 67 FORDHAM L. REV. 443, 458 (1998) (discussing the rule that gives the client the right to discharge the attorney for any reason).
9. *See* Garcia v. Teitler, 443 F.3d 202, 211 (2d Cir. 2006) ("Under New York law, an attorney may be dismissed by a client at any time with or without cause."); Avery v. Manitowoc County, 428 F. Supp. 2d 891, 895 (E.D. Wis. 2006) ("The rule is based on the idea that the client-lawyer relationship is not commercial in nature but one whose essential features are trust and confidence, such that a client should not be forced to rely on a lawyer if he no longer wishes to do so."); Kreizinger v. Schlesinger, 925 So. 2d 431, 433 (Fla. Dist. Ct. App. 2006) ("The lawyer-client relationship is an 'at will' contract because a client has a right to discharge a lawyer at any time, with or without cause."); Pellettieri, Rabstein & Altman v. Protopapas, 890 A.2d 1022, 1028 (N.J. Super. Ct. App. Div. 2006) ("[T]here is virtually no limitation on a client's ability to terminate the relationship.").
10. "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is

and the principal has been referred to as the master.[11] If the principal does not have the right to control the physical attributes of the agent's actions, the agent has been labeled as an independent contractor.[12] Not all independent contractors are agents, but if a party has been authorized to act for a principal, and if the principal does not have the ability to control the physical actions of the authorized party, the party is an independent contractor and also an agent of the principal. The *Restatement (Second) of Agency* (*"Restatement (Second)"*) states: "'[I]ndependent contractor' is a term which is antithetical to the word 'servant,' although not to the word 'agent.'"[13]

Attorneys generally have been viewed as independent contractor agents. Clients do not control the physical actions of attorneys, but they do authorize attorneys to act for them. Thus, attorneys are not servants, but agents. The *Restatement (Second)* specifically notes that attorneys are independent contractors and also agents.[14]

The *Restatement (Third) of Agency* (*"Restatement (Third)"*) no longer uses the terms "independent contractor," "servant," or "master." Rather, the *Restatement (Third)* uses the terms "employer" and "employee" for the anachronistic terms, "master" and "servant."[15] The *Restatement (Third)* also abandons the term "independent con-

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subject to the other's control or right to control." RESTATEMENT (SECOND), *supra* note 6, § 220(1).

11. *Id.* § 2 (defining master, servant, and independent contractor).

12. *See id.* § 14N ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."). *See also* DAN B. DOBBS, THE LAW OF TORTS § 336 (2001) (discussing tort liability of independent contractors); GREGORY, *supra* note 6, § 7, at 18–19 (discussing various classifications of agents).

13. RESTATEMENT (SECOND), *supra* note 6, § 14N cmt. a (1958). *See also* United States. v. Thomas, 377 F.3d 232, 238 (2d Cir. 2004) (financial advisor is independent contractor but this role would not preclude him from also being an agent); Wiggs v. City of Phoenix, 10 P.3d 625, 628 (Ariz. 2000) (independent contractors can be agents); Stoll v. Noel, 694 So. 2d 701, 703 (Fla. 1997) (physicians were independent contractors and also agents of the hospital); Bonk v. McPherson, 605 A.2d 74, 78 (Me. 1992) (independent contractors can be agents); Robles v. Consolidated Graphics, Inc., 965 S.W.2d 552, 558 (Tex. Ct. App. 1997) (even if the plaintiff was an independent contractor, he could also be and was an agent); RESTATEMENT (SECOND), *supra* note 6, § 2(3) (stating that the independent contractor "may or may not be an agent").

14. *See* RESTATEMENT (SECOND), *supra* note 6, § 14N cmt. a (1958) ("[A]ttorneys . . . are independent contractors since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, . . . they fall within the category of agents."). *See also* GREGORY, *supra* note 6, § 7, at 19 (Attorneys are independent contractors who are agents. Examples of independent contractors who are nonagents include building contractors, buyers, and sellers.); Cohen, *supra* note 6 (stating attorneys are agent independent contractors).

15. *See* RESTATEMENT (THIRD), *supra* note 5, Introduction.

tractor" because of the substantial confusion and lack of clarity surrounding its use.[16] The *Restatement (Third)* does not have a substitute term for "independent contractor," but it deals with these issues in terms of nonservant agents, servant agents, and individuals who are not agents at all.[17] Many courts, undoubtedly, will continue to use the older language.[18]

Agents have also been categorized according to the scope of their agency. "A general agent is authorized to conduct a series of transactions involving a continuity of service."[19] Most general agents are "managers, sales clerks and persons of that type."[20] A special agent is one "authorized to conduct a single transaction or a series of transactions not involving continuity of service."[21] While any particular attorney could be a special or general agent depending on the relationship with the client, typically courts have viewed attorneys as special agents.[22]

C. Actual and Apparent Authority

A principal is bound by the actions of the agent if the agent has actual or apparent authority to take the action.[23] Actual authority can be express or implied and requires that the principal, by words or conduct "reasonably believe[d]" by the agent, causes the agent to be-

16. *See id.* § 1.01 cmt. c. "[T]he common term 'independent contractor' is equivocal in meaning and confusing in usage because some of those labeled independent contractors are agents while others are nonagent service providers. The antonym of 'independent contractor' is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider." *Id.*

17. *See id.*

18. Because the terms "master," "servant," and "independent contractor" have been the accepted terms of art for decades, a discussion of applicable rules and court use of those rules must include the terms used by the courts. For clarification, however, and for easy understanding in light of the *Restatement (Third)*, this article refers to "master employer," "servant employee," and "independent contractor."

19. RESTATEMENT (SECOND), *supra* note 6, § 3(1).

20. *Id.* § 3 cmt. c.

21. *Id.* § 3(2). *See* Costco Wholesale Corp. v. World Wide Licensing Corp., 898 P.2d 347, 352 (Wash. Ct. App. 1995) (citing the *Restatement (Second)*). *See generally* GREGORY, *supra* note 6, § 7, at 18–19 (discussing the special and general distinction).

22. *See, e.g.*, Firemen's Ins. Co. of Newark v. Pugh, 686 So. 2d 281, 283 (Ala. Civ. App. 1996) (attorney is a special agent during the prosecution or defense of his client's case); Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1305 (Ind. 1998) (attorney employed to handle only workers compensation claim is a special agent); State *ex rel.* Montgomery v. Goldstein, 220 P. 565, 567 (Or. 1923) (An attorney is a special agent.).

23. *See* RESTATEMENT (THIRD), *supra* note 5, §§ 2.01–.03 (defining "authority" and "apparent authority"); *See generally* GREGORY, *supra* note 6, § 14.

lieve that the agent is authorized to take action.[24] A principal can, orally or in writing, ask or direct the agent to take action on the principal's behalf. This express authority can be very general or very specific. The principal can also imply to the agent that the agent has authority to take action on the principal's behalf. Generally, this requires evidence that, although the principal did not expressly state that the agent had authority, the principal manifested an intention that the agent have that authority.[25] The *Restatement (Third) of the Law Governing Lawyers* ("*RLGL*") states that the lawyer's act will be considered to be the client's act if "the client has expressly or impliedly authorized the act," if the client ratifies the act, or if the act is reasonably believed by the lawyer to be required by law or by a tribunal.[26]

A principal can also be bound by the actions of the agent vis-à-vis the third party if the agent acts with apparent authority.[27] Apparent authority exists if the *principal's* acts or words in the circumstances—not the agent's acts or words—create a reasonable belief in the third party dealing with the agent that the agent is authorized to take the action on behalf of the principal.[28] Notably, however, if the agent does not have actual authority to act on behalf of the principal, the princi-

24. *See* RESTATEMENT (THIRD), *supra* note 5, § 2.01 (Actual authority is created when the agent "reasonably believes, in accordance with the principal's manifestation to the agent, that the principal wishes the agent to act.").

25. *See* RESTATEMENT (THIRD), *supra* note 5, § 2.01 cmt. b. *See also* Stevens v. Frost, 32 A.2d 164, 168–69 (Me. 1943) ("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 . . . .").

26. *See* RLGL, *supra*, note 6, § 26(1).

27. *See* RESTATEMENT (THIRD), *supra* note 5, § 2.03 (defining "apparent authority"). The *Restatement (Second)* provides for "inherent agency power" as an alternative to actual or apparent authority. *See* RESTATEMENT (SECOND), *supra* note 6, § 8A. This concept has neither been widely used nor widely understood. The *Restatement (Third)* abandons it on the theory that it is covered by other concepts. *See* RESTATEMENT (THIRD), *supra* note 5, ch. 2, Introductory note; *id.* § 1.03, Reporter's Note a.

28. The *Restatement (Third)* states: "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when as third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT (THIRD), *supra* note 5, § 2.03. *See also* RESTATEMENT (SECOND), *supra* note 6, § 8 (defining "apparent authority"). *See also* Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1121 (1st Cir. 1993) ("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.'" (emphasis omitted) (quoting Sheinkopf v. Stone, 927 F.2d 1259, 1269 (1st Cir. 1991))); Bolus v. United Penn Bank, 525 A.2d 1215, 1222 (Pa. Super. Ct. 1987) ("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 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."). *See also* RESTATEMENT (THIRD), *supra* note 5,

pal may pursue the agent for recompense for acting without authority.[29]

In evaluating the existence of apparent authority, courts consider the prior dealings between the principal and the third party. By allowing the agent to take certain actions, the principal communicates to third parties that the agent may have the authority to act similarly in the future.[30] Courts often perform a "positional" analysis of apparent authority. If a principal places the agent in a position that customarily has certain authority, then a third party is reasonable in concluding that the agent in the position has such authority. So, if a principal bestows upon the agent the title of "Vice President of Human Relations," a third party would be justified in concluding that the agent has authority customarily given to holders of such a position.[31]

The *RLGL* specifically recognizes the possibility of apparent authority in the attorney-client setting by stating that the client is responsible for the acts of the lawyer if "the tribunal or [a] third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestations of such authorization."[32] A client is responsible for a lawyer's statements if the statements are made with actual authority or if the statements concern "a matter within the scope of the representation and [are] made by the lawyer during it."[33]

A court easily could conclude that an attorney's actions constituting the tort of abuse of process, for example, are within the attorney's

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§ 3.03 (discussing creation of apparent authority). *See generally* GREGORY, *supra* note 6, § 23, at 64–72 (discussing apparent authority).

29. *See* RESTATEMENT (THIRD), *supra* note 5, § 8.09(1) ("An agent has a duty to take action only within the scope of the agent's actual authority."). *See also id.* cmt. b ("If an agent takes action beyond the scope of the agent's actual authority, the agent is subject to liability to the principal for loss caused the principal."); Johnson v. Tesky, 643 P.2d 1344, 1347 (Or. Ct. App. 1982) ("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.").

30. *See* Earl v. St. Louis Univ., 875 S.W.2d 234, 238 (Mo. Ct. App. 1994) ("The principal may . . . create the appearance of authority by prior acts."). *See also* Bills v. Wardsboro Sch. Dist., 554 A.2d 673, 675 (Vt. 1988) ("The existence of an agency relationship does not depend on the label the parties gave it, but may be demonstrated from the circumstances of the particular situation or the conduct of the parties.").

31. *See* Earl v. St. Louis Univ., 875 S.W.2d 234, 238 (Mo. Ct. App. 1994) ("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 authority."). *See also* RESTATEMENT (THIRD), *supra* note 5, § 3.03 cmts. b, c, d, & e (discussing ways of creating apparent authority regarding position).

32. RLGL, *supra* note 6, § 27 (2000).

33. *Id.* § 28(3)(b) (2000).

actual or apparent authority in representing the client. Likewise, a court could conclude that an attorney acted with actual or apparent authority when accepting a settlement offer or waiving the attorney-client privilege.

D. Tort Responsibility

A client's tort responsibility for an attorney's actions will likely depend on the relationship deemed to exist between the parties. Generally speaking, the doctrine of respondeat superior[34] does not apply because attorneys are unlikely to be deemed servant-employees of their clients.[35] As noted earlier, attorneys are generally viewed as independent contractors—not servants—because clients do not have physical control over attorneys' actions. Since attorneys are independent contractors, respondeat superior liability does not apply.[36] Thus, it becomes important to determine whether the attorney has dual status as an agent of the client.

Historically, the law imposed no tort liability on a principal for the physical harm caused by the actions of a *nonagent* independent contractor.[37] This rule has gathered some exceptions through the years,

34. The *Restatement (Third)* notes that respondeat superior is closely related to tort law but is generally thought of as an agency doctrine. RESTATEMENT (THIRD), *supra* note 5, § 2.04 cmt. b. *See also* RESTATEMENT (THIRD), *supra* note 5, § 2.04 ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment."). *Accord* RESTATEMENT (SECOND), *supra* note 6, § 2 cmt. a (a master is liable for physical harm caused to third persons by the tort of the servant within the scope of the employment). *See also* GREGORY, *supra* note 6, § 52, at 117–123 (discussing respondeat superior). This is true even for intentional torts. *See* W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed. 1984). *See generally* DOBBS, *supra* note 12, § 334 (discussing the rationale of respondeat superior); *id.* § 335 (discussing respondeat superior as applied to servants); Fowler V. Harper, *The Basis of the Immunity of an Employer of an Independent Contractor,* 10 IND. L.J. 494 (1934) (discussing the rationale for and origin of respondeat superior).

