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Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority

I

Reasons for Uncertainty

Civil claims are usually terminated by settlement. As many settlements involve parties represented by lawyers, one would expect that the controlling legal principles involving lawyer settlement authority would have been resolved long ago. In fact, courts and commentators have often declared the settled nature of such principles.[1] Unfortunately, current legal guidelines are quite unsettled. Recently, the American Bar Association (ABA), the American Law Institute (ALI), and several state supreme courts have each had a significant opportunity to quell much of the uncertainty. Not only did they fail to seize the moment, but some compounded existing problems.

This Article will demonstrate the unsettled nature of contemporary legal principles governing lawyer civil claim settlement authority. After reviewing recent ABA and ALI pronouncements, it will review the possible lawmakers. In part, uncertainty about the guidelines continues because there is confusion and debate about relevant lawmakers. Lawmakers must be determined in intrastate, interstate, and federal-state settings. The Article will next demonstrate, particularly through recent state supreme court decisions, many of the uncertainties plaguing the legal principles guiding lawyers' work in civil claim settlements. These

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[1] *See, e.g.*, Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331, 1333 (Ill. 1995) (concerning a lawyer's authority to settle a civil claim on behalf of a plaintiff/client, the court says "the controlling legal principles are quite settled").

uncertainties include doubts about express, implied, apparent, inherent, presumptive, and retroactive lawyer authority. Both content and terminology contain difficulties. In conclusion, the Article will offer suggestions for the appropriate lawmakers and for the public policies germane to lawyer civil claim settlement authority, including ideas about possible new ABA, ALI, and supreme court initiatives.

In part, the unsettled nature of the controlling legal principles arises because there is confusion, which is often unrecognized,[2] over whether general contract or agency law principles should apply to civil claim settlements. Some courts broadly assert that civil claim settlements are so comparable to other contracts,[3] or that lawyer-client relationships are so analogous to other principal-agent relationships,[4] that the same contract or agency guidelines should apply.[5] Further, some courts suggest that civil claim

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[2] *See, e.g.*, United States v. International Bd. of Teamsters, 986 F.2d 15, 20 (2d Cir. 1993). The Court employed federal law to determine whether an attorney had apparent authority to settle a federal contempt proceeding involving a client. The court referenced an early version of THE LAW GOVERNING LAWYERS, *infra* note 27, and used it to resolve a related question as to the attorney's actual authority, but then employed the RESTATEMENT OF AGENCY, *infra* note 28, in resolving the apparent authority issue. *Id.*

[3] *See, e.g.*, Hayes v. National Serv. Indus., 196 F.3d 1252 (11th Cir. 1999) ("In general, the law of contracts governs the construction and enforcement of settlement agreements."); Dillow v. Ashland, Inc., No. 97-6108, 1999 WL 685941, *1 (6th Cir., Aug. 24, 1999) ("In determining whether a settlement agreement is a valid contract, the district court should refer to state substantive law."); Beverly v. Chandler, 564 So. 2d 922, 923 (Ala. 1990) ("The contract Mary Beverly made with her attorneys and the settlement agreement made by her attorneys with Dr. Chandler are both governed by principles of contract law and are as binding on the parties as any other contract is."); *In re* Marriage of Davis, 678 N.E.2d 68, 69 (Ill. App. Ct. 1997) (construing an agreed marriage dissolution judgment, the court said that the "same rules that apply to construing contracts apply to interpreting divorce decrees"); City of Chicago Heights v. Crotty, 679 N.E.2d 412 (Ill. App. Ct. 1997) (involving a similar ruling for federal civil rights claim settled in state court); Omaha Nat'l Bank of Omaha v. Mullenax, 320 N.W.2d 755, 758 (Neb. 1982) ("It is virtually undisputed that a compromise and settlement agreement is subject to the general principles of contract law and is enforceable under the same principles as other contracts.").

[4] *See, e.g.*, Blanton v. Womancare, Inc., 696 P.2d 645, 649 (Cal. 1985) ("As a general proposition the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency."). *But see*, *e.g.*, Edwards v. Born, Inc., 792 F.2d 387, 389 (3d Cir. 1986) (referencing the general proposition in *Blanton*, the court recognized that because this area "implicates practical and ethical considerations peculiar to the adjudicatory process . . . courts have glossed agency principles" and thus look to both general agency principles and special judicial precedents for guidance).

[5] Some commentators suggest that traditional contract and agency law principles should apply to the attorney settlement context. *See, e.g.*, Grace M. Giesel, *Enforce-*

settlements are so intertwined with the policies behind the claims being settled that the settlements should be guided by the laws of those lawmakers who created the relevant substantive laws.[6] At least for pending civil claims, other courts state that any settlements should be chiefly governed by their own civil procedure laws.[7] Frequently, these judicial declarations appear in an all-or-nothing form, implying that most, if not all, relevant guidelines originate from a single lawmaker.

The unsettled nature of the controlling legal principles on lawyer civil claim settlement authority is also attributable to the confusion over proper characterizations of the lawyer-client relationship. Characterization often results when an all-or-nothing approach is disavowed and the elements of the lawyer-client relationship are individually analyzed to determine guiding legal principles. Courts characterize the lawyer-client relationship when determining who in government has lawmaking powers, which supreme court lawmaking mechanism should promulgate new guidelines, or when devising the content of any new guidelines. In these determinations, characterizations of the lawyer-client relationship as substance, procedure, or ethics may be reasonable at times. Often this goes unrecognized where courts generally assume that all elements of the lawyer-client relationship should be characterized similarly for settlement purposes.[8] Upon individual inquiry, there is no single characterization which should apply to all elements of the lawyer-client relationship. Even in a limited, intrastate setting, where all the relevant conduct occurs within a single jurisdiction, usually no single characterization will always work. Further, appropriate characteriza-

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ment of Settlement Contracts: The Problem of the Attorney Agent, 12 GEO. J. LEGAL ETHICS 543, 585 (1999) [hereinafter Giesel] (suggesting that a return to old contract and agency principles will clarify "murky" standards of lawyer settlement authority).

[6] *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361-62 (1952) (asserting that questions involving releases of Federal Employers' Liability Act claims in state courts are governed by the Act since "devices designed to liquidate or defeat" such claims "play an important part in the federal Act's administration" and since "uniform application throughout the country" is essential to effectuating the Act's purposes).

[7] *See, e.g.*, Kennedy v. Hyde, 682 S.W.2d 525 (Tex. 1984) (asserting civil case settlement agreements must conform to the Texas civil procedure rule mandating that agreements "touching any suit pending . . . be in writing, signed and filed . . . unless . . . made in open court and entered of record").