35. One example of a servant employee is a driver who is taking supplies for his employer to another location. The driver's employer will be responsible to any third party injured by the driver's negligent conduct in driving the vehicle to this other location. The employer in this example need not have told the driver to run every red light between Point A and Point B to be held liable. It is enough that the employee was acting within the scope of his employment. This liability is based on the idea that the "master employer" has the power to control the servant employee's physical actions.

36. *See* GREGORY, *supra* note 6, § 52, at 118. *See also* WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 83A (1964) (Respondeat superior is "a condition imposed by the common law in return for the privilege of utilizing the services of others . . . in business matters.").

37. *See* RESTATEMENT (SECOND), *supra* note 6, § 2 cmt. b (noting that liability for independent contractors is extremely limited); *id.* §§ 214–216 (dealing with a principal's tort liability generally). *See generally* James B. McHugh, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor*

but it still basically holds true,[38] although it is occasionally the target of criticism for lack of underlying rationale.[39]

If, however, an attorney is an independent contractor and is deemed to be acting as an agent of a client, the law is less clear. Some sources state that there is no liability for independent contractors, without any consideration of agent or non-agent status.[40] Such a statement is incorrect because it overlooks well-accepted agency law which imposes liability on a principal for the actually or apparently authorized actions of an agent.[41] This error may be due to confusion of two subsets of law: respondeat superior and agency principles.[42]

While a client is not responsible for an attorney's tortious conduct through respondeat superior, agency law provides an additional basis

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Rule, 40 U. CHI. L. REV. 661 (1972) (discussing the rule of nonliability); KEETON, *supra* note 34, § 71 (discussing imputed negligence and independent contractors).

38. *See* RESTATEMENT (SECOND) OF TORTS § 409 (1965) (for the general rule of no liability); *id.* §§ 410–429 (for exceptions to the general rule of no liability). *See also* DOBBS, *supra* note 12, § 336 (discussing tort liability of the employer); GREGORY, *supra* note 6, § 51, at 114–117 (discussing situations in which an employer is responsible for the torts of a nonagent independent contractor under the respondeat superior doctrine); KEETON, *supra* note 34, § 71, at 509–16 (discussing the rule and its exceptions); Harper, *supra* note 34 (discussing the rule's development as the creation of an exception for the rule of liability); Roscoe T. Steffen, *Independent Contractor and the Good Life,* 2 U. CHI. L. REV. 501 (1935) (discussing the rule and its exceptions).

39. *See* Harper, *supra* note 34 (questioning rationale); McHugh, *supra* note 37 (noting the lack of valid rationale and arguing for a rule of joint liability).

40. *See, e.g., In re* Berry Publ'g Serv., 231 B.R. 676, 682 (Bankr. N.D. Ill. 1999) ("Under Illinois law a principal is not liable for an agent's torts, provided the agent is not an employee."). For example, *Prosser and Keeton on the Law of Torts* deals with the issue of tort liability of the nonservant agent in section 70 and makes clear that tort liability is possible on several bases such as a tort within the context of apparent authority. *See* KEETON, *supra* note 34, § 70, at 508. However, section 71 states: "For the torts of an independent contractor, as distinguished from a servant, it has long been said to be the general rule that there is no vicarious liability upon the employer." *Id.* at § 71, at 509. The treatise then clarifies that there are few settings of potential liability for independent contractors but these are exceptional situations of nonagent independent contractors. The treatise never discusses, in this independent contractor section, the possibility of the agent independent contractor. It is thus no surprise that courts make the same error regarding tort liability for independent contracts agents such as attorneys.

41. *See* discussion *supra* section II.C.

42. The *Restatement (Third)* abandons the terms "independent contractor" and "servant" and simply defines the category of "employee" as the status required for respondeat superior liability. *See* RESTATEMENT (THIRD), *supra* note 6, Introduction. The omission of the category of "independent contractor" should assist in eliminating some of the confusion exhibited in the courts in dealing with tort liability for agents who are not servant employees. *See, e.g.*, Horowitz v. Holabird & Root, 816 N.E.2d 272, 278 (Ill. 2004) (discussing three different views of the law, with the majority taking the position that an attorney cannot be an independent contractor and an agent with regard to a particular action).

of tort liability if the tortious acts are actually or apparently authorized. Regardless of the fact that the party is also an independent contractor, the principal may be responsible if the independent contractor acts with actual or apparent authority. This is not a conflicting basis of liability; rather, it is an alternative basis for liability.[43]

Thus, tort liability is possible even when the agent is not a servant. In addition to the sections of the *Restatement (Second)*, the *Restatement (Third)*, and the *RLGL* that express the general notion of principal liability for agent action within actual or apparent authority,[44] other sections of the *Restatement (Second)* and the *Restatement (Third)* deal with torts specifically. For example, the *Restatement (Second)* section 216 states:

> A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.[45]

The *Restatement (Second)* further states in section 265:

> (1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.
>
> (2) Unless there has been reliance, the principal is not liable in tort for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment.[46]

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43. Some sources note this. See, for example, Dobb's torts treatise, which states:

> The most common kind of vicarious liability is based upon the principle of respondeat superior. Under that principle, private and public employers are generally jointly and severally liable along with the tortfeasor employee for the torts of employees committed within the scope of employment. . . But, respondeat superior may apply to impose liability upon the employer for contracts made by an agent within his authority and also for many kinds of torts, including fraud and other torts that do not entail physical harms.

DOBBS, *supra* note 12, § 333, at 905. *See also* Charles Davant IV, *Employer Liability for Employee Fraud: Apparent Authority or Respondeat Superior?*, 47 S.D. L. REV. 554, 562–65 (2002) (discussing the two alternative bases for tort liability in the context of the tort of fraud); Grease Monkey Int'l, Inc. v. Montoya, 904 P.2d 468, 473 (Colo. 1995) (en banc) (discussing the alternatives).

44. *See* RESTATEMENT (THIRD), *supra* note 5, §§ 1.01, 2.01, 2.03, 3.01; RESTATEMENT (SECOND), *supra* note 6, §§ 6–8; RLGL *supra* note 6, §§ 26–27.

45. RESTATEMENT (SECOND), *supra* note 6, § 216.

46. *Id.* § 265. *See also* E.A. Prince & Son, Inc. v. Selective Ins. Co. of the Southeast, 818 F. Supp. 910, 912 (D.S.C. 1993) (recognizing possibility of liability on the basis of apparent authority); Taylor v. Costa Lines, Inc., 441 F. Supp. 783, 786–87 (E.D. Pa. 1977) (discussing apparent authority as an alternate basis to servant status for tort liability); Premium Fin. Specialists, Inc. v. Hullin, 90 S.W.3d 110, 113 (Mo. Ct. App. 2002) (recognizing possibility of responsibility on the basis of apparent authority); Parlato v. Equitable Life Assurance Soc'y of the United States, 749 N.Y.S.2d 216, 222–225 (N.Y. App. Div. 2002) (recognizing possibility of responsibility on basis of apparent authority). *See generally* KEETON, *supra* note 34, § 70, at 508 (discussing responsibility and apparent authority).

The *Restatement (Second)* also contains several sections specifically dealing with particular tort settings. Section 253 is particularly relevant, addressing the responsibility of the principal for the agent's actions in tortiously conducting or instituting legal proceedings. Section 253 states:

> A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.[47]

Comment (a) to this section notes that this is the situation of an attorney and client.[48] The comment adds to the section by stating: "The principal is liable only if the conduct of the agent is, at least in part, to carry out the purposes of the principal."[49] Though the comment does not clarify the reasoning of the drafters, the thought may have been that the activity would only be within the realm of actual or apparent authority if the activity was to carry out the purpose of the principal—in whole or in part. Other sections of the *Restatement (Second)* deal specifically with liability for matters such as fraud and defamation.[50]

The *Restatement (Third)* takes a more general approach, but it clearly makes a principal responsible for any authorized act as well as for torts committed "with apparent authority in dealing with a third party on or purportedly on behalf of the principal."[51] Section 7.08 provides:

> A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.[52]

III. CLIENT RESPONSIBILITY FOR TORTIOUS CONDUCT OF ATTORNEYS

A. Basic Liability Concepts Applied

On occasion, courts address whether a client should be responsible for an attorney's tortious actions. This question and the courts' treatment of it are particularly interesting when the tort is wrapped up in the representation, such as the torts of wrongful use of civil process, abuse of process, defamation, interference with a business relationship, or fraud. Basic agency principles dictate that the attorney is not

47. RESTATEMENT (SECOND), *supra* note 6, § 253.
48. *See id.*
49. *Id.*
50. *See id.* § 254 (discussing defamation); *id.* §§ 256–264 (discussing misrepresentations).
51. *Id.* § 7.03(2)(b).
52. *Id.* § 7.08.

a servant employee but rather is an independent contractor.[53] Thus, the client is not responsible for the attorney's tortious conduct in the same manner that a master employer would be responsible for the torts of a servant employee under respondeat superior.[54] A client is not responsible for the tortious acts an attorney commits solely because those acts are committed in the scope of the employment as a master would be responsible for a servant. A third party injured when an attorney's tortious actions cause a car wreck would not recover on the basis of respondeat superior from the attorney's client, even if the attorney was on the way to a deposition for that client.

Yet, the attorney, assuming the attorney has been engaged by the client to perform legal services, is an agent of the client for some purposes. Under traditional agency law, client tort responsibility can be based on the principal-agent relationship even though the attorney is an independent contractor, not a servant. The client can be responsible for the attorney's torts if (1) the client actually authorized the attorney's actions or (2) the attorney's actions are within the apparent authority of the attorney.

The scope of the actual agency depends on what the client-principal has authorized the attorney to do. Some clients may authorize the attorney generally to handle a particular matter or all of the client's legal matters. This sort of authorization is the equivalent of the client telling the attorney to play a chess game with the lone instruction being that the attorney should try to win. Other clients may take tighter control and authorize specific steps in the representation. For example, in a negotiation process, the client may specify each position the attorney should take after each action or communication by the opposing party. This sort of authorization is the equivalent of the client authorizing the attorney to make one move in the chess game and specifying exactly what the move should be. After the opposing party moves his chess piece, the client can authorize another specific move.

So, it is possible that the client-principal actually authorizes the tortious actions of the attorney, either specifically or generally. If the client generally has authorized the attorney to act and the specific tortious actions are the choice of the attorney, the tortious actions may have been within the scope of the authority. This would be true, perhaps especially so, if the client communicated to the attorney that the client wanted to succeed at any cost.

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53. *See* RESTATEMENT (SECOND), *supra* note 6, § 14N cmt. a ("[A]ttorneys . . . are independent contractors . . . ."). *See also* discussion *supra* section II.B.

54. *See* RESTATEMENT (THIRD), *supra* note 5, § 2.04 ("An employer is subject to liability for torts committed by employees while acting in the scope of their employment."); RESTATEMENT (SECOND), *supra* note 6, § 2 cmt. a (stating that a master is liable for physical harm caused to third persons by the tort of the servant within the scope of the employment). *See also* discussion *supra* section II.D.

Even if an attorney's actual authority is unclear, or, perhaps hard to prove, apparent authority is possible in the settings of wrongful use of civil proceedings, abuse of process, interference with a business relationship, defamation, or fraud. The client-principal, by enlisting the services of the attorney to handle the legal matter, represents to the opposing party and to the court that the attorney-agent has the authority to speak and act as is customary in such a setting.[55] The *Restatement (Second)* specifically deals with the issue of the client's responsibility for the attorney's actions regarding the institution of legal proceedings, defamation, and fraud.[56] Even without the specific provisions, however, the application of both the *Restatement (Second)'s* and the *Restatement (Third)'s* general provisions lead to the possibility of client responsibility for tortious actions of the client's attorney.[57]

B. Recent Case Law

1. Traditional Approach

Courts' reactions to the question of a client's responsibility for tortious actions by the client's attorney in settings entangled with the representation are interesting in terms of the courts' confusion about this area of the law, in terms of motivating policy, and in terms of what this policy discloses about views of the attorney-client relationship. Some courts have adhered fairly closely to traditional agency law and the *Restatement (Second)*.[58] For example, in the recent case of *SouthTrust Bank v. Jones, Morrison, Womack & Dearing*,[59] a client settled with a third party and then pursued indemnity from several law firms. The actions of the firms constituted the basis of the third party's claim against the client for malicious prosecution and abuse of

55. *See* RESTATEMENT (THIRD), *supra* note 5, § 7.08 ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission."). *See also* RESTATEMENT (SECOND), *supra* note 6, § 265(1) ("A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority" but reliance is essential.).

56. *See* RESTATEMENT (SECOND), *supra* note 6, §§ 253–64.

> A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.

Id. § 253 (1958).

57. *See* RESTATEMENT (THIRD), *supra* note 5, § 7.08.

58. The *Restatement (Third)* is simply too new to have had much consideration by the courts or much effect on judicial decisions.