[8] *See, e.g.*, Lydon v. Eagle Food Ctrs., Inc., 696 N.E.2d 1211, 1214 (Ill. App. Ct. 1998) (resolving a lawyer civil claim authority question the court stated that "the law of principal and agent applies to an attorney-client relationship").

tions of elements of the lawyer-client relationship for settlement purposes should vary between jurisdictions since relevant lawmakers as well public policies differ markedly.

II

ABA AND ALI PRONOUNCEMENTS

For lawyer conduct guidelines, the proposals of the ABA usually have significant influence. ABA pronouncements on lawyer civil claim settlement authority seemingly began with the adoption of the *Model Code of Professional Responsibility* on August 12, 1969.[9] Its Ethical Consideration 7-7 (EC 7-7) provided guidelines for lawyers and lawmakers as follows:

> 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 and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer . . . .[10]

The client's decisionmaking responsibility in criminal case settlements was comparable under EC 7-7 which, after noting that a "defense lawyer in a criminal case has the duty to advise his client fully," stated that "it is for the client to decide what plea should be entered."[11]

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[9] ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (1992), at 29 [hereinafter 1992 MODEL RULES] ("Prior to the Model Rules, the distribution of decision-making authority had never been fully addressed in the professions' standards of conduct. The 1908 Canons of Professional Ethics discussed only the lawyer's authority to 'control the incidents of trial.' . . . Nor did the Model Code squarely address the issue . . . although the Model Code referred to the client's authority in a number of its aspirational Ethical Considerations. . . ."). In the next edition, published in 1996, the Center simply noted Model Rule 1.2(a) "has no counterpart in the Disciplinary Rules of the Model Code" and quoted a few ethical considerations. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (1999), at 15 [hereinafter 1996 MODEL RULES]. While specific ABA pronouncements on lawyer civil claim settlement authority first appeared in 1969, even prior to the 1908 Canons, the 1969 Model Code's policy recognizing client autonomy in settlement matters was noted in judicial precedents. *See, e.g.*, United States v. Beebe, 180 U.S. 343, 351 (1901).

[10] MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1969) [hereinafter MODEL CODE]. On other civil case decisions reserved for the client, see, for example, *In re Marriage of Helsel*, 243 Cal. Rptr. 657, 660-61 (Cal. Ct. App. 1998) (finding no authority for attorney to waive clients' fundamental right, such as trial by jury, or a stipulation impairing a sufficiently substantial portion of the case).

[11] MODEL CODE, *supra* note 10, EC 7-7.

On August 2, 1983, the ABA adopted the *Model Rules of Professional Conduct*.[12] They continued to recognize expressly exclusive client decisionmaking responsibilities in both civil and criminal case settlement settings. The pertinent guideline, Model Rule 1.2, is entitled "Scope of Representation" and states, in part: "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . ."[13]

Today, some American states follow EC 7-7[14] while others follow Model Rule 1.2(a).[15] A few states have not substantially implemented either the ABA Code or the ABA Model Rules, but rather follow their own variations, including provisions on settlement.[16] At least a few states have no pertinent written professional conduct provisions concerning settlements.[17]

The differences in the civil claim settlement guidelines within EC 7-7 and Model Rule 1.2(a) are minor, as each clearly recognizes a client's exclusive decisionmaking responsibility. The ABA pronouncements also seemingly equate client settlement prerogatives in the civil and criminal case settings as the ABA employs such comparable terms as "decide" and "decision." Because of the need for personal decisionmaking by criminal defendants in making guilty pleas and thus in criminal case settlements, was clearly established by the Supreme Court of the United States as a nondelegable client responsibility before EC

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[12] 1992 MODEL RULES, *supra* note 9, at 2.

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

[14] *See, e.g.*, GA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7; NEB. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7; VA. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7; VT. CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7.

[15] *See, e.g.*, ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.2; ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.2; N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.2; N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.2.

[16] *See, e.g.*, LA. RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) ("Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations."). More generally, at least in some states, like New York, the lawyer professional responsibility provisions, adopted in New York by the four appellate divisions of the Supreme Court, constitute an amalgam of Model Code, Model Rule, and non-ABA provisions.

[17] Thus, California and Maine do not have any written professional conduct rules specifically addressing lawyer settlement authority. *See* CAL. RULES OF PROFESSIONAL CONDUCT; ME. BAR RULES, Rule 3: Code of Professional Responsibility.

7-7 was finally adopted,[18] the implication of similar ABA terminology for civil and criminal case settlements is that personal client responsibility in both settings was necessary and nondelegable.[19] Yet, in fact, binding civil claim settlement decisionmaking both inside and outside of civil litigation is often undertaken by lawyers without client participation.[20] At times, this decisionmaking occurs even where there has been no earlier delegation of settlement authority by the client to the lawyer. The legitimacy of certain civil claim settlements reached only by lawyers is, in fact, recognized in ABA literature outside the Model Code and Model Rules, where the derogation of the apparent policies that underlay EC 7-7 and Model Rule 1.2(a) are not addressed.[21]

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[18] *See* Boykin v. Alabama, 395 U.S. 238, 244 n.7 (1969) (noting that in employing a guilty plea to effect a conviction, a trial judge must be satisfied that a criminal defendant has a full understanding of what the plea connotes and of its consequence and must act only after conducting an on the record examination of the defendant).

[19] Comparable personal client responsibility for civil and criminal case settlements is also often suggested by courts. For example, the California Supreme Court has said:

> We must read the constitutional language in light of the general rule that in both civil and criminal matters, a party's attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters .... In the civil context, the attorney has authority to enter into stipulations binding on the client in all matters of procedure, though he or she may not stipulate in a manner to "impair the client's substantial rights or the cause of action itself." ... Thus the attorney cannot without authorization settle the suit, stipulate to a matter that would eliminate an essential defense, agree to entry of a default judgment, or stipulate to nominal damages .... In the criminal context, too, counsel is captain of the ship. As we said recently: "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics." ... It is for the defendant to decide such fundamental matters as whether to plead guilty ... whether to waive the right to trial by jury ... whether to waive the right to counsel ... and whether to waive the right to be free from self-incrimination.

In re Horton, 813 P.2d 1335, 1341-42 (Cal. 1991) (quoting People v. Hamilton, 48 Cal. 3d 1142, 1163 (1989)).

[20] The inapplicability of the criminal plea procedures to releases of civil claims is widely recognized. *See, e.g.*, Rodgers v. United States Steel Corp., 70 F.R.D. 639, 645 n.15 (W.D. Pa. 1976).

[21] The Indiana Supreme Court has said that the absence of client participation, and perhaps even delegation, in lawyer civil claim authority cases can be reconciled with its ABA-inspired law as the former concerns the lawyers' relationship with third parties and the latter concerns lawyer-client relationships. Yet, it did not explain why its ABA-inspired law, MODEL RULES OF PROFESSIONAL CONDUCT Rule

Thus, the most recent ABA book containing annotations to the *Model Rules of Professional Conduct* recognizes the possible delegation by a client to a lawyer of civil claim settlement authority. It says that authority can be expressly delegated to a lawyer "in the employment contract or retainer agreement"[22] or implicitly.[23] The most recent ABA book even mentions cases holding that a client may be bound to a lawyer's settlement, absent any client delegation, as long as there is apparent authority.[24] This book on the Model Rules also declares that a lawyer generally has no "inherent authority" to bind a client to a civil claim settlement;[25] yet, in so doing, it fails to mention instances of in-court presumptions of delegated lawyer settlement authority grounded on inherent authority principles.[26]

The *Restatements of the Law* by the ALI, including those dealing with *The Law Governing Lawyers* and the *Restatement of Agency* are good sources on the parameters of delegated and undelegated lawyer civil claim settlement authority. *The Law Governing Lawyers* provides a contrast to EC 7-7 and Model Rule 1.2(a). Its statements on prevailing legal principles directly rec-

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1.2(a), required such principles as apparent or implied attorney authority to be forbidden in criminal, but not in civil, settings. Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1303 n.6 (Ind. 1998).

[22] 1996 MODEL RULES, *supra* note 9, at 18 ("Ideally, a lawyer's authority can be found clearly stated in the employment contract or retainer agreement."); *see also* 1992 MODEL RULES, *supra* note 9, at 31.

[23] 1996 MODEL RULES, *supra* note 9, at 19 ("Authority may also be implied from a client's more general directive, when the means to follow that directive require the grant of such authority."); *see also* 1992 MODEL RULES, *supra* note 9, at 32.

[24] 1996 MODEL RULES, *supra* note 9, at 19 (explaining that cases involving apparent authority reason that a lawyer's substantive decisionmaking authority on behalf of a client may be presumed by virtue of representation, as well as other cases recognizing apparent authority can arise from "the impression given to a third party" by the client); *see also* 1992 MODEL RULES, *supra* note 9, at 32.

[25] 1996 MODEL RULES, *supra* note 9, at 17 ("[A] lawyer has no inherent authority to settle client's claim."); *see also* 1992 MODEL RULES, *supra* note 9, at 31.

[26] These instances are covered in the discussion of apparent authority, which cover client's conduct with adversaries and not with their own lawyers. 1996 MODEL RULES, *supra* note 9, at 19; 1992 MODEL RULES, *supra* note 9, at 32. The Model Rules are also confusing in other respects. For example, the 1992 MODEL RULES, *supra* note 9, at 32, states about implied authority: "A client can ratify the acts or agreements of his or her lawyer even though those actions exceed the authority given by the client if the client accepts the results of the lawyer's actions or fails to object within a reasonable length of time." Here, rather than focusing on conduct between the client and the lawyer, which can trigger implied delegation of authority to the lawyer before the lawyer acts, the focus is on conduct by the client before others after the lawyer has already acted. This focus indicates authority is retroactively given. *See also* 1996 MODEL RULES, *supra* note 9, at 19.

ognize that the delegation of client settlement responsibility to a lawyer can be express or implied.[27] Moreover, *The Law Governing Lawyers* recognizes apparent authority as a vehicle by which a lawyer may bind a client to a civil claim settlement even though no settlement responsibility was actually delegated. Additionally, it speaks to both presumptive and retroactive lawyer authority. Likewise, the *Restatement of Agency* defines inherent agency power to include, at times, the authority of a lawyer to bind a client to a civil claim settlement where there is neither delegated nor apparent authority.[28]

Section 33 of *The Law Governing Lawyers* describes the "decisions" which "are reserved to the client" as including "whether and on what terms to settle a claim" and "how a criminal defendant should plead." Yet, the section also states that such decisions may be undertaken by a lawyer for the client "when the client has validly authorized the lawyer to make the particular decision."[29] Section 33, however, limits the opportunity for valid authorization by saying that "[r]egardless of any contrary agreement with a lawyer, a client may revoke a lawyer's authority to make" any such decision.[30] Also, unlike EC 7-7 and Model Rule 1.2(a), the section recognizes differences between delegations of settlement authority in civil and criminal cases as well as in differing civil case contexts. It recognizes limits on delegations where the law "requires the client's personal participation or approval,"[31] as prevailing criminal and civil laws had often done even prior to EC 7-7.

Section 38 of *The Law Governing Lawyers* says that a lawyer's "act is considered to be that of a client" when "the client has expressly or impliedly authorized the act."[32] Thus, section 38 recognizes that a client's responsibility for a civil claim settlement decision can be delegated to a lawyer. Section 38 also provides that the lawyer's act can bind the client where authority concern-

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[27] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 (1998) [hereinafter THE LAW GOVERNING LAWYERS].

[28] RESTATEMENT (SECOND) OF AGENCY § 8A (1958) [hereinafter RESTATEMENT OF AGENCY]. This Restatement also speaks more generally to agent authority by the acts of a principal in terms comparable to THE LAW GOVERNING LAWYERS, *supra* note 27, which discusses express, apparent, and retroactive authority.

[29] THE LAW GOVERNING LAWYERS, *supra* note 27, § 33(1).

[30] *Id.* § 33(3).

[31] *Id.* § 33(2).

[32] *Id.* § 38(1).

ing the act is reserved to the lawyer.[33] In the civil claim settlement context, such authority is reserved to the lawyer if there is a "law or an order of a tribunal" requiring "an immediate decision without time to consult the client."[34] Finally, section 38 says that the act of a lawyer is considered to be that of a client where "the client ratifies the act."[35]

Absent actual initial client authorization or later ratification, section 39 indicates that the acts of a lawyer are also considered to be those of the client when client conduct constitutes apparent authority; that is, when a "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."[36] And, section 37 recognizes that a lawyer appearing in court on a client's behalf may be presumptively authorized to represent the client, with the extent of authority left to sections 38 and 39.[37]

In addition, the *Restatement of Agency* seems to recognize that a lawyer may have the "inherent agency power" to bind a client to a civil claim settlement. Section 8A defines inherent agency power as "the power of an agent . . . which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."[38] This section has been employed by some courts to bind clients to lawyer-prompted settlements without any client delegation or any client manifestation of settlement authority in the lawyer.[39]

Thus, ALI pronouncements provide more informative guides to lawyer civil claim settlement authority than ABA pronouncements. The former better reflect the existing case law, rules, and statutes. The ALI pronouncements recognize that a client's

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[33] *Id.* § 38(2).

[34] *Id.* § 34.

[35] *Id.* § 38.

[36] *Id.* § 39.