59. 939 So. 2d. 885 (Ala. Civ. App. 2005).

process. The client, a bank, had engaged a law firm for the collection of a corporate credit card debt. That firm then engaged another firm. Eventually, these firms obtained a default judgment against the third party though he was not responsible for the debt, he was never served, and he was at all times living at the address listed for him in the local telephone listings. These actions occurred after the bank had instructed its contact law firm to close the file.[60]

The Alabama Court of Civil Appeals held that the lower court's grant of summary judgment in favor of the law firms was inappropriate.[61] The Alabama court applied general agency law to hold that a client can be responsible for the tortious actions of the client's attorneys.[62] The court reached this result by acknowledging that attorneys are agents of clients;[63] that principals are responsible, in tort and otherwise, for the acts of agents;[64] and that, therefore, client-principals are responsible for the tortious actions of attorney-agents.[65] The *SouthTrust* court reached its result without any discussion of the independent contractor status of attorneys or the effect of that status. Rather, the court relied upon *Restatement (Second)* section 253, the section specifically imposing liability on a principal in the context of institution of legal proceedings and upon Alabama precedent, to state that a principal such as a client could be responsible for an agent's intentional torts if the acts were "'[1] in the line and scope of his employment . . . ; *or* [2] that the acts were in furtherance of the business of [the principal] . . . ; *or* [3] that [the principal] participated in, authorized, or ratified the wrongful acts.'"[66] The *SouthTrust* court concluded that the banking client could be responsible for the law firms' actions even if those actions were outside the scope of the employment and expressly not authorized since there was no evidence that the attorneys had a purpose "to accomplish some personal objective rather than to further the Bank's business objective of collecting a debt."[67] Even without the benefit of section 253 of the *Restatement (Second)*, one can easily argue that these attorneys were acting with apparent authority, and thus, the client was responsible in tort.[68]

60. *See id.* at 890–93.

61. *See id.* at 902.

62. *See id.* at 903–04.

63. *See id.* at 903.

64. *See id.* at 903–04.

65. SouthTrust Bank v. Jones, Morrison, Womack & Dearing, 939 So. 2d. 885, 906 (Ala. Civ. App. 2005).

66. *Id.* at 904–905 (quoting Joyner v. AAA Cooper Transp., 477 So. 2d 364, 365 (Ala. 1985) (emphasis added)).

67. *Id.* at 906.

68. *See* RESTATEMENT (THIRD), *supra* note 5, § 7.08.

Likewise, other courts have followed traditional agency principles.[69] In *Koutsogiannis v. BB & T,*[70] the South Carolina Supreme Court reviewed the question of whether the client, a bank, could be responsible for the tortious actions of the attorney in pursuing a debt against a third party. After a jury verdict against the bank and in favor of the third party, the bank claimed the lower court erred in not giving the jury an instruction about the lack of liability for independent contractors.[71] The South Carolina Supreme Court disagreed, stating that the attorney was an agent of BB &T and the attorney's actions in engaging in settlement negotiations and in submitting a proposed summary judgment order were within the scope of the representation.[72] The Court stated: "[T]he trial court did not err by failing to charge the law of independent contractor and charging only the law of agency."[73] One can assume that the Court viewed attorney actions within the scope of the representation as apparently, even if not actually, authorized by the client.

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69. *See, e.g.,* Southwestern Bell Tel. Co. v. Wilson, 768 S.W.2d 755 (Tex. Ct. App. 1988). In *Southwestern Bell*, the court held that the client can be responsible if the acts are "committed by the agent for the purpose of accomplishing the mission entrusted to him by his principal." *Id.* at 759. The third party claimed that the attorney had committed tortious conduct in the process of collecting an agreed judgment. *Id.* at 758. The attorneys, at the time of the allegedly tortious conduct, were acting on the client's behalf so the client was liable. *Id.* at 759–60.

In *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571 (Ind. Ct. App. 1985), the Indiana Court of Appeals stated that by virtue of the retainer, the attorney has implied authority to do all things necessary to accomplish the purpose of the engagement. *Id.* at 573. The court held "that neither the absence of a master-servant relationship nor the characterization of the attorney as an independent contractor is a bar to liability of the client for the torts of the attorney acting within the scope of his authority." *Id.* at 574.

In *Nyer v. Carter*, 367 A.2d 1375, 1377 (Me. 1977), the client instructed the attorney to, in the words of the Court, "do whatever was necessary to preserve the assets of the assignors." *Id.* at 1377. The third party claimed that the attorney committed malicious prosecution and abuse of process. The Court found the client responsible for the attorney's allegedly tortious actions even though the client did not know about the problematic legal action. *Id.* at 1378. The Court stated that "the principal is liable if the act was done within the course and scope of the agency employment, even though appellant did not specifically authorize the tortious conduct." *Id.* at 1378. Note that the *Nyer* Court uses the phrase, "scope of . . . employment," which is a phrase used for imposing liability on a master employer for the actions of a servant employee. This Court probably did not truly intend to imply that the attorney had servant status. Rather, the more likely interpretation is that the Court was really discussing the point that the conduct was within the scope of the attorney's actual or apparent authority.

70. 616 S.E.2d 425 (S.C. 2005).

71. *See id.* at 427.

72. *See id.* at 428.

73. *Id. See also* Crane Creek Ranch, Inc. v. Cresap, 103 P.3d 535 (Mont. 2004) (addressing claims of fraud, negligent misrepresentation, deceit, the Court held that the client was responsible for negligent acts of attorney-agent but that the attorney was not responsible in tort).

2. Reserved Approach

Some courts apply a more reserved version of agency law.[74] In *Givens v. Mulliken ex rel. McElwaney*,[75] the Tennessee Supreme Court evaluated whether an insured client and the insurer providing the legal representation under an insurance policy could be responsible for the tortious acts of the attorney. A third party claimed the attorney defending the client had committed torts such as invasion of privacy and abuse of process.[76] The Court stated that the typical situation of attorney and insurer or attorney and insured is one in which the attorney is an independent contractor. The insurer has no right to control the "methods or means" the attorney uses to defend the insured.[77] While the Court noted that the insured client has significant

74. *See, e.g., In re* Germain, 249 B.R. 47, 50 (Bankr. W.D.N.Y. 2000) (stating that client must have knowledge, client must consent, or client must ratify the attorney's actions); Miller v. Ryan, 706 N.E.2d 244, 252 (Ind. Ct. App. 1999) (stating that client is responsible only for acts of the attorney within the scope of the authority; contact with medical peer review panel in violation of ethics rules governing lawyers was not within the scope of authority of the attorney); Baldasarre v. Butler, 625 A.2d 458, 465 (N.J. 1993) ("An innocent client should not be held vicariously liable for the wrongful conduct of his or her attorney against the attorney's other clients if the client does not direct, advise, consent to or participate in the attorney's improper conduct."); Baglini v. Lauletta, 768 A.2d 825, 839 (N.J. Super. Ct. App. Div. 2001) (stating that clients bear no responsibility unless they "direct, advise, consent to or participate in the attorney's improper conduct") (quoting *Baldassare*, 625 A.2d at 465); Bradt v. West, 892 S.W.2d 56, 76 (Tex. Ct. App. 1994) (stating that employment is not enough; client must be "implicated in some way other than merely having entrusted his legal representation to the attorney"); Demopolis v. Peoples Nat'l Bank of Washington, 796 P.2d 426, 434 (Wash. Ct. App. 1990) (stating that the client is responsible for the defamatory statements of the attorney only if the attorney acted within the scope of the employment and with the client's knowledge and consent). *See also* Plant v. Trust Co. of Columbus, 310 S.E.2d 745 (Ga. Ct. App. 1983). The Georgia court specifically refused to apply "ordinary agency law." *Id.* at 746–47. The court stated that the client must have "expressly or impliedly authorized, knew of, or ratified, the personal act of verbal and emotional abuse . . . ." *Id.* at 747. The court cannot presume authority "from the mere fact of general retention . . . ." *Id.* at 747. The attorney had been instructed to use "whatever arrangements [the attorney] wanted . . . ." *Id.* at 746.

75. 75 S.W.3d 383 (Tenn. 2002).

76. *Id.* at 390.

77. *Id.* at 394. Other courts have addressed the question of the liability of the insurer for the tortious conduct of the lawyer engaged by the insurer to defend the insured. While the *Givens* court provides that liability is possible though unlikely, other courts seem to deny liability more categorically. For example, in *Aetna Cas. & Sur. v. Protective Nat'l Ins. Co. of Omaha*, 631 So. 2d 305 (Fla. Dist. Ct. App. 1994), the court refused to impose liability on the insurer for the attorney's negligence. The court first explained its decision using language suggesting that no liability can be imposed because the attorney is an independent contractor. The court concluded, however, with the more important fact that the insurer is the principal in the customary relationship, not the insured. *See id.* at 308. Note that the third party in the typical scenario in which this question arises is the insured

authority and right of control, the client does not have the type of control (control over "the time, place, methods and means") that would make the attorney a servant employee rather than an independent contractor.[78] The Court recognized an exception to the rule of nonliability of principals for the torts of independent contractors in the situation in which the principal, in fact, "directed, commanded, or knowingly authorized" the conduct.[79] The Court explicitly stated that the existence of the employment relationship itself was insufficient to establish liability and that liability cannot result "solely from the exercise of that attorney's independent professional judgment."[80] In so stating, the Court was reacting to the intermediate appellate court's

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client. This paradigm is quite different from the situation in which the third party seeking to establish liability of the client is truly a stranger to the relationship between attorney and client. *See also* Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co., 963 F. Supp. 453, 454 (M.D. Pa. 1997) (holding that insurer had no liability for attorney malpractice); Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 526 (Cal. Ct. App. 1973) (stating that malpractice liability of attorney cannot be imputed to insurer); Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 541 (Mass. 2003) (holding that insurer had no liability for attorney's malpractice); Feliberty v. Damon, 527 N.E. 2d 261, 265 (N.Y. 1988) (Doctor insured claimed the attorney provided by the insurer committed malpractice; the court found the insurer not responsible for the attorney's negligence.).

Other courts disagree. *See, e.g.*, Boyd Bros. Transp. Co., Inc. v. Fireman's Fund Ins. Cos., 729 F.2d 1407 (11th Cir. 1984) (insurer liability for attorney's actions possible); Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525, 530 (5th Cir. 1962) ("Those whom the Insurer selects to execute its promises, whether attorneys, physicians, no less than company-employed adjusters, are its agents for whom it has the customary legal liability.").

Another similar setting is the situation in which a union provides a lawyer to a union member and then the union member claims that the provided attorney has committed malpractice and that the union is responsible. *See, e.g.*, Mamorella v. Derkasch, 716 N.Y.S.2d 211, 213 (N.Y. App. Div. 2000) (holding that the union was not responsible for attorney's malpractice).

78. *Givens*, 75 S.W.3d at 396.

79. *Id.* at 390 (regarding the insurer). *See also id.* at 397 (regarding the insured client). Unfortunately, the *Givens* court talks in terms of right of control and exercise of control in this discussion. *See id.* at 395 ("[A]lthough an insurer clearly lacks the *right* to control an attorney retained to defend an insured, we simply cannot ignore the practical reality that the insurer may seek to exercise actual control over its retained attorneys in this context.") (emphasis added). *See also id.* at 396 ("[W]hen the insurer does undertake to exercise actual control over the actions of the insured's attorney, then it may be held vicariously liable for any harm to a plaintiff proximately caused thereby."). The power to exercise control is a major factor in deciding whether a party is a servant rather than an independent contractor. The *Givens* court's mention of control may be confusing and lead some to believe that the court is finding that the attorney is a servant. In reality, the court is simply following agency law that allows tort liability for independent contractors if the tortious action occurs in the actual or apparent authority of the independent contractor. A grant, or apparent grant, of authority is not synonymous with the power to control and does not necessarily convert an independent contractor into a servant employee.

80. *Id.* at 396 (regarding the insurer).

treatment of the case. The appellate court had stated that the law presumes that the attorney acts with the authority of the client, so the client must be responsible for the attorney's tortious actions on the basis of the attorney-client relationship alone.[81] The Tennessee Supreme Court stated that the "presumption regarding the apparent authority of an attorney was accurately stated," but that the "approach is too broad because it exposes the client to tort liability for virtually every action taken by the attorney during the representation, irrespective of whether the client actually directed or knowingly authorized those actions."[82] The Court worried that to use such a broad approach would require too much supervision by clients, parties who are not capable of doing so.[83]

Such a holding and such statements indicate that the Tennessee Supreme Court's view of a grant of authority is one of a very specific grant, as opposed to a more general grant. The Court indicated that it would recognize liability when the client or insurer tells the attorney the move to make but probably not when the client tells the attorney to take action to win or to achieve certain objectives. In addition, the Court's statements about apparent authority certainly seem to indicate that apparent authority cannot be recognized in the attorney-client setting.

In *In re Germain,*[84] the Bankruptcy Court in the Western District of New York evaluated a claim against a client for actions of the client's attorneys. The client retained the attorneys, a firm running a "debt reduction" program, "'to render all needed and necessary services and to take any and all actions and proceedings necessary which [the firm] may deem advisable to settle and compromise in whole or in part certain specified and outstanding creditor actions, claims, proceedings, demands and obligations.'"[85] The third party, a law firm, claimed malicious prosecution. The client was unaware of the attorneys' filing of the allegedly improper litigation, and there was no evidence of the client's desire, specifically, to sue the third party.[86] Because of the peculiar quasi-judicial role of an attorney, the court refused to allow the scope of an attorney's authority to extend to wrongful acts. As partial justification for its position, the court noted that the innocent third party in this case was a law firm that should accept the "overhead costs" of this situation while the client, a con-

81. *Id.*
82. *Id.* at 397.
83. *Id.* at 397. *See also* Bradt v. West, 892 S.W.2d 56, 76–77 (Tex. Ct. App. 1994) (expressing the same concern that allowing liability on the basis of the relationship alone would create an impossible duty of supervision beyond the capabilities of the typical client).
84. 249 B.R. 47 (Bankr. W.D.N.Y. 2000).
85. *Id.* at 48-49 (quoting the retainer agreement between the client and attorneys).
86. *Id.* at 49.

sumer with typical debt problems, "should not be expected to bear the increased cost of doing business that her creditor's lawyers suffer when her lawyer oversteps the bounds of proper legal process."[87] Such a statement is interesting in that the court is looking at the equities and concluding that the client is the innocent party more deserving of protection. The fact that the client did in fact engage the law firm was irrelevant to this court. The fact that the third party was a law firm, though an innocent one, somehow made it the appropriate bearer of the burden.

3. Very Limited Approach

Occasionally, a court just gets this confusing area of law wrong. The court is not evaluating interests and choosing to diverge from the accepted rule. Rather, the court, apparently, misapplies the accepted rule. An example of this is *In re Berry Publishing Services*,[88] where the court simply stated that a principal can be responsible for an agent's torts only if the agent is an employee.[89] Unsurprisingly, the court concluded that the client could not be responsible for the tortious actions of the client's attorney.[90] This court ignored any liability resulting from the agency apart from the servant employee liability.[91]

In other cases, the courts seem more clearly to choose to apply the law differently. In *Horwitz v. Holabird & Root*,[92] the Supreme Court of Illinois had before it a claim that a client was responsible for the client's law firm's tortious interference with business relationships. The client, an architectural business, engaged the law firm to collect a debt from a real estate development entity that had used the architectural business's services. As part of the discovery process in the debt collection matter, the law firm became aware of the investors and business associates of the real estate entity. The real estate entity divulged its tax returns after obtaining a confidentiality agreement from the architectural firm's counsel. The law firm then contacted many of these investors and associates by letter and informed them that the real estate entity had apportioned itself a greater share of the business than was appropriate and that the investors' share of the loss was reported as less than what was appropriate. The letters were on

87. *Id.* at 51.
88. 231 B.R. 676 (Bankr. N.D. Ill. 1999).
89. *Id.* at 682.
90. *Id.* at 682–83. Sometimes, it is difficult to determine whether the court is making a policy decision against liability or rather simply misapplying the law out of confusion. *See, e.g.*, Lynn v. Superior Court, 225 Cal. Rptr. 427, 428–29 (Cal. Ct. App. 1986) (a lawyer can be an agent of the client in business transactions but is an independent contractor in the role of trial attorney and a principal is not responsible for an independent contractor's torts absent compelling public policy).
91. *See In re* Berry Publ'g Serv., 231 B.R. 676, 682 (Bankr. N.D. Ill. 1999).
92. 816 N.E.2d 272 (Ill. 2004).

law firm stationery and contained the following statement: "[W]e represent [the architectural firm] who [has] a judgment against [the real estate entity]."[93] The trial court granted the motion of the architectural business, the client, for summary judgment on the basis that as a matter of law the client could not be responsible for the actions of its law firm.[94] The appellate court relied upon agency law and held that the client could be responsible for the acts of the law firm, the client's agent. The appellate court found that there were genuine issues of fact as to whether the acts of the law firm were "within the scope of its authority" and as to whether the client ratified the actions of the law firm.[95]

The Illinois Supreme Court concluded "that when, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions."[96] The Court recognized that independent contractors can be agents and that attorneys are generally in this category.[97] However, the Court then stated:

> Nonetheless, when attorneys act pursuant to the exercise of independent professional judgment, they possess such considerable autonomy over the details and manner of performing their work that they are presumptively independent contractors for purposes of imposing vicarious liability. Accordingly, where a plaintiff seeks to hold a client vicariously liable for the attorney's allegedly intentional tortious conduct, a plaintiff must prove facts demonstrating either that the client specifically directed, controlled, or authorized the attorney's precise method of performing the work or that the client subsequently ratified acts performed in the exercise of the attorney's independent judgment. If there is no evidence that the client directed, controlled, authorized, or ratified the attorney's allegedly tortious conduct, no vicarious liability can attach.[98]

The Court found no evidence of client direction, control, authorization, or ratification.[99]

In recognizing the conflict with section 253 of the *Restatement (Second)*, which allows liability, the *Horwitz* Court stated that it disagreed with the *Restatement*'s "discounting" of the ethical obligations that constrain an attorney to not take action that would be tortious.[100] In addition, the Court seemed especially concerned with not creating a precedent that would encourage client control of litigation. The Court stated: "Were we to hold otherwise, we would in effect compel clients

93. *Id.* at 274.
94. *Id.*
95. *Id.* at 275.
96. *Id.* at 278.
97. *Id.* at 279.
98. Horwitz v. Holabird & Root, 816 N.E.2d 272, 279 (Ill. 2004).
99. *Id.*
100. *Id.* at 280.

in similar cases to oversee or micromanage every action taken by their attorneys during the course of the attorney-client relationship, and obligate clients to take control of their representation at the slightest hint of potentially wrongful conduct on the part of their attorneys."[101] The supervision required would cause plaintiffs not to file suit, would cause defendants not to defend vigorously, and would make clients "'ultimately responsible for their own legal representation . . . .'"[102]

After dismissing the concept of apparent authority by noting that the parties did not raise the theory,[103] the Court stated that "an attorney can be both an independent contractor and an agent, but regarding particular conduct is either one or the other, not both."[104] The Court further reasoned that "clients are reasonably justified in expecting that their attorneys will represent them ethically and within the bounds of the law."[105]

This opinion is striking not only for its rejection of the *Restatement (Second)* principle in section 253 regarding client responsibility for institution of legal proceedings, but also for its novel interpretation that attorneys cannot be both independent contractors and agents at the same time, though the *Restatement (Second)* clearly provides that agent independent contractors exist and that attorneys are good examples of such.[106] While the *Horwitz* opinion states that the client can be responsible if the client "directed, controlled, authorized, or ratified" the action,[107] the Court seems to eliminate the possibility of a general grant of authority as a basis for liability. If the client does not tell the attorney to send out the offending letters to the investors, there is no client responsibility.

As Justice McMorrow, author of one of the dissenting opinions in *Horwitz,* points out, the majority's position "is unnecessarily and improperly creating a wholesale change to the traditional laws of agency with the issuance of its opinion."[108] By taking the position that when

101. *Id.* at 281.
102. *Id.* (quoting Bradt v. West, 892 S.W.2d 56, 76–77 (Tex. Ct. App. 1994)).
103. Horwitz v. Holabird & Root, 816 N.E.2d 272, 282 (Ill. 2004).
104. *Id.*
105. *Id.* at 283.
106. *See* RESTATEMENT (SECOND), *supra* note 6, § 14N.
107. 816 N.E.2d at 279.
108. *Id.* at 295 (McMorrow, dissenting). "[T]he majority's holding rests upon incorrect premises and uses reasoning which is sure to engender confusion and uncertainty among the bench and bar." *Id.* Another dissent notes:

> Along the way, the majority ignores previous holdings of this court regarding general agency principles, relies on inapposite and ill-founded authority from other jurisdictions, and diverges from the Restatement, the Seventh Circuit, and our own appellate court, each of which has arrived at what I submit is the proper conclusion, that a client may be held vicariously liable for the actions of his chosen counsel, his agent, by application of ordinary principles of agency law.

Id. at 303 (Freeman, dissenting).

exercising "independent professional judgment"[109] the attorney is not an agent of the client, the Court is also saying that at that time the attorney owes the client no fiduciary duties. Such a position has far-reaching ramifications. Can an attorney ever take action as an agent of the client that has not been specifically and particularly detailed and directed by the client? Any decision by the attorney or choice of action would seem to make the attorney a nonagent for the purposes of the action. Justice McMorrow suggests that the appropriate approach is to acknowledge that attorneys are agents of their clients but that the presumption should be that the agent's authority does not extend to intentional tortious acts of the attorney.[110] Thus, clients would not have an impossible burden of supervision, and the standard would not chill the enforcement of legal rights.[111]

C. Why Do Some Courts Deviate from Traditional Agency Law?

The *Horwitz* majority, and to some extent Justice McMorrow's dissenting opinion in *Horwitz,* focus on the client's burden if the court created precedent encouraging supervision of attorney conduct, the chilling effect a precedent of client responsibility would have on taking legal action, and the client's justifiable expectation of ethical and legal attorney conduct.[112] Other courts consider these issues as well.[113] Some courts talk of the "innocent client."[114] Yet, these courts do not address the rights of the innocent third party.[115] If a client selects counsel, and if counsel takes action later deemed tortious, why is it unfair to protect the innocent third party and to make the client responsible to that third party? The client has the balm of a malpractice action, discipline proceedings, and the like to avenge the wrong vis-à-vis the attorney. As Justice Freeman writes in a dissenting opinion in *Horwitz*, "*all* agency liability is based on the premise that it is the client's responsibility to choose its agent carefully, at risk of being held

109. *Id.* at 279.

110. *Id.* at 290 (McMorrow, dissenting). Justice McMorrow was of the opinion that there was sufficient evidence of client authorization, either "expressly or impliedly" such that summary judgment was improper. *Id.* at 295–96.

111. *Id.* at 294.

112. *See id.* at 280–81 and 294.

113. *See, e.g.,* Givens v. Mullikin *ex rel.* McElwaney, 75 S.W.3d 383, 397 (Tenn. 2004) (encouragement of a level of supervision not possible by the typical user of legal services); Bradt v. West, 892 S.W.2d 56, 76–77 (Tex. Ct. App. 1994) (encouraging supervision not possible by the typical client).

114. *See, e.g.*, Baldasarre v. Butler, 625 A.2d 458, 464–65 (N.J. 1993) ("innocent client").

115. The court in *In re Germain*, 249 B.R. 47, 51–52 (Bankr. W.D.N.Y. 2000), considered the position of the third party but concluded that since the third party was itself a law firm working in the debt collection area, it was the better party to take the risk than the client of the offending law firm.

liable for their actions if they behave wrongly in promoting the principal's interests in those actions with the conduct of which they are entrusted."[116]

In addition, Justice Freeman suggests that one must also consider the "unscrupulous" client who engages an attorney "known to 'push the envelope' and then, ostrich-like, hide[s] his head in the sand so as to disavow any specific involvement in the attorney's methods, and walk[s] away from any wrongdoing committed by his chosen agent on his behalf in the service of his cause."[117] It is naïve to believe that there are not clients out there who strenuously encourage their attorneys to win at all costs. When attorneys succumb to those pressures and engage in tortious actions those clients are not innocent by any stretch of the imagination. Yet, some courts give these clients a free pass. Why do some courts not find the balance of equities struck by traditional agency rules adequate? Why protect the client rather than the innocent third party? What does such a stance tell us about the courts' view of the lawyer-client relationship?

IV. CLIENT RESPONSIBILITY FOR SETTLEMENTS BY COUNSEL

The vast majority of courts are wary of traditional agency concepts in the context of settlement agreements. Traditional agency concepts would dictate that the client could authorize the attorney to settle a matter either by granting the attorney express authority or by granting the attorney authority impliedly. In addition, apparent authority could apply to bind a client to a settlement entered into by the attorney if the client took actions that led a reasonable third party dealing with the attorney to believe the client authorized the attorney to settle even though the client had not so authorized the attorney. Most courts do not apply agency concepts to the settlement context in the traditional manner.[118]

A. Settlement is the Client's Decision

1. Model Rules of Professional Conduct

The American Bar Association's *Model Rules of Professional Conduct* ("*MRPC*"), the ethics standards in effect in the majority of United

116. Horwitz v. Holabird & Root, 816 N.E.2d 272, 303 (Ill. 2004) (Freeman, dissenting).

117. *Id.* at 302 (Freeman, dissenting).

118. For a broader discussion of attorney authority regarding settlement, see Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent,* 12 GEO. J. LEGAL ETHICS 543 (1999); Dean C. Harvey, *Settling in New York: Abdicating Traditional Agency Principles in the Context of Settlement Disputes,* 9 TOURO L. REV. 449 (1993).

States jurisdictions, state in Rule 1.2 that as between attorney and client, the decision to settle is the client's decision.[119] Rule 1.2(a) generally states that decisions about objectives are the client's decisions, and specifically states that "[a] lawyer shall abide by a client's decision whether to settle a matter."[120] Even earlier ethics standards agreed with this proposition.[121] In addition, Rule 1.4 provides that a lawyer must "reasonably consult with the client"[122] and "keep the client reasonably informed about the status of the matter."[123]

2. *The Restatement (Third) of the Law Governing Lawyers*

Similarly, the *Restatement (Third) of the Law Governing Lawyers* ("*RLGL*") places the right to decide important matters, such as whether to settle, on the client.[124] The *RLGL* goes further, however, by stating that decisions like settlement are the client's "except when the client has validly authorized the lawyer to make the particular decision."[125] In addition, the *RLGL* states that if a client grants authority to a lawyer regarding settlement, the client can, of course, revoke that authority even if an agreement with the attorney states to the contrary.[126] Like the *MRPC,* the *RLGL* requires the attorney to keep the client informed and to consult with the client.[127] Thus, the *RLGL* meshes with agency principles in recognizing the client's right to authorize the attorney to act with regard to settlement. The *RLGL*

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119. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006).

120. *Id.*

121. See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983), which 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 . . . .

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983). *See also* Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct,* 17 U.C. DAVIS L. REV. 1049, 1054 n.12 (1984) (quoting *Hoffman's Fifty Resolutions in Regard to Professional Deportment,* Resolution XIX, in 2 D. Hoffman, A Course of Legal Study 752–75 (2d ed. 1836), 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.").

122. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2006).

123. *Id.* at R. 1.4 (a)(3).

124. *See* RLGL, *supra* note 6, § 22.