[37] *Id.* § 37 (explaining that "[a] lawyer who enters an appearance before a tribunal on behalf of a person is presumed to represent that person as a client," though this presumption may be rebutted).

[38] RESTATEMENT OF AGENCY, *supra* note 28, § 8A; *see also id.* at cmt. b (explaining that "because agents are fiduciaries acting generally in the principal's interests, and are trusted and controlled by him, it is fairer that the risk of loss caused by disobedience of agents should fall upon the principal rather than upon third persons").

[39] *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1304 (Ind. 1998).

responsibility for a civil claim settlement can be delegated to a lawyer via actual authority;[40] that a client can otherwise be bound to a lawyer's settlement acts, as by way of apparent authority[41] or inherent agency power;[42] and that there are important distinctions between civil and criminal case settlements as well as between settlements of different types of civil cases.[43]

III

THE POSSIBLE LAWMAKERS

Before looking to how the ABA and ALI pronouncements actually reflect American laws, an exploration of possible lawmakers seems appropriate. Relevant laws can not be explored if they can not be found. The ABA and ALI pronouncements say little about who should be making American laws on lawyer civil claim settlement authority, though they raise significant questions about the contents of such laws. If law reform efforts are undertaken, as we will later urge, difficult issues concerning appropriate lawmakers will certainly arise. Even a cursory exploration of actual and possible lawmakers reveals that there are several relevant entities, chiefly including the legislature; the supreme court as rulemaker; and, the supreme court as case decisionmaker. On occasion, there have been bitter disputes about appropriate allocations of power. These disputes continue. Significant debates and variations on the allocations of law-making powers can be found in intrastate, interstate, and federal-state settings.

Such disagreements can be illustrated by a cursory review of the requirements of the federal Older Workers Benefit Protection Act ("FOWBPA"),[44] which guides the waiver of claims under the federal Age Discrimination in Employment Act ("ADEA").[45] These requirements guide civil claim settlements,[46] as do explicit requirements on lawyer authority, to act

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[40] THE LAW GOVERNING LAWYERS, *supra* note 27, § 38.

[41] *Id.* § 39.

[42] RESTATEMENT OF AGENCY, *supra* note 28, § 8A.

[43] THE LAW GOVERNING LAWYERS, *supra* note 27, § 33(2) (recognizing civil jury trial waiver laws can require "the client's personal participation or approval"); *see, e.g.*, 29 U.S.C. § 626(f) (1994) (waiver of jury trial right for federal age discrimination claim).

[44] 29 U.S.C. § 626(f).

[45] 29 U.S.C. §§ 621-634.

[46] These statutory mandates are recognized as containing "stricter requirements

on behalf of a client. In part, the FOWBPA requires the following:

> (f) Waiver
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> (1) An individual may not waive any right or claim under this [chapter] unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum–
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> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
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> . . . .
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> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
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> . . . .
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> (2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section . . . 623 or 633a [of this title] may not be considered knowing and voluntary unless at a minimum–
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> (A) subparagraphs (A) through (E) of paragraph (1) have been met; and
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> (B) the individual is given a reasonable period of time within which to consider the settlement agreement.[47]

In considering such requirements, significant questions will arise about lawmaking powers in intrastate, interstate, and federal-state settings. In the intrastate civil action setting, determinations of who promulgates such requirements often will be guided by initial characterizations. Three issues arise early on: whether a requirement as to a writing (and presumably as to a signature of the claimant on the writing[48]) under section (f)(1)(A) is (1) substantive (antidiscrimination) law, usually made by the legislature; (2) procedural law (at least when used in civil actions), often made with the involvement of both the high court and the legislature; or, (3) lawyer professional conduct law (since there

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on settlements of ADEA claims" than apply to Title VII claims. Watson v. Mobil Oil Corp., 132 F.3d 37 (7th Cir.), *aff'g* No. 96C389 (N.D. Ill. 1997).

[47] 29 U.S.C. § 626(f).

[48] *Compare* Lavan v. Nowell, 708 So. 2d 1052, 1052 n.3 (La. 1998) (stating that a code provision requiring that a compromise agreement must be "in writing" implicitly mandates "signatures of both parties") *with* Johnson v. Department of Corrections, 38 Cal. App. 4th 1700, 1703 (Cal. Ct. App. 1995) (stating that a statute requiring a party's written or oral stipulation means the party's own personal agreement).

are limits on the settlement authority which might otherwise be delegated to lawyers), typically made only by the supreme court. In the interstate civil action setting, initial characterizations again play a role. Is the section (f)(1)(A) limit on lawyer authority a civil procedure law requisite, usually guided by forum law; a substantive law requisite guided by the policies underlying the antidiscrimination claim; or, at least in part, a lawyer ethics law, typically guided by the law of the licensing state? Finally, when a federal age discrimination employment claim is presented in a state trial court, there can be inquiry into characterization, raising issues of the ethical, substantive, and procedural law constraints on lawyers.

A. Intrastate Lawyer Settlement Authority Issues

For any American state, as well as for the federal government, there are several potential lawmakers involved in wholly internal matters relating to lawyer civil claim settlement authority. Possible lawmakers and the scope of their powers must be explored contextually. Even though there are often similar end results originating from different lawmakers, a wide variety of approaches to the allocation of lawmaking powers are relevant to court procedures and the practice of law. The starting point for any intrastate inquiry is the express provisions of the constitution; most frequently, the relevant provisions will address judicial procedural rulemaking,[49] supervisory,[50] administrative,[51] or regulatory[52] powers, as lawyer settlement authority issues arguably

[49] *See, e.g.*, MO. CONST. art. V, § 5 ("[S]upreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals"); N.C. CONST. art. IV, §13(2) ("The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court"). On whether civil procedure rules on claim settlements may abridge substantive rights, see *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984) (questions are unaddressed but deemed "problematical").

[50] *See, e.g.*, MONT. CONST. art. VII, § 2(2) (stating that the supreme court "has general supervisory control over all other courts"); ILL. CONST. art. VI, § 16 (providing general supervisory authority over all courts vested in supreme court and exercised by chief justice).

[51] *See, e.g.*, CAL. CONST. art. VI, § 6 (stating that judicial council shall "adopt rules for court administration . . . not inconsistent with statute"); ILL. CONST. art. VI, § 16 ("General administrative . . . authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice"); N.Y. CONST. art. VI, § 28(b) (stating that the chief administrator "shall supervise the administration and operation of the unified court system").