125. *Id. See also id.* § 21 (stating that the lawyer and client may agree that the lawyer has the authority to make certain decisions).

126. *See id.* § 22(3).

127. *See id.* § 20.

agrees with *MRPC* that the attorney does not have a general authority to settle.[128]

Section 27 of the *RLGL* addresses apparent authority as it relates 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 (and not the lawyer's) manifestations of such authorization.[129]

Although the *RLGL* does not specifically address apparent authority in the settlement context, nothing in the *RLGL* is inconsistent with application of the concept of apparent authority to the settlement scenario.

B. Case Law

Many courts start from the proposition that the settlement decision is the client's decision and conclude that, as a result of that proposition, the traditional rules of agency cannot apply. Courts agree that a client can expressly bestow authority to settle on an attorney-agent.[130] Some courts, however, seem to state that the *only* way an attorney can have authority to settle is by express authorization. If courts really mean what they say on this point,[131] such a statement necessarily prevents recognizing implied actual authority and apparent authority. For example, in *Reutzel v. Douglas,*[132] the Supreme Court of Pennsylvania stated that "a client's attorney may not settle a case without the client's grant of express authority, and such authority can only exist where the principal specifically grants the agent the authority to perform a certain task on the principal's behalf."[133] In response to an argument that the attorney might have apparent au-

128. *See id.* § 23 (setting forth the general authority situations: to refuse unlawful representation and to act as required by the law or order of the tribunal).

129. *Id.* § 27. *See also id.* § 21 cmt. a ("A lawyer who has acted with apparent authority . . . to settle a case, binds the client as against third persons.").

130. *See, e.g.*, Jago v. Special Needs Home Health Care, 190 S.W.3d 352, 353 (Ky. Ct. App. 2006) ("The law is clear that express client authority must be had" for a settlement by an attorney to be binding on the client.); Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc., 749 P.2d 90, 92 (N.M. 1988) ("[A]n attorney's authority to settle must be expressly conferred."); Reutzel v. Douglas, 870 A.2d 787, 789–90 (Pa. 2005) ("The law in this jurisdiction is clear and well-settled that an attorney must have express authority in order to bind a client to a settlement agreement.").

131. In *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 749 P.2d 90, 92–93 (N.M. 1988), the court makes the statement that express authority is required yet, inconsistently, goes on to apply apparent authority. *See also* Trs. of Mich. Reg'l Council of Carpenters' Employee Benefits Fund v. Custom Poured Walls, Inc., 346 F. Supp. 2d 939, 941 (E.D. Mich. 2004) ("specific authority" to settle required; apparent authority possible).

132. 870 A.2d 787 (Pa. 2005).

133. *Id.* at 790.

thority, the *Reutzel* Court stated that a "statement that an attorney can bind his client to a settlement based on apparent authority alone is simply an incorrect statement of the law."[134] The Court also clarified that implied actual authority is not a possibility by quoting an earlier Pennsylvania case which stated that "'apparent or implied authority does not extend to unauthorized acts which will result in the surrender of any substantial right of the client, or the imposition of new liabilities or burdens upon him.'"[135]

Likewise, in *Jago v. Special Needs Home Health Care*,[136] the Kentucky Court of Appeals stated: "The law is clear that express client authority must be had to enter into a settlement agreement, and apparent authority is insufficient."[137] One is left to wonder where implied authority would fit here. Interestingly, the court cited *Clark v. Burden*,[138] a Kentucky Supreme Court opinion in which the Court stated that "in ordinary circumstances, express client authority is required,"[139] but then—in contradiction—mentioned that "[a]ctive participation [by the client] in the particulars of settlement may be deemed to create implied authority."[140] Finally, the *Clark* Court stated that apparent authority is generally unavailable, but a court could, in the interest of justice, assign responsibility if a third party's rights were "substantially and adversely affected by an attorney possessing apparent authority but who lacked actual authority."[141] While such an opinion muddies the water in terms of when a court will recognize attorney authority, the opinion makes clear that the traditional agency doctrine, at least with regard to apparent authority, does not apply.

Some courts are willing to apply the doctrine of apparent authority in the settlement context.[142] Most of these courts do not view the cli-

134. *Id.*

135. *Id.* (quoting Starling v. W. Erie Ave. Bldg. & Loan Ass'n, 3 A.2d 387, 388 (Pa. 1939)). *See also* Fender v. Wal-Mart Corp., 341 F. Supp. 2d 1193, 1196–97 (N.D. Okla. 2004) ("[A]bsent express authority, an attorney cannot enter into a settlement and thereby compromise the rights of his client.").

136. 190 S.W.3d 352 (Ky. Ct. App. 2006).

137. *Id.* at 353.

138. 917 S.W.2d 574 (Ky. 1996).

139. *Id.* at 576.

140. *Id.* at 576–77.

141. *Id.* at 577. *See also* Dixie Operating Co. v. Exxon Co., 493 So. 2d 61, 63–64 (Fla. Dist. Ct. App. 1986) ("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.").

142. *See, e.g.*, United States v. United States Currency in the Sum Six Hundred Sixty Thousand Two Hundred Dollars, More or Less, 423 F. Supp. 2d 14 (E.D.N.Y. 2006) (recognizing the doctrine but finding actual authority); *In re* Kollel Mateh Efraim, L.L.C., 334 B.R. 554 (Bankr. S.D. N.Y. 2005); Trs. of Mich. Reg'l Council of Carpenters' Employee Benefits Fund v. Custom Poured Walls, Inc., 346 F. Supp. 2d 939 (E.D. Mich. 2004); Makins v. District of Columbia, 861 A.2d 590,

ent's act of retaining the attorney as a sufficient act to mislead a third party into believing the attorney is authorized to settle. Thus, retention alone does not establish apparent authority.[143] The retention of the attorney also does not create implied actual authority. The client, by engaging the attorney to handle the matter, does not grant the attorney authority to settle.[144]

In contrast, Georgia courts take the position that retaining the attorney to handle the matter bestows actual and apparent authority upon the attorney to settle. Only by notifying third parties of a limitation on this authority can the apparent authority be defeated. For example, in *Speed v. Muhanna*,[145] the attorney represented a client in relation to injuries received in a store. Before the treating physician would agree to be deposed, he required a promise that the matter would not involve an action for medical negligence. The plaintiff's attorney agreed. The client, however, later sued the doctor for malpractice through the use of a different attorney. The doctor defended with the promise of counsel that there would be no medical malpractice action. The court found actual authority for the attorney's promise because the attorney was authorized to "investigate and pursue 'any and all claims which [the plaintiff] may have against [the store], and any other Defendants later named or identified, as a result of' the incident at [the store]."[146] The court concluded that even if actual authority was not present, apparent authority was present because the client in no way notified any third party that the attorney's authority was limited.[147] The court noted that the client's remedy is against the attor-

595 (D.C. 2004); Stearns Bank N.A. v. Palmer, 182 S.W.3d 624 (Mo. Ct. App. 2005).

143. *See* Fennell v. TLB Kent Co., 865 F.2d 498, 502 (2d Cir. 1989) ("A client does not create apparent authority for his attorney to settle a case merely by retaining the attorney."); Edwards v. Born, Inc., 792 F.2d 387, 390 (3d Cir. 1986) ("It is well settled that an attorney does not possess the inherent authority to compromise by virtue of his retention for the litigation."); Makins v. District of Columbia, 861 A.2d 590, 595 (D.C. Ct. App. 2004) ("Retention of the attorney by itself is insufficient to bestow actual or apparent authority.").

144. *See* Fender v. Wal-Mart Corp., 341 F. Supp. 2d 1193, 1196 (N.D. Okla. 2004) ("'The relationship of attorney and client does not imply that a power has been given to the attorney to compromise and settle a claim.'" (quoting Humphreys v. Chrysler Motors Corp., 399 S.E.2d 60, 62 (W. Va. 1990))).

145. 619 S.E.2d 324 (Ga. Ct. App. 2005).

146. *Id.* at 327 (emphasis omitted).

147. *Id.* at 328. The *Georgia Uniform Court Rules* state that counsel of record have apparent authority to "enter into agreements on behalf of their clients in civil actions." GEOR. UNIF. RULES SUPER. CTS. R. 4.12. Case law has applied the concept regardless of whether there is a matter filed with a court. *See* Pembroke State Bank v. Warnell, 471 S.E.2d 187 (Ga. 1996); Brumbelow v. Northern Propane Gas Co., 308 S.E.2d 544 (Ga. 1983).

ney selected by the client and that the third party, the innocent, should not have to bear any burden in the situation.[148]

Other than Georgia courts, very few courts have applied the apparent authority doctrine to the settlement context and found it to exist.[149] Often, courts state that apparent authority is possible but do not find that it exists on the basis of the facts.[150]

Some courts' views on authority are evidenced not so much by what they say about authority but rather by where they place the burden of proof. For example, in *Sharick v. Southeastern University of the Health Sciences, Inc.*,[151] the court required "clear and unequivocal authority."[152] Such a statement may or may not limit recognized authority to express actual authority. The court further required, however, that the party claiming the existence of the attorney's authority shoulder the burden of proof.[153] In contrast, other courts may require "express authority" but presume that such authority exists and require the client to disprove the authority.[154]

C. Variation from Agency Principles

Courts have taken many approaches to the question of attorney authority to settle a client's matter. Clearly, some of these approaches do not apply traditional agency principles in the traditional manner.

148. Speed v. Muhanna, 619 S.E.2d at 329 (Ga. Ct. App. 2005) (quoting White v. Orr Leasing, Inc., 436 S.E.2d 693, 695 (Ga. 1993)).

149. *But see* Rosenblum v. Jacks or Better of America W. Inc., 745 S.W.2d 754, 763 (Mo. Ct. App. 1988) (finding apparent authority where the attorney had previously acted as the "exclusive negotiator in the settlement process" and had accepting portions of the settlement offers and rejecting others).

150. *See, e.g.*, Auvil v. Grafton Homes, Inc., 92 F.3d 226 (4th Cir. 1996) (finding no apparent authority where the attorney negotiated settlement, met with the clients and returned to opposing counsel stating that the clients had agreed; no apparent authority); Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004) (finding that sending attorney to a court-ordered settlement conference and permitting the attorney to negotiate settlement were insufficient acts to establish apparent authority).

151. 891 So. 2d 562 (Fla. Dist. Ct. App. 2004).

152. *Id.* at 565.

153. *Id.*

154. *See, e.g.*, Harris v. Ark. State Highway & Transp. Dep't, 437 F.3d 749, 750–51 (8th Cir. 2006) (burden on the client to disprove authority); Cinelli v. MCS Claim Servs., Inc., 236 F.R.D. 118 (E.D.N.Y. 2006) (presumption of authority). *See also In re* Kollel Mateh Efraim, L.L.C., 334 B.R. 554, 559 (Bankr. S.D.N.Y. 2005) ("Because of the unique nature of the attorney-client relationship and the public policy favoring settlements, an attorney who enters into a settlement, particularly one on the record in open court, is presumed to have the actual authority to bind his client. . . . 'any party challenging an attorney's authority to settle a case under such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority.'" (quoting *In re* Artha Mgmt., Inc., 91 F.3d 326, 329 (2d Cir. 1996))).

Why? Why do courts not find the balance of equities struck by traditional agency rules adequate?

In the context of settlement enforcement, this is an especially interesting query since the courts of the United States have long recognized a public policy in favor of private settlement.[155] Courts in the United States are very much in favor of encouraging parties to disputes to reach resolution of their matters. This policy is based on the notion that private settlements lead to a more efficient court system[156] and reduce the overall negative impact on the participants.[157] Private resolution of disputes also allows the parties to craft a resolution that best fits their needs and desires.[158]

With such a well-recognized policy in place, one would expect that courts would be inclined to find settlement agreements enforceable. Yet, as discussed above, many courts are extremely wary of enforcing settlement agreements entered into by an attorney when the client claims the attorney lacked the authority to settle. For some courts, this wariness takes the form of rejection of traditional agency law. For example, a court may refuse to recognize apparent authority in this context. Agency doctrine has withstood the test of time as striking the appropriate balance among the parties and interests in varied contexts. Yet, some courts do not accept this balance when the question is the authority of an attorney-agent to bind a client to a settlement agreement.

As is the case in the tort responsibility context, such a stance seems to emanate from a desire to protect the client over all others. The concept of apparent authority recognizes the interest of the innocent third party who is reasonably misled by the client's actions as superior to the interest of the client-principal. The client selects the attorney-agent while the innocent third party has no such involvement. Even so, the apparent authority doctrine lends protections to the third party only if the principal, the client, takes action that leads

155. *See* St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 656 (1898) ("[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored."). *See also* Keahole Def. Coal., Inc. v. Board of Land & Natural Res., 134 P.3d 585, 605 (Haw. 2006) ("[T]his court has acknowledged the strong public policy in favor of settlement of claims.").

156. *See* Long Term Mgmt, Inc. v. Univ. Nursing Care Ctr., Inc., 704 So. 2d 669, 673 (Fla. Dist. Ct. App. 1997) (stating that settlements are favored as a means to conserve judicial resources).

157. *See* Village of Kaktovik v. Watt, 689 F.2d 222, 231 (D.C. Cir. 1982) (noting that successful settlements avoid the expense and delay incidental to litigation). *See also* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) ("Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming.").

158. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 502 (1985) (noting that parties are more likely to abide by agreements they make themselves).

the third party to reasonably believe that the attorney-agent has authority to bind the client. Each court can evaluate whether, on the particular facts, the client-principal has done enough to be justifiably bound. Courts applying more limited agency theory elevate protection of the client over all other interests even though the client chooses the attorney-agent. Logically, this choice should make the client responsible for that agent.

V. CLIENT RESPONSBILITY FOR ATTORNEY WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

Another area in which some courts, though not the majority, do not apply the traditional agency model is the treatment of the issue of waiver of the attorney-client privilege.

A. The Parameters of the Privilege

The attorney-client privilege protects from compelled disclosure communications intended to be confidential between attorney and client. The communications must be made for the purpose of obtaining or rendering legal advice and not made for the purpose of committing a crime or fraud.[159] The attorney-client privilege, unlike its weaker

159. An oft-quoted definition of the privilege is one crafted in 1950 by Judge Wyzanski in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950):

> The privilege applies only if
> (1) the asserted holder of the privilege is or sought to become a client;
> (2) the person to whom the communication was made
> (a) is a member of the bar of a court, or his subordinate and
> (b) in connection with this communication is acting as a lawyer;
> (3) the communication relates to a fact of which the attorney was informed
> (a) by his client
> (b) without the presence of strangers
> (c) for the purpose of securing primarily either
> (i) an opinion on law or
> (ii) legal services or
> (iii) assistance in some legal proceeding, and not
> (d) for the purpose of committing a crime or tort; and
> (4) the privilege has been
> (a) claimed and
> (b) not waived by the client.

Id. at 358–59. *See also* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (McNaughton Rev. 1961); RLGL, *supra* note 6, § 68 (discussing coverage of the attorney-client privilege); *In re* Syncor ERISA Litigation, 229 F.R.D. 636, 643 (C.D. Cal. 2005) ("The attorney-client privilege may be divided into eight essential elements: '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal ad-

cousin, the work product doctrine,[160] is an absolute protection—if it applies. No matter the cost or need for the protected information, the privilege prevents disclosure.[161] A creature of Anglo-Saxon law for many centuries,[162] as well as existing in other legal frameworks,[163] it is the oldest of the privileges that continues to exist.[164] The privilege creates an environment encouraging free discussion and disclosure between the attorney and the client so that the attorney can render, and the client can receive, the best and most appropriate legal advice for the situation. The client can "bare all" to the attorney with no fear that the communication will become available to the opposing party.[165] Ultimately, the lawyer must have full disclosure to ade-

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viser, (8) unless the protection be waived.'" (quoting *In re* Grand Jury Investigation, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992))).

160. *See* FED. R. CIV. P. 26(b)(3) (disclosure determined by a balance of need for protection and need for the evidence). *See also* Hickman v. Taylor, 329 U.S. 495 (1947) (genesis of the work product doctrine).

161. *See, e.g.*, St. Luke Hosp., Inc. v. Kopowski, 160 S.W.3d 771, 776–777 (Ky. 2005) ("[W]hen a communication is protected by the attorney-client privilege it may not be overcome by a showing of need.").

162. *See, e.g.*, Berd v. Lovelace, 21 Eng. Rep. 33 (1577). *See also* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:2, at 6–8 (2d. ed. 1999) (giving an in-depth history of the attorney-client privilege); Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege,* 66 CAL. L. REV. 1061 (1978) (same). The privilege has bases in Roman law and canon law. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 181, at 302 (2d ed. 1994); Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client,* 16 CALIF. L. REV. 487 (1928).

All United States jurisdictions have an attorney-client privilege approximating the definitions noted here. In many jurisdictions the privilege is a creature of common law while in some jurisdictions it is codified. *See, e.g.*, ALA. RULE OF EVID. 502; KAN. STAT. ANN. § 60–426 (2006); KENTUCKY RULE OF EVID. 503. The federal privilege is a creature of the common law. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

163. *See* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.2.4 (2002).

164. *See* MUELLER & KIRKPATRICK, *supra* note 162, § 181, at 302; WIGMORE, *supra* note 159, § 2290, at 542. *See also* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications."); Frease v. Glazer, 4 P.3d 56, 60 (Or. 2000) ("The attorney-client privilege is one of the oldest and most widely recognized evidentiary privileges.").

165. In *Trammel v. United States*, 445 U.S. 40, 51 (1980), the Supreme Court stated: "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* at 51. *Annesley v. Anglesea*, a case decided in 1743 which makes the same point, states:

> No man can conduct any of his affairs which relate to matters of law, without employing and consulting with an attorney; even if he is capable of doing it in point of skill, the law will not let him; and if he does not fully and candidly disclose every thing that is in his mind, which he apprehends may be in the least relative to the affair he consults his attorney upon, it will be impossible for the attorney properly to serve him.

quately counsel the client so that the client may remain within the bounds of the law. This preventive effect of the privilege creates societal benefits because this effect encourages legitimate conduct and discourages conduct contrary to law.[166] Modern day courts frequently espouse this instrumental rationale of the attorney-client privilege.[167] Commentators have noted other, more humanistic rationales.[168]

The cost of such nondisclosure, however, is that the entire story may not come before the court, thwarting the court's truth-discovering function. Society has long accepted that cost as reasonable in light of the believed benefits it creates by enhancing the attorney-client relationship.[169] Yet, the privilege's perceived tendency to hide evidence

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17 How. St. Tr. 1137, 1239 (1743) *See also* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("[T]he attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."). *See generally* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 72, at 299 (5th ed. 1999); IMWINKELRIED, *supra* note 163, § 6.2.4; MUELLER & KIRKPATRICK, *supra* note 162, § 181, at 302–03; WIGMORE, *supra* note 159, § 2291, at 545–54.

Other justifications, such as protection of the privacy interest of the client in any communication and the autonomy of the client, have not been relied upon by courts but have been discussed in commentary. *See* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5472, at 77–79(1986); Albert W. Altschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative,* 52 U. COLO. L. REV. 343, 350 (1981).

166. The *Model Rules of Professional Conduct* state, in part, with regard to the general ethical duty to maintain client confidences, the following:

> The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2006).

167. *See* MUELLER & KIRKPATRICK, *supra* note 162, § 181, at 302 ("prevailing modern rationale"). *See also* Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is 'to encourage clients to make full disclosure to their attorneys.'"); United States v. Philip Morris Inc., 314 F.3d 612, 618 (D.C. Cir. 2003) ("The privilege promotes "sound legal advocacy by ensuring that the counselor knows all the information necessary to represent his client.").

168. *See* IMWINKELRIED, *supra* note 163, § 6.2.4; MUELLER & KIRKPATRICK, *supra* note 162, § 181, at 302–03: *See also* Grace M. Giesel, *The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations,* 48 MERCER L. REV. 1169, 1175–82 (1997). (discussing rationales and criticisms of rationales).

169. *See* Maldonado v. New Jersey *ex rel.* Admin. Office of Courts-Prob. Div., 225 F.R.D. 120, 128 (D.N.J. 2004) (stating the privilege "obstructs the search for truth"). *See also* STRONG, *supra* note 165, § 72, at 299 (Discussing privileges, the

causes courts to scrutinize the privilege's applicability and to apply the privilege narrowly.[170]

B. The Privilege is the Client's Privilege

The privilege is the client's, so the client has the power to assert the privilege or to waive it.[171] This statement clarifies that the attorney does not have an independent privilege regarding the communication even though the attorney is a party to it. Thus, when litigation arises, and when the opposing party requests production of the earlier communication with counsel, the client may refuse to disclose the communication by asserting that the attorney-client privilege protects the communication from disclosure.

C. Authority to Assert the Privilege

1. Agency

Within the context of asserting or waiving the attorney-client privilege, agency law would instruct that the client could specifically direct the attorney-agent to assert or waive the privilege and give the attorney express and specific authority to so act. In addition, the client could give the attorney actual authority by implication. For example, a court might logically conclude that a client-principal gave the attorney-agent the implied authority to act regarding the privilege by employing the attorney to handle a litigation matter. Finally, as to third parties, the attorney-agent may have apparent authority to waive the attorney-client privilege if the client-principal took action that led the third party to believe, reasonably, that the attorney-agent had the authority to act for the client regarding the privilege.

Courts recognize the authority of attorneys, as agents of clients, to assert the attorney-client privilege. The United States Supreme

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court stated, "Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light."); WIGMORE, *supra* note 159, § 2291, at 554 ("It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth."); Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability,* 102 HARV. L. REV. 565 (1989) (questioning the benefit of the privilege in light of its cost).

170. *See* Ross v. City of Memphis, 423 F.3d 596, 600 (6th Cir. 2005) ("The attorney-client privilege is 'narrowly construed because it reduces the amount of information discoverable during the course of a lawsuit.'" (quoting United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997))).

171. *See* IMWINKELRIED, *supra* note 163, § 6.5.1, at 535; RICE, *supra* note 162, § 9:1, at 5. *See also* KL Group v. Case, Kay & Lynch, 829 F.2d 909, 918 (9th Cir. 1987) ("[T]he client is the holder of the attorney-client privilege."); First Union Nat'l Bank of Del. v. Maenle, 833 N.E.2d 1279, 1286 (Ohio Ct. App. 2005). ("Thus, the privilege belongs to the client . . . .").

Court, in *Fisher v. United States*,[172] noted that a "universally accepted" tenet was that an attorney representing a client may assert the attorney-client privilege.[173]

2. The Model Rules of Professional Conduct

The American Bar Association's *Model Rules of Professional Conduct* ("*MRPC*") are consistent with recognition of the attorney's right to assert the attorney-client privilege.[174] Rule 1.6 of the *MRPC* states that the lawyer "shall not reveal information relating to the representation of the client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation" or the disclosure fits within several very specific exceptions to the rule.[175] In addition, the comments to Rule 1.6, addressing an order by the court or tribunal to reveal confidential information, states: "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."[176] Thus, absent any evidence to the contrary in a particular case, courts accept that attorneys have actual implied authority to assert the privilege even when the client has not expressly instructed the attorney to assert the privilege.[177]

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172. 425 U.S. 391 (1976).

173. *Id.* at 402 n.8. *See also* WRIGHT & GRAHAM, *supra* note 165, § 5500, at 489 ("lawyer's authority to claim the privilege is universally recognized"); Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) ("It has been generally . . . accepted . . . that the attorney-client privilege survives the death of the client . . . ."); Frease v. Glazer, 4 P.3d 56, 60 (Or. 2000) ("[T]he client's attorney may claim the privilege on the client's behalf.").

174. *See* Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833, 863 (1956) ("[T]he attorney has the duty, upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from being violated.").

175. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006).

176. *See id.* R. 1.6 cmt. 13.

177. *See* MUELLER & KIRKPATRICK, *supra* note 162, § 200, at 381. In *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967), the court stated:

> Appellant would conclude from this that an attorney may not claim the privilege where, as here, the client is not present. Such a conclusion obviously misconceives the federal rule. Language as that quoted above merely emphasizes that, as at common law, the "privilege is the client's, not the attorney's." 8 Wigmore, Evidence, 2321, p. 629 (McNaughton rev. ed. 1961), in the sense that an attorney can neither invoke the privilege for his own benefit when his client desires to waive it nor waive the privilege without his client's consent to the waiver. Not only may an attorney invoke the privilege in his client's behalf when the client is not a party to the proceeding in which disclosure is sought, . . . but he should do so, for he is "duty-bound to raise the claim in any proceeding in order to protect communications made in confidence."

3. The Restatement (Third) of the Law Governing Lawyers

Section 86 of the *Restatement (Third) of the Law Governing Lawyers ("RLGL")* deals with this issue by requiring the attorney to invoke the privilege "when doing so appears reasonably appropriate, unless the client: (i) has waived the privilege; or (ii) has authorized the lawyer or agent to waive it."[178] The Reporter's Notes to the *RLGL* state that the lawyer at the time of the creation of the communication "is presumed to have authority to claim the privilege" on behalf of the client.[179] If the client's current litigation counsel disagrees with former counsel, the current attorney handling the litigation "determines whether to assert or waive the privilege."[180] The *RLGL* reinforces the position that the attorney has a duty to assert the attorney-client privilege. Section 60(b) states: "[t]he lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure."[181] A comment to section 60 explains: "The duty to safeguard entails the corollary duties to provide adequate supervision of nonlawyer personnel . . . and to assert privileges and other legal protection applicable to confidential client information such as the attorney-client privilege . . . and the work product immunity."[182] A comment to section 27 states the following: "By retaining a lawyer, a client implies that the lawyer is authorized to act for the client in matters relating to the representation and reasonably appropriate in the circumstances to carry it out."[183] This statement more generally supports the notion of attorney authority to assert the privilege.

4. Agency and the Recognition of Client Rights are Consistent

Recognizing the authority of the agent to assert the privilege in no way contradicts the client's ownership of the privilege right. The client holds the right but, as with any other agent, may grant an agent authority to act to affect that right either expressly or by implication. The legal system accepts that the client-principal grants that authority by implication to the attorney with whom the client is speaking when creating the privileged communication. In addition, the client-principal grants that authority by implication to the attorney han-

381 F. 2d 551, 556 (2d Cir. 1967) (citations omitted).

178. RLGL, *supra* note 6, § 86(1)(b).

179. *Id.* § 86 Reporter's Note to cmt. b.

180. *Id.* § 86 Reporter's Note to cmt. c. *See also* WRIGHT & GRAHAM, *supra* note 165, at § 5500, at 492 (stating that litigation attorney's decision controls over any judgment of prior counsel); United States v. DeLillo, 448 F. Supp. 840 (E.D.N.Y. 1978) ("[I]f the former and present attorneys differ . . . the current attorney's position should be followed.").