[52] *See, e.g.*, ARK. CONST. amend. 28 ("The Supreme Court shall make rules regu-

may be within the ambit of any or all of these powers. Usually, but certainly not always, lawyer civil claim settlement authority may also be deemed by the courts to be subject to inherent judicial power.[53] This authority can emanate from separation of powers principles,[54] especially where express constitutional provisions about relevant lawmaking powers are absent and where any other constitutional provisions are too uncertain to be employed alone. Even where there are seemingly clear constitutional allocations of lawmaking powers, usually to the supreme court, occasionally territorial battles on characterization are still waged.[55] And, even without an interbranch war, contextual inquiry may be necessary since initially allocated powers from the constitution, statute, or some other source, can usually be fully, or at least significantly, reallocated.[56] Examples of reallocations include powers to the supreme court by the legislature;[57] powers

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lating the practice of law and the professional conduct of attorneys at law"); FLA. CONST. art. V, § 15 ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.").

[53] *See, e.g.*, Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 374-76 (1998). Through a "negative" form of inherent powers concept, courts may declare any statute unconstitutional that deals with lawyer regulation; however, this power on occasion is not used, as where, via "comity," the courts "accept" the statutes. *Id.* A recent illustrative case is *Kunkel v. Walton*, 689 N.E.2d 1047, 1051 (Ill. 1997) (invalidating a portion of the 1995 Illinois Civil Justice Reform Amendments dealing with waivers of the doctor-patient privilege in bodily injury cases).

[54] *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1094-96 (Ill. 1997).

[55] *See, e.g.*, Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999). Since high court civil procedure rules still can not be overridden by legislature, the resurrection of an earlier invalidated statute dealing with medical malpractice pleading, notwithstanding its new express characterization as "substantive," is itself invalidated as the court laments the latest chapter in "turbulence among . . . coordinate branches of government" arising from tort reform efforts wherein the legislature chooses "to usurp" the high court's authority "by refusing to recognize" its holding. *Id.*

[56] As with substantive lawmaking, on such matters as commercial trade and environmental protection, which has been reallocated to administrative agencies, there may be limits on the ability of initially allocated court procedure/legal profession lawmakers to reallocate their powers, especially if the initial powers are constitutionally granted. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (stating that justices differ on constitutionally-based nondelegation doctrine in the administrative agency setting).

[57] *See, e.g.*, N.C. CONST. art. IV, § 13(2) (stating that while the General Assembly has the power to make "rules of practice and procedure," it "may delegate this authority to the Supreme Court"); CAL. BUS. & PROF. CODE § 6076 ("[W]ith the approval of the Supreme Court, the Board of Governors may formulate . . . rules of professional conduct for all members of the bar in the State.").

shared between the supreme court and the legislature;[58] and powers shared between the supreme court and lower courts.[59] As well, powers exercised by a single lawmaker can be exercised in a variety of ways, such as by a court, through either judicial rulemaking or case decision.[60]

1. Lawyer Conduct Laws

A significant guide to the legal principles on American lawyer civil claim settlement authority within a single jurisdiction is contained in the sets of state supreme court rules on lawyer professional conduct. These rules are often fashioned under a constitutionally-recognized power to regulate the practice of law.[61] Here, such professional conduct rules usually stand apart from other sets of court-promulgated rules, such as rules of civil procedure, evidence, and appellate practice, and generally follow ABA pronouncements.[62] On lawyer civil claim settlement authority, these professional conduct rules typically follow either Model Rule 1.2(a) or EC 7-7, meaning that the details may be substantially fleshed out in interpretive court decisions.[63]

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[58] *See, e.g.*, CAL. BUS. & PROF. CODE, div. 3, ch. 4, arts. 5-6 (stating that while article 5 recognizes lawyer conduct standards and disciplinary proceedings may involve the Board of Governors, article 6 establishes certain General Assembly standards for lawyer conduct and recognizes possible disciplinary proceeding involving the Supreme Court); O'Connell v. St. Francis Hosp., 492 N.E.2d 1322, 1326 (Ill. 1986) (permitting "concurrent" procedural rulemaking powers, as long as General Assembly does not unduly infringe upon court's regulation of judicial system).

[59] *See, e.g.*, 28 U.S.C. § 2071(a) (stating that the Supreme Court and lower courts may "prescribe rules for the conduct of their business," but lower court rules "shall be consistent with Acts of Congress" as well as with any Supreme Court rules).

[60] Consider, for example, the work product doctrine applicable in federal civil actions, which was first substantially defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), but was later codified in FED. R. CIV. P. 26(b)(3). The discretion to lawmaker either by rulemaking or case decision can, at times, be constrained. *See, e.g.*, 28 U.S.C. § 2074 (stating that while other evidence rules do not need congressional approval, rules on evidentiary privileges must be approved by Congress, so lawmaking via rulemaking here seemingly is forbidden).

[61] *See, e.g.*, Amendment to Rules Regulating the Florida Bar, 605 So. 2d 252 (Fla. 1992) (ordering the amendment of regulatory rules for lawyers issued under constitutional authority recognizing both the "exclusive" high court jurisdiction to admit and discipline lawyers and the power to adopt "practice and procedure rules," under FLA. CONST. art. V, §§ 2(a), 15).

[62] *But see* ARIZ. SUP. CT. R. 42 (containing Arizona Rules of Professional Conduct).

[63] Such court decisions may not, in fact, reflect interpretations of the ABA-inspired state law. *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1303 n.6 (Ind. 1998) (holding that while the Indiana Professional Conduct Rule 1.2(a) "parallels" judicial precedents on attorney civil claim settlement authority, the former

Though they may not contain a separate provision dealing with settlement authority, on occasion, there is a more distinct set of court rules on lawyer conduct[64] that leaves guidelines to case decisions.[65] Sometimes, there is a statutory scheme that significantly regulates legal practice, including aspects of lawyer civil claim settlement authority.[66]

2. *Civil Procedure Laws*

Other major sources of laws on lawyer civil claim settlement authority are civil procedure codes or civil procedure rules. Section 664.6 of the California Civil Procedure Law states that a stipulation about a civil claim settlement may be presented in "a writing signed by the parties outside the presence of the court or orally before the court."[67] Texas Civil Procedure Rule 11 mandates that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record."[68] This provision has been interpreted to limit the circumstances under which lawyers may settle the civil claims of their clients.[69]

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deals only with the lawyer-client relationship while the latter concerns the attorney's "dealings with third parties" on behalf of the client).

[64] *See, e.g.*, CAL. RULES OF PROFESSIONAL CONDUCT 3-510 (requiring a lawyer to communicate written offers of settlement and is read to require further the communication of significant oral offers of settlement).

[65] *See, e.g.*, Blanton v. Womancare, Inc., 696 P.2d 645, 647 (Cal. 1985) (discussing implied actual authority and apparent authority of lawyer to settle a client's claim).