181. RLGL, *supra* note 6, § 60(b).

182. *Id.* § 60 cmt. a.

183. *Id.* § 27 cmt. c.

dling the matter in which the question of disclosure of the privileged communication arises by employing the attorney to handle that matter. Similarly, corporate officers act as agents in asserting the privilege on behalf of the principal, the corporation.[184] The application of agency concepts to the privilege assertion is simply a recognition of the fact that the client is the holder of the privilege and, as holder, has many rights, including the right to grant an attorney the authority to assert it.

D. Authority to Waive

1. Agency

If a communication is protected by the attorney-client privilege, that privilege may be waived and, thus, its protection lost. Since the privilege belongs to the client, the privilege is the client's to waive. Given the usual conduct of litigation and the role of the attorney and client in that litigation sphere, the attorney's words or conduct, in the majority of situations, is the basis for most waiver claims. The question that arises, then, is whether the attorney may waive the privilege on behalf of the client.

As an initial matter, basic agency principles make clear that a client certainly should be able to expressly instruct the attorney to waive the privilege. The client has the right to waive, and, of course, the client may expressly authorize the attorney to waive on behalf of the client. To hold otherwise is to deny the application of well-accepted agency law and to deny a client rights other principals hold. Yet, occasionally, courts make statements that seem to limit the client's ability to expressly authorize an attorney to waive the privilege. For example, the court in *Martin Marietta Materials, Inc. v. Bedford Reinforced*

184. *See, e.g.*, Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) ("The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.").

In *American Steamship Owners Mutual Protection & Indemnity Ass'n, Inc. v. Alcoa Steamship Co, Inc.*, 232 F.R.D. 191 (S.D.N.Y. 2005), the court states:

> As an inanimate entity, a corporation must act through its agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation. . . . Thus, for a solvent corporation, corporate management, acting through its officers and directors, has the authority to exercise the privilege, a power that must be exercised consistent with management's fiduciary duties.

Id. at 196 (quoting Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985)) (citation omitted). *See also* Wrench L.L.C. v. Taco Bell Corp., 212 F.R.D. 514, 517 (W.D. Mich. 2002) ("In general, the privilege belongs to the corporation and may be asserted or waived only by those with authority to do so—typically the officers and directors.").

Plastics, Inc.,[185] stated: "While an attorney may assert the privilege on the client's behalf, . . . only the client may waive the privilege."[186]

One possible explanation for the broad statement is that the court is simply saying that the client, as opposed to the communicating lawyer, has the right and authority to waive.[187] With this view, the court is not speaking to or limiting in any way the litigation attorney as agent; the client could authorize a waiver by the attorney. However, the broad statement appears to apply not only to the communicating lawyer but also to the lawyer representing the client in litigation after the creation of the protected communication.

Basic agency principles also would allow a client to impliedly authorize an attorney to waive the attorney-client privilege. The only question is whether the client has in fact impliedly authorized the attorney to waive the privilege. Most courts seem to accept that an attorney is acting with implied authority, or at least apparent authority, to waive the privilege when the attorney fails to object to a disclosure, knowingly discloses a communication known to be privileged, knowingly discloses a communication the attorney wrongly believes to be not privileged, or inadvertently discloses a clearly privileged communication.[188] Even if the attorney does not have actual authority, it is possible that the attorney has apparent authority to waive the privilege if a reasonable third party would think the attorney was acting with authority when the waiver occurs.

2. *The Restatement (Third) of the Law Governing Lawyers*

The *Restatement (Third) of the Law Governing Lawyers* ("*RLGL*") endorses the application of traditional agency principles to the waiver situation. In Section 61, the *RLGL* clarifies that a lawyer may disclose confidential information "when the lawyer reasonably believes that doing so will advance the interest of the client in the representation."[189] In an explanatory comment, the *RLGL* notes that the attorney has "general authority" to take such steps and that "[n]o explicit

185. 227 F.R.D. 382 (W.D. Pa. 2005).

186. *Id.* at 390 (citation omitted).

187. This was, in fact, the setting of the alleged waiver in *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382 (W.D. Pa. 2005).

188. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.16, at 9–65 (3d ed. 2005 & Supp.).

> [T]hird parties may generally assume that a disclosure made by a lawyer is authorized by the client, even if that is not the case. For example, if a lawyer discloses information that would have been protected by the attorney-client privilege, the law generally assumes that the client—who controls the privilege has waived it by authorizing the lawyer to do so as the client's agent.

Id. See also infra section V.D.3.

189. RLGL, *supra* note 6, § 61.

request or grant of permission is required."[190] Section 78 of the *RLGL* provides that the privilege is waived if the client, the client's attorney, or any other agent of the client:

> (1) agrees to waive the privilege,
>
> (2) disclaims protection of the privilege and
> (a) another person reasonably relies on the disclaimer to that person's detriment; or
> (b) reasons of judicial administration require that the client not be permitted to revoke the disclaimer; or
>
> (3) in a proceeding before a tribunal, fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication.[191]

Further, section 79 of the *RLGL* states that the privilege is waived if the client, the client's attorney, or any other agent "voluntarily discloses" the communication.[192] The comments to section 79 note that the section flows from the general idea that "[a] lawyer generally has implied authority to disclose confidential client communications in the course of representing a client."[193] Further, the attorney's apparent authority would exist even though the attorney may have acted without client consultation.[194] A reasonable third party would think the attorney was acting on behalf of the client.[195] Indeed, the client may have specifically instructed the attorney not to disclose a communication, so the attorney would not have actual authority. In such a situation, the attorney may have apparent authority as long as the third party dealing with the attorney does not know of any limitation. Finally, section 86 states that the client may act to invoke or waive the privilege "personally or through counsel or another authorized agent."[196]

3. *Most Courts' Holdings Are Consistent with Agency Principles*

In modern times, the question of waiver of the privilege often arises in situations in which attorneys produce protected communications without realizing that they are doing so. In these inadvertent disclosure settings, the attorney discloses the privileged document as the result of all sorts of activities, most of which could be classified as

190. *Id.* § 61 cmt. b.
191. *Id.* § 78.
192. *Id.* § 79.
193. *Id.* § 79 cmt. c.
194. *Id.*
195. *See also* RLGL, *supra* note 6, § 27 (A lawyer has apparent authority if a "third person reasonably assumes that the lawyer is authorized to do the act.").
196. *Id.* § 86. *See* Hollingsworth v. Time Warner Cable, 812 N.E.2d 976, 991 (Ohio Ct. App. 2004) ("[C]orporate executives and managers, if endowed with appropriate authority by their employer, may on behalf of the corporation either assert or waive the attorney-client privilege." (quoting Shaffer v. OhioHealth Corp., 2004 WL 35725 (Ohio Ct. App. 2004))).

varying degrees of negligence. Often, the privileged document simply becomes confused with unprivileged documents, and the lawyer's staff produces it to opposing counsel.[197]

In this inadvertent disclosure context, many courts determine whether the disclosure waives the privilege by looking at factors such as the precautions taken by the disclosing attorney, the extent of the disclosure in terms of amount of privileged material, the value of the material to the litigation, the measures taken to rectify the disclosure, the promptness with which the discloser acted to rectify, and whether justice would be served by finding no waiver.[198] For these courts, disclosure is not dispositive. A communication can be disclosed and still be privileged. This approach is consistent with agency law in that the courts are accepting that the attorney disclosing the protected communication, if the attorney is the discloser, had implied authority or at least apparent authority to so act.

This approach is also consistent with several proposed and recent amendments to federal rules. Proposed Rule 502 of the *Federal Rules of Evidence* provides that there is no waiver of the attorney-client privilege as the result of an inadvertent disclosure if the disclosure occurred in the context of a federal administrative procedure or a federal litigation matter and if the holder "took reasonable precautions to prevent disclosure and took reasonably prompt measures once the holder knew or should have known of the disclosure, to rectify the error."[199] In addition, the proposed rule makes any agreement concerning the effect of the disclosure binding on the parties.[200] The agreement can bind third parties only if the agreement becomes a part of a court order.[201]

197. The issue of inadvertent disclosure has been a frequent topic of law review articles. *See, e.g.*, Roberta Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege,* 42 CATH. U. L. REV. 465 (1993); Richard Marcus, *The Perils of Privilege: Waiver and the Litigator,* 84 MICH L. REV. 1605 (1986); Audrey Rogers, *New Insights on Waiver and the Inadvertent Disclosure of Privileged Materials: Attorney Responsibility as the Governing Precept,* 47 FLA. L. REV. 159 (1995).

198. *See, e.g.*, United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483 (N.D. Miss. 2006) (utilizing a factor approach to find no waiver of privilege for documents inadvertently disclosed); Atronic Int'l, GMBH v. SAI Semispecialists of America, Inc., 232 F.R.D. 160 (E.D.N.Y. 2005) (utilizing a factor approach to find a waiver of privilege on carelessness grounds where emails were inadvertently produced under Rule 26 and again at a deposition); Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688 (M.D. Fla. 2005) (utilizing a factor approach to find that privilege had been waived). *See also* RLGL, *supra* note 6, § 79 cmt. h (discussing inadvertent disclosure).

199. Proposed Fed. R. Evid. 502(b) (May 15, 2006), *available at* http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

200. *See id.* 502(e).

201. *See id.* 502 (d); *id.* 502(e).

Recent changes to Rule 26 of the *Federal Rules of Civil Procedure* also allow agreements not to waive. The revised rule further provides that a party may assert the privilege with regard to already disclosed communications and the other party "must promptly return, sequester, or destroy the specified information" and copies of it.[202]

Some courts take the position that any disclosure is a waiver in the inadvertent disclosure setting. No privilege exists regardless of how the disclosure occurs.[203] For example, in the context of a patent dispute, one court stated that inadvertent "disclosure of documents subject to an attorney-client privilege operates as a waiver."[204] The court noted that "[m]istake or inadvertence is, after all, merely a euphemism for negligence, and, certainly . . . one is expected to pay a price for one's negligence."[205] Courts in contexts other than patents hold the same view.[206] This absolute approach is consistent with agency law as the courts applying the approach accept that an attorney disclosing protected communications has implied authority, or at least apparent authority, to do so.

Courts recognize an attorney's authority to waive the privilege in settings other than inadvertent disclosure. For example, courts often find a failure to properly document assertion of the privilege on a privilege log to constitute a waiver.[207] Privilege logs are almost always created by the attorney or the attorney's staff. Also, courts often find

202. FED. R. CIV. P. 26(b)(5)(B). *See generally* Ronald J. Hedges, *A View From the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure,* 227 F.R.D. 123 (2005); Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against their Codification in the Federal Rules of Civil Procedure,* 47 WM. & MARY L. REV. 663 (2005).

203. *See, e.g.*, Minebea Co. v. Papst, 228 F.R.D. 34, 35 (D.D.C. 2005) ("[I]f a client wished to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels." (quoting *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989))); Ares-Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994) ("In this district, disclosure of documents subject to an attorney client privilege operates as a waiver to any documents disclosed by inadvertence." (internal punctuation omitted) (quoting Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988))); Wichita Land & Cattle Co. v. American Fed. Bank, F.S.B., 148 F.R.D. 456, 457 (D.D.C. 1992) ("Disclosure of otherwise-privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege."); F.D.I.C. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) ("[W]hen a document is disclosed, even inadvertently, it is no longer held in confidence despite the intentions of the party and thus, 'the privilege is lost . . . .'" (quoting *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989))).

204. Ares-Serono, Inc v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994).

205. *Id.* (quoting Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1988)).

206. *See, e.g., Singh*, 140 F.R.D. at 253.

207. *See, e.g.*, Smithkline Beecham Corp. v. Apotex Corp., 232 F.R.D. 467, 476 (E.D. Pa. 2005) (failing to identify the author of a document on the privilege log is waiver).

the attorney's failure to assert the privilege or object to disclosure of a privileged communication to be waiver.[208]

However, courts recognizing an attorney's authority to waive the privilege usually do not expressly address the issue. Rather, the authority is implicitly assumed. One case in which the court expressly dealt with the authority issue is *In re Grand Jury Investigations of Ocean Transportation.*[209] The court evaluated two claims of privilege for documents that an attorney had produced in response to a grand jury subpoena duces tecum. Unlike the traditional inadvertent disclosure setting in which the attorney recognizes the document as privileged but produces it by mistake, the attorney in *Ocean Transport* intended to produce a set of documents because the attorney believed the documents to be unprivileged. Several months later the privilege was asserted.[210] The second claim to privilege in *Ocean Transport* related to a set of documents produced but marked with a "P." When opposing counsel inquired about the documents with the "P," he was assured that the documents were not privileged. Later, the privilege was asserted. The court deemed the privilege waived for both sets of documents.[211] The court noted that the client had, in general, instructed the attorney not to produce any documents protected by the privilege.[212] The court stated that the attorney then acted as the client's agent in determining what to disclose.[213]

In contrast, there are other situations where the attorney is clearly not acting as an agent of the client. Yet, the finding that an agency did not exist is consistent with agency doctrine. This situation exists when the attorney discloses, not to further the interests of the client in the attorney's role as a representative of the client, but rather to satisfy ethical responsibilities. For example, in *Newman v. State,*[214] the attorney disclosed communications with his client as permitted by the applicable ethics rule. The rule allowed disclosure of information if the attorney believed such disclosure was reasonably necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily

208. *See, e.g.,* Cunningham v. Conn. Mutual Life Ins., 845 F. Supp. 1403, 1408–09 (S.D. Cal. 1994) (failing to place the document on a privilege log operates as a waiver); Banks v. Office of Senate Sergeant-at-Arms, 233 F.R.D. 1, 9 (D.D.C. 2005) (failing to assert privilege until after the privilege log was submitted resulted in waiver).

209. 604 F.2d 672 (D.C. Cir.), *cert. denied sub nom.* Sea-Land Serv., Inc. v. United States, 444 U.S. 915 (1979).

210. *Id.* at 674.

211. *Id.* at 675.

212. *Id.* at 674.

213. *Id.* at 675. *See also* United States v. Martin, 773 F.2d 579 (4th Cir. 1985) (attorney acted within the scope of this authority in making statements to the IRS on his client's behalf).

214. 863 A.2d 321 (Md. 2004).

harm."[215] The attorney reported the client had discussed killing her children. The Court refused to find that the privilege had been defeated by the disclosure because the attorney was not acting as the agent of the client in making the disclosure.[216] Such a holding is consistent with agency principles even though the Court recognized no agency.

4. Some Courts Do Not Apply Traditional Agency Concepts

A few courts, however, take the position that an inadvertent disclosure by an attorney cannot be a waiver.[217] For example, in *Premier Digital Access, Inc. v. Central Telephone Company*,[218] the United States District Court for the District of Nevada evaluated whether a privileged communication (an email), which was disclosed during document production, retained the protection of the privilege. The email was from an in-house attorney to the client, and it offered advice about a contract. In the subsequent litigation, litigation counsel produced 1280 pages of documents, including the email, as its initial disclosure pursuant to Rule 26 of the *Federal Rules of Civil Procedure*. The client discovered the disclosure a year later when the opposition mentioned it in a response to a motion for summary judgment. The client claimed that it was an inadvertent disclosure by litigation counsel.[219] The court refused to find a waiver on the basis of the inadvertent disclosure, stating: "[W]aiver of the privilege may only occur due to a voluntary disclosure, and that disclosure must be made by the

215. *Id.* at 332 (quoting MD. RULES OF PROF'L CONDUCT R. 1.6(b)).

216. *Id.* at 333. The *Newman* court noted that to allow the attorney to destroy the privilege without consent of the client would do much damage to the privilege. *Id.* Note that in this scenario the attorney is not acting as the attorney for the client and so cannot be said to have implied authority to make the disclosure. *See also* Purcell v. Dist. Attorney for the Suffolk Dist., 676 N.E.2d 436 (Mass. 1997) (finding that privilege was not defeated even though attorney revealed privileged communications to warn of an arson threat).

217. *See, e.g.*, KL Group v. Case, Kay & Lynch, 829 F.2d 909 (9th Cir. 1987) (regarding inadvertent disclosure during discovery, the client is the holder of the privilege and the holder did not voluntarily disclose the document); Premier Digital Access, Inc. v. Cent. Tele. Co., 360 F. Supp. 2d 1168 (D. Nev. 2005) (requiring voluntary disclosure by the client for waiver); 46th Cir. Trial Court v. Crawford County, 702 N.W.2d 588 (Mich. Ct. App. 2005), *rev'd on other grounds*, 719 N.W.2d 553 (Mich. 2006) (noting that there can be no waiver based on an inadvertent disclosure because waiver must be intentional); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991) (holding that an inadvertent disclosure by an attorney does not constitute a waiver); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099 (D. Del. 1990) (inadvertent disclosure by counsel does not waive privilege); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982) (inadvertent disclosure by the attorney cannot be waiver).

218. 360 F. Supp. 2d 1168 (D. Nev. 2005).

219. *Id.* at 1171.

client."[220] Interestingly, in reaching its result, the court relied on a Nevada state court opinion, *Manley v. State,*[221] in which the Court also stated that "the attorney may claim the privilege on the client's behalf, [but] only the client has the ability to waive it."[222] Thus, these courts reject the notion that the attorney is impliedly authorized to act for the client in the litigation role. In addition, these courts appear to reject the notion that the attorney may have apparent authority to act for the client.[223]

The rationale of some of these cases seems tied to an erroneous view of the standard for waiver of the privilege. In *Mendenhall v. Barber-Greene Co.*,[224] a case of inadvertent production by an attorney, the court found no waiver because it believed a waiver required an "'intentional relinquishment or abandonment of a known right.'"[225] The *Mendenhall* court recognized that the standard was one for constitutional rights but stated that it applied to the attorney-client privilege as well. The *Mendenhall* court concluded: "If we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege."[226]

The generally accepted position on the standard of required mental state is that waiver of the attorney-client privilege is an event of lesser moment than a waiver of constitutional rights. The waiver must be voluntary but not necessarily intentional and knowing.[227] The *RLGL* states: "To constitute waiver, a disclosure must be voluntary. The disclosing person need not be aware that the communication was privi-

220. *Id.* at 1174.

221. 979 P.2d 703 (Nev. 1999).

222. *Id.* at 707 n.1.

223. In *Helman v. Murry's Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990), the court stated: "The holder of the privilege is the client. It would fly in the face of the essential purpose of the attorney/client privilege to allow a truly inadvertent disclosure of a privileged communication by counsel to waive the client's privilege." *See also* KL Group v. Case, Kay & Lynch, 829 F.2d 909 (9th Cir. 1987) (noting that regarding the inadvertent disclosure of documents during discovery; the client is the holder of the privilege and that the holder did not voluntarily disclose the documents); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936 (S.D. Fla. 1991) (holding that there was no waiver of the privilege during an inadvertent disclosure by the attorney, where there was no intentional relinquishment by the client).

224. 531 F. Supp. 951 (N.D. Ill. 1982).

225. *Id.* at 955 (quoting United States *ex rel.* Ross v. Franzen, 668 F.2d 933, 941 (7th Cir. 1982)).

226. 531 F. Supp. at 955 (emphasis omitted).

227. *See* RICE, *supra* note 162, § 9.20 at 58 (Attorney-client privilege is not a constitutional right; thus, "the client's *intention not to waive* will not prevent one's voluntary disclosure from effecting a waiver.").

leged, nor specifically intend to waive the privilege."[228] Judicially compelled disclosures, for example, would not be voluntary disclosures.[229]

Apart from the inadvertent disclosure setting, a few courts have denied the application of basic agency concepts in other waiver settings. In *Compulit v. Banctec, Inc.*,[230] the court examined whether a law firm could waive its client's attorney-client privilege by disclosing privileged information to a litigation support company. The court took the position that the law firm could not waive the privilege "because it rests with the client."[231] The court did not explore implied authority or apparent authority.

Perhaps the most intriguing case, however, is *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust.*[232] In *Sampson*, an attorney voluntarily produced documents that were privileged but that the attorney thought were not privileged. The client did not specifically consent to the production or even know about it.[233] The Wisconsin Court of Appeals decided that the attorney had waived the privilege. Under general agency concepts, the appellate court held discovery compliance was an area the client delegated to the lawyer and that a waiver of the attorney-client privilege need not be "an intentional relinquishment of a known right."[234]

The Wisconsin Supreme Court disagreed, stating:

> [A] lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request. We hold that only the client can waive the attorney-client privilege under Wis. Stat. § 905.11.[235]

The Court specifically stated that ordinarily under agency law the acts of counsel "during the representation" bind the client but held that reliance on this agency theory was "misplaced" in this situation.[236] The Court compared the waiver situation to a case in which a court imputed an attorney's actions in missing deadlines to the client

228. RLGL, *supra* note 6, § 79 cmt. g. *See also* MUELLER & KIRKPATRICK, *supra* note 162, § 5.28, at 564 (1995) (discussing voluntary disclosure).

229. *See* Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 275 (E.D. Va. 2004) ("It is clear that a 'judicially compelled' disclosure is not a voluntary one."); Gov't Guar. Fund of Republic of Finland v. Hyatt Corp., 182 F.R.D. 182, 187 (D.V.I. 1998) ("The attorney client privilege is not destroyed by disclosure of protected information to an outside party which is done only under the compulsion of a court order.").

230. 177 F.R.D. 410 (W.D. Mich. 1997).

231. *Id.* at 412.

232. 679 N.W.2d 794 (Wis. 2004).

233. *Id.* at 795.

234. *Id.* at 795–96.

235. *Id.* at 796.

236. *Id.* at 801.

and sanctioned the client. In that situation, in the Wisconsin Supreme Court's view, the equities were in favor of imputing the attorney's actions to the client because the client chose the noncomplying attorney. Holding the client responsible assisted the functioning of the judicial system. The Court distinguished the waiver situation by stating that imputation in the privilege situation did not promote the "functioning of the justice system" while protecting the privilege did.[237] To hold otherwise would place "too heavy a burden on the attorney-client relationship if an attorney were allowed to waive the attorney-client privilege in cases like the present case."[238] The Court stated: "[T]he agency doctrine does not apply to waiver of attorney-client privilege as it relates to privileged documents."[239]

E. The Policies

To hold that an attorney cannot be authorized to waive a client's attorney-client privilege is to limit the rights and power held by the client. A typical principal can authorize another to act as an agent of the principal by express language, by implication, or by apparent authorization. According to some courts, client-principals do not share these powers. These courts refuse to recognize that the client may have expressly or impliedly authorized the attorney to waive the privilege and refuse to recognize the application of apparent authority to the situation. The logical extreme in the context of a corporation seeking to waive the privilege is that the corporation does not have a right to waive since a corporation can only act through an agent. If the corporation cannot authorize an agent to waive, no waiver is possible. If a court is willing to allow a corporation to authorize a nonlawyer-agent to waive, then the court creates the odd situation in which the corporation could expressly, impliedly or apparently authorize a nonlawyer-agent but not a lawyer-agent.[240]

This minority view seems motivated by a desire to protect the attorney-client privilege and a desire to protect the client from the client's own chosen attorney. Such motivation is odd. First, courts traditionally have been wary of the privilege because of its propensity to shield relevant evidence from the fact-finder. As a result of this wariness, courts apply the privilege strictly and interpret it narrowly.[241] One would expect courts to be inclined to find waiver. Sec-

237. *Id.* at 802.
238. *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 679 N.W.2d 794, 802 (Wis. 2004).
239. *Id.*
240. Professor Paul Rice has noted this oddity. *See* RICE, *supra* note 162, § 9.47, at 253.
241. *See* Deel v. Bank of America, N.A., 227 F.R.D. 456, 458 (W.D. Va. 2005) ("Because the attorney-client privilege 'impedes the full and free discovery of the truth, it

ond, why does the client need protection from the actions of the attorney chosen by the client? Protecting the client seems odd, especially since the client selects the attorney and enjoys the protection of attorney standards of conduct that other principals do not have. Further, such a position means that attorneys have less incentive to exercise care with privileged documents.

VI. CONCLUSION

This analysis reveals several meager truths. In the context of client responsibility for an attorney's tortious conduct, some courts are disinclined to apply traditional agency concepts so as to make clients responsible for attorney torts or to bind the clients to settlements agreed to by their attorneys. In the context of waiver of the attorney-client privilege, some courts are wary of applying traditional agency concepts so that the clients are bound by the attorneys' waivers.

The courts clearly appear to be motivated by desire to protect the client-principals. Yet, as the above discussion reflects, courts may not be making decisions with a clear understanding of what traditional agency law would dictate. In other words, courts motivated by a desire to protect client-principals may not understand that their holdings deviate significantly from traditional agency principles. Thus, these courts have a less-than-perfect understanding of the costs of additional client protection while perhaps having a "rose-colored glasses" view of the need for client protection.

The effect of providing the added protection to clients is that those clients are not held responsible for their attorneys' actions. The third party dealing with the client's attorney—the injured party in the tort scenario, the opposing party in the settlement context, and the opposing party and the court in the context of the waiver of the attorney-client privilege—bears the burden of the attorney's conduct. Traditional agency law would make client responsibility possible if actual or apparent authority is present. Traditional agency law would give weight to the client's responsibility in selecting the attorney. Some modern courts choose to ignore these established principles. The client is protected; the innocent third party is not. The client has no incentive to exercise care in selecting an attorney and no incentive to monitor the matter handled by the attorney. There is no disincentive to the client inclined to encourage inappropriate lawyer conduct. The deceptive and deceitful client walks away whistling.

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must be narrowly construed and recognized only to the very limited extent that excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" (quoting *In re* Grand Jury Subpoena, 341 F.3d 331, 335 (4th Cir. 2003), *cert. denied sub nom.* Under Seal v. United States, 541 U.S. 982 (2004) (other internal quotation marks omitted))).

This special treatment of attorneys and clients creates confusion as to the rules of law that apply to the attorney and client relationship. Attorneys are agents, perhaps, and clients are principals, perhaps. Even so, rules that apply to other principals and agents may not apply. As courts render opinions in which attorneys are treated differently, the law of agency in general becomes less clear.

Such significant negative effects must have redeeming justification or rationalization. Unfortunately, there is no compelling justification for setting aside traditional agency rules in the context of the attorney and client relationship. Client-principals need no special protection over and above what agency law provides for other principals. As in any other agency and principal setting, the client-principal is perfectly capable of choosing an attorney for whatever legal services are required and consulting with that attorney to achieve the goal. When, occasionally, matters go awry, the client should be responsible for the attorney if the customary rules of agency would so dictate. The client-principal reaps the benefits of the relationship and rightfully must shoulder the costs and risks. The attorney and client relationship is simply not so different from other agency relationships as to require different rules. Any special protection is present in the form of the rules of ethics governing attorney conduct, principles of fiduciary duty, and attorney malpractice liability.