[66] *See, e.g.*, OR. REV. STAT. §§ 9.005-9.990 (1999) (regulating attorneys and including section 9.330 on the authority of an attorney to bind a client by the attorney and client agreement). In Oregon, legal practice guidelines may also originate from the state bar board of governors and the Supreme Court, under OR. REV. STAT. § 9.490 (rules of professional conduct), or from the Council on Court Procedures, under OR. REV. STAT. § 1.735 (practice and procedure rules in civil proceedings). In the absence of a significant statutory scheme, special laws can address lawyer civil claim settlement authority. *See, e.g.*, LA. CIVIL CODE ANN. art. 3071 (West 1998) (stating that an agreement ending a lawsuit "must be either reduced into writing or recited in open court"); Felder v. Georgia Pacific Corp., 405 So. 2d 521, 523 (La. 1981) (holding that the code provision necessarily implies that any writing be signed by both parties).

[67] CAL. CIV. PROC. CODE § 664.6 (West 1998).

[68] TEX. CIV. PROC. CODE ANN. R. 11 (West 1999); *see also* LA. CIV. CODE ANN. art. 3071 (West 1998) (stating that a contract to end lawsuit "must be either reduced into writing or recited in open court.").

[69] Kennedy v. Hyde, 682 S.W.2d 525, 528-29 (Tex. 1984) (holding Rule 11 applies to civil claim settlements).

3. *Special Statutes*

With or without far-reaching professional conduct and civil procedure laws, special statutes can address lawyer civil claim settlement authority for discrete civil claims; for example, FOWBPA does this, though implicitly. Notwithstanding the general provisions of Texas Civil Procedure Rule 11, the Texas Family Code controls lawyer settlement authority in certain marriage dissolution cases. A Texas statute provides: "A mediated settlement agreement is binding on the parties if the agreement: (1) provides in [a separate paragraph] that the agreement is not subject to revocation; (2) is signed by each party . . .; [and] (3) is signed by the party's attorney."[70] By requiring that certain agreements be written and signed by each party and the lawyer, the legislature has limited many forms of delegated and undelegated lawyer civil claim settlement authority. Likewise, in Louisiana, a statute on certain property disputes mandates that authority "must be given expressly to . . . enter into a compromise or refer a matter to arbitration."[71]

4. *Case Law*

Finally, lawyer civil claim settlement authority may be guided by case precedents. An Illinois Supreme Court decision involving the recognition of an "in court" presumption about express lawyer civil claim authority illustrates such guidelines.[72] The court said that "[w]hile an attorney's authority to settle must be expressly conferred, the existence of the attorney of record's authority to settle in open court is presumed unless rebutted by affirmative evidence that authority is lacking."[73]

B. Interstate Lawyer Settlement Authority Issues

While there are difficulties in locating powers regarding lawyer settlement authority allocated and reallocated to lawmakers within a single government, in many multistate conduct settings the ascertainment of possible lawmakers and applicable guidelines is even more difficult. Hard choices must be made at times when two or more involved governments differ in their ap-

[70] TEX. FAM. CODE ANN. § 6.602 (West 1999).

[71] LA. CIV. CODE ANN. art. 2997 (West 1998) (covering the different modes of acquiring the ownership of things).

[72] Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331, 1334 (Ill. 1995).

[73] *Id.* (quoting Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1211 (Ill. 1982)).

proaches. Assuming there is only one state, is it the law of the licensing state of the lawyer which governs civil claim settlement authority? Or, assuming there is only one location, is it the law of the state where the lawyer was retained, where the client lives, or where the alleged settlement was reached?[74] Or, is it the law of the government whose substantive law defines the claim to be settled? Or, is it the law of the government with "the most significant relationship to the parties and the transaction"?[75] And, are the means of choosing among the laws of competing jurisdictions altered when differing types of civil claims are at issue or when the civil claims have already been presented to a government supported adjudicatory body, like a trial court? Again, characterizations with early focus on substance/procedure/ethics distinctions are often crucial. Neither the ABA nor the ALI pronouncements provide much guidance for drawing these distinctions in interstate settings.

While there was no counterpart in the ABA Model Code, the ABA Model Rules do contain a choice of law provision for lawyer disciplinary proceedings. Model Rule 8.5(b) says:

> In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
> (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice . . . the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> (2) for any other conduct,
> (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
> (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.[76]

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[74] Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150, 152 (6th Cir. 1992) (employing *lex loci* rule of Ohio to settlement contract question in diversity case).

[75] Tiernan v. Devoe, 923 F.2d 1024, 1033 (3d Cir. 1991) (citations omitted) (holding that the Pennsylvania choice of law rule, which as employed by the federal court included consideration of not only facts relating to the alleged settlement, but also facts relating to where the initial claim arose).

[76] MODEL RULES, *supra* note 13, § 8.5(b).

However appealing such an approach may be for interstate conflicts over lawyer civil claim settlement authority, the provision has not yet been widely used there, perhaps because the Model Rules as a whole are deemed by the ABA not "to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."[77] In addition, the Model Rule approach may be unwise in civil claim settlement authority arenas because it contains at least some seeds of uncertainty.[78] In *The Law Governing Lawyers*, the ALI found the ABA rule for choice of law in disciplinary proceedings too "rigid" and opted for a more uncertain approach involving presumptive preferences and utilization of the most significant relationship test.[79]

C. Federal-State Lawyer Settlement Authority Issues

Beside intrastate and interstate issues, federal-state issues can arise regarding lawyer civil claim settlement authority. Most often they surface when a state law claim is presented in a federal court or when a federal law claim is presented in a state court.[80] For such federal court presentations, case precedents have been required since there is no comprehensive scheme of general lawyer conduct standards that is applicable nationwide in the Article III federal courts[81] and only a few relevant general federal civil

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[77] 1996 MODEL RULES, *supra* note 9, at xviii (statement as to scope of Model Rules).

[78] Uncertainties include locating places of principal legal practice; defining predominant effect; and, determining how to proceed when one or more, but not all, involved states view lawyer civil claim settlement authority as something other than a matter of lawyer professional conduct.

[79] THE LAW GOVERNING LAWYERS, *supra* note 27, § 5 cmt. h (stating that each issue for which there is a conflict must be addressed on its specific facts as there is no more specific formula than the significant relationship test).

[80] Outside of these settings, federal-state issues can arise where federal law claims are presented in federal court, but where lawyer civil claim settlement authority may nevertheless be governed by state law. *Compare, e.g.*, *Tiernan*, 923 F.2d at 1032-33 (stating that an attorney's authority to settle pending federal and state law claims may be governed by state law) *with* Michaud v. Michaud, 932 F.2d 77, 80 (1st Cir. 1991) (stating that courts will "apply federal law to the issue of an attorney's authority to settle a civil action brought under federal law"). *Compare, e.g.*, Reo v. United States Postal Serv., 98 F.3d 73, 76 (3d Cir. 1996) (applying state-law standards on parental authority to settle a minor child's claim, as there was no distinct need for nationwide legal standards and there was well-developed state law) *with* Neilson v. Colgate-Palmolive Co., 993 F. Supp. 225 (S.D.N.Y. 1998) (holding that according to local court rule a guardian's ability to settle federal civil rights claims of an incompetent need not be followed).

[81] Recently, some proposals have been floated and a United States Judicial Conference committee has been exploring the feasibility and suitability of both general

procedure laws.[82] Precedents have addressed matters like lawyer civil claim settlement authority for in-court proceedings[83] and for settlements grounded on a lawyer's implied or apparent authority.[84] Characterization often plays a key role but analysis is often cursory.[85] For presentations of federal law claims in state courts, usually the lawyer professional conduct standards of the forum state are employed without much analysis or objection since many federal courts expressly defer generally to these state standards,[86] and characterization as an ethics law matter is usually not disputed. This premise also applies to many federal law claims that are presented in the federal courts.

The failure to pay more attention to federal-state issues involving lawyer civil claim settlement authority is unfortunate. The unsettled questions are especially troubling since an explosion of related issues and new questions seems imminent. The recent amendments to Federal Civil Procedure Rule 16 expressly permit a district court to "require that a party or its representatives be present or reasonably available by telephone in order to consider possible settlement of the dispute."[87] Inevitably, questions will arise about whether federal or state lawmakers should determine

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and specific federal policies. *See, e.g.*, Comment, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063 (1998).

[82] *See, e.g.*, FED. R. CIV. P. 11 (certifications of litigation papers by attorneys); 28 U.S.C. § 1927 (unreasonable and vexatious multiplication of proceedings by attorneys).

[83] *See, e.g.*, Oliver v. Kroger Co., 872 F. Supp. 1545 (N.D. Tex. 1994) (using Texas civil procedure rule).

[84] *See, e.g.*, Glazer v. J.C. Bradford and Co., 616 F.2d 167 (5th Cir. 1980) (using Georgia law); Hayes v. National Serv. Indus., 196 F.3d 1252 (11th Cir. 1999) (same).

[85] *See, e.g.*, Tiernan v. Devoe, 923 F.2d 1024, 1033 (3d Cir. 1991). The *Tiernan* court concluded that the focus of inquiry about lawyer civil claim settlement authority should be on an attorney's relationship with the client; in a federal civil case there is no substantial federal interest affected during such an inquiry and so state law should be employed, even though the attorney's conduct occurred in a conference before the federal trial judge which seemed key to the legal issue involving settlement authority. *Id.*

[86] *See, e.g.*, U.S. DIST. CT. S.D. ILL. R. 83.4(d)(2) ("The Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois . . . except as otherwise provided by specific rule of this Court."). *But see* U.S. DIST. CT. N.D. ILL. R. 3.52(B). Misconduct and grounds for discipline are set out in the court's own Rules of Professional Conduct, which significantly follow the ABA Model Rules. By contrast, standards for lawyer conduct found in, for example, state civil procedure laws are not subject to such express recognition and would only be employed in federal courts after an *Erie* doctrine analysis. *See, e.g.*, *Oliver*, 872 F. Supp. at 1547 (using Texas Civil Procedure Rule 11).

[87] FED. R. CIV. P. 16(c).

when a lawyer is a "representative" able to "consider" (and effectuate) settlement under Rule 16. In a comparable setting involving an "agent" under a federal rule of civil procedure for receipt of service of process, the United States Supreme Court opted for a "uniform federal standard" on agency rather than giving deference to state law where there were likely "contrary local policies."[88] A similar ruling under Rule 16 would prompt uniformity but undercut the traditional deference accorded by federal courts to state lawyer professional conduct standards. The use of federal law standards would also invite possible differences between in-court and out-of-court legal representation.

IV

CONTEMPORARY STANDARDS FOR LAWYER CIVIL CLAIM SETTLEMENT AUTHORITY

A. Delegated Authority

Notwithstanding the ABA pronouncements, a client can usually delegate authority to a lawyer to settle a civil claim.[89] Delegated authority, also often called "actual" authority, may be given either expressly or implicitly, with the focus in each setting on the conduct between the client and the lawyer, involving chiefly the "written or spoken words or other conduct" of the client.[90] Relevant client conduct includes express written or oral direction. These directives can bestow very narrow or very broad settlement authority. Relevant conduct also includes client actions which cause the lawyer to reasonably believe that the client wishes the lawyer to act upon settlement in the client's behalf.[91]

1. Express Authority

One traditionally-recognized form of actual authority is express authority. As described in section 38 of *The Law Gov-*

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[88] National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) (interpreting what is now Rule 4(e)(2) of the Federal Civil Procedure Rules).

[89] Exceptions can arise both in certain procedural law and substantive law settings, as where the signature of the party/client is needed. *See, e.g.*, Cook v. Surety Life Ins. Co., 903 P.2d 708 (Haw. Ct. App. 1995) (stating that a writing is required to delegate express authority to settle).

[90] *See, e.g.*, Scott v. Randle, 697 N.E.2d 60, 66 (Ind. Ct. App. 1998) (citing RESTATEMENT OF AGENCY, *supra* note 28, § 26).

[91] *Id.*; *see, e.g.*, Edwards v. Born, Inc., 792 F.2d 387, 389 (3d Cir. 1986) (finding implied authority where client repeatedly told lawyer it was the lawyer's "job" to arrive at a settlement figure).

erning Lawyers, a "lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third persons when: (1) the client has expressly . . . authorized the act."[92] A comparable provision in section 7 of the *Restatement of Agency* states that authority is "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."[93] The accompanying comment recognizes that while it is "possible for a principal to specify minutely what the agent is to do" by creating "express authority", most authority is "created by implication" meaning that it is "inferred from the words used, from customs and from the relations of the parties."[94]

Notwithstanding the guidance provided by the ALI, significant difficulties have arisen when courts must determine what type of client conduct is sufficient to trigger express authority to settle. There is disagreement on whether verbal assertions will always suffice or whether a writing is required. Likewise, there are disagreements on the specificity of the language or conduct required, as well as on the means by which express authority may be revoked. Finally, there are disagreements on the burdens of proof relevant to matters relating to express authority.

Some jurisdictions find that the mere retention of a lawyer is sufficient conduct to create express authority. For example, one federal court said "it is well established" that a lawyer "retained for litigation purposes is presumed to possess express authority."[95] Elsewhere the holdings differ. Thus, the Vermont Supreme Court has held that the mere retention of a lawyer, even when coupled with express permission to negotiate on the client's behalf, did not authorize the lawyer to enter into a settlement agreement.[96]

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[92] THE LAW GOVERNING LAWYERS, *supra* note 27, § 38.

[93] RESTATEMENT OF AGENCY, *supra* note 28, § 7.

[94] *Id.* § 7 cmt. c; *see also id.* § 26 cmt. c (stating that the "authority to perform a particular act can be conferred by the specific words of a statement to the agent" or "be inferred from words or conduct which the principal has reason to know indicate to the agent that he is to do the act for the benefit of the principal"). At times, express authority is employed for conduct not involving client-lawyer directives. *See, e.g.*, Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331, 1334 (Ill. 1995) (creating a presumption of express authority when lawyer appears for client in open court).

[95] HNV Cent. River Front Corp. v. United States, 32 Fed. Cl. 547, 549 (1995); *see also* Bryant v. Department of Justice, 86 F.3d 1179 (Fed. Cir. 1996).

[96] New England Educ. Training Serv., Inc. v. Silver St. Partnership, 528 A.2d 1117, 1119 (Vt. 1987).

Likewise, state governments vary on the form of express authorization required to delegate settlement authority. Many states allow a client to delegate express authority orally to a lawyer.[97] Conversely, some states require written client delegation of express authority to settle. Thus, the Hawaii Supreme Court found that a statute which said "no practitioner shall have power to . . . settle such matters confided to the practitioner, unless upon special authority in writing from the practitioner's client"[98] "clearly sets restrictions" on a lawyer's ability to settle a matter.[99]

Even if a client's delegation of settlement authority is in the proper form, uncertainties can still arise about the specificity of the language or conduct required. Some jurisdictions hold that general language by the client is enough to delegate express authority to settle. One federal appeals court held that "it is permissible for a client to give its lawyer general authority to settle cases."[100] The court even thought it "unnecessary" to define the exact meaning of express authority or to decide whether "the rule of express authority requires an explicit oral or written grant of settlement authority, rather than a general consent by the client."[101] Other courts require more specific language or conduct expressly authorizing the lawyer to settle. For example, another federal appeals court, employing Pennsylvania law, said that express authority "must be the result of explicit instructions regarding settlement."[102]

Moreover, there is conflict among jurisdictions about which types of delegations of express authority may be valid. The ALI and several states declare that nonrevocable delegations of settlement authority via general retainer agreements are void. Section 33 of *The Law Governing Lawyers* states that regardless of any contrary agreement with a lawyer, a "client may revoke a

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[97] *See, e.g.*, Hays v. Fischer, 777 P.2d 222, 226 (Ariz. Ct. App. 1989) (finding that a client's oral concurrence to settle the case for $10,500 expressly authorized the lawyer to settle).

[98] Hawai'i Hous. Auth. v. Uyehara, 883 P.2d 65, 71 (Haw. 1994); *see also* Cook v. Surety Life Ins. Co., 903 P.2d 708, 714 (Haw. Ct. App. 1995) (stating that a lawyer did not have express authority as "the express written consent of the client is required in settlement proceedings").

[99] *Cook*, 903 P.2d at 71 (interpreting HAW. REV. STAT. § 605-7).

[100] Smedley v. Temple Drilling Co., 782 F.2d 1357, 1360 (5th Cir. 1986).

[101] *Id.*

[102] Tiernan v. Devoe, 923 F.2d 1024, 1033 (3d Cir. 1991).

lawyer's authority."[103] Accordingly, section 33 forbids an irrevocable delegation of settlement authority through a general retainer agreement.[104] And, the Georgia Supreme Court invalidated a nonrevocable contingent fee agreement which delegated full settlement authority to the lawyer.[105] Conversely, some jurisdictions allow such a nonrevocable delegation of settlement authority in the general retainer agreement. For example, the Alabama Supreme Court upheld a provision of a retainer agreement which stated: "I give and grant unto him full power to act as my attorney . . . to settle said claim at his discretion before or after suit is instituted and to take any and all steps which he deems proper and desirable."[106] The court sustained this delegation of settlement authority "with no limitations or restrictions," finding "a client can give express authority to his or her attorney to act, by signing an employment contract that gives this authority."[107]

Finally, jurisdictions employ different burdens of proof in determining whether a lawyer has been delegated express authority to settle. The burden of proof regarding a lawyer's express authority to settle may be placed upon either of the parties.[108] For

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[103] THE LAW GOVERNING LAWYERS, *supra* note 27, § 33(3) (dealing with authority reserved to the client).

[104] *Id.* at cmt. c.

[105] *In re* Lewis, 463 S.E.2d 862 (Ga. 1995).

[106] Beverly v. Chandler, 564 So. 2d 922, 924 (Ala. 1990).

[107] *Id.* at 924. *But see* Newton v. SuperMarkets Gen. Corp., No. CIV.A. 88-4165, 1989 WL 144104, at *4 (E.D. Pa. Nov. 29, 1989). In *Newton* a written agreement stated "client authorizes the Law Offices of Herbert Monheit, P.C. to negotiate, prosecute, and within their sole discretion settle client's claim." While the court stated that such a writing "could constitute express authorization" to settle as express authority may flow from a grant of general authority, it also suggested that a "blanket authorization without appropriate follow-up" may be "inconsistent" with Rule 1.4 of the Model Rules requiring that a client be kept "reasonably informed." *Id.*; *see also* Hayes v. Eagle-Picher Indus., 513 F.2d 892, 892-93 (10th Cir. 1975) (finding that a retainer contract indicating lawyer would settle for a group of claimants if majority wished was invalid when a minority of claimants later objected to settlement).

[108] In Florida, for instance, the burden of proof to demonstrate that a client has delegated express authority to a lawyer is placed on the party seeking to demonstrate a settlement agreement. Linardos v. Lilley, 590 So. 2d 1064, 1064 (Fla. Dist. Ct. App. 1991). Such a burden of proof is protective of a client's interest in controlling the fate of the cause of action. But in *Newton*, a federal court found "that the Pennsylvania courts would likely place the burden of proof on the client to establish that his attorney lacked the requisite authority . . . the client has greater access to information . . . between his attorney and himself than does the opposing party." 1989 WL 144104, at *2.

example, the Alaska Supreme Court affirmed a lower court decision employing a "preponderance of the evidence" burden of proof as to the existence of a lawyer's settlement authority.[109] Yet, the New Mexico Supreme Court suggested a higher standard, saying that a "client may give his attorney . . . express authority . . . but such authority must be clear and unequivocal."[110]

2. *Implied Authority*

Another form of actual authority is implied authority. In *The Law Governing Lawyers*, section 38 states that a "lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third persons when: (1) the client has . . . impliedly authorized the act."[111] The ALI *Law Governing Lawyers* also cross-references the *Restatement of Agency*, section 7, comment c, which provides that "most authority is created by implication[,] . . . powers are all implied or inferred from the words used, from customs and from the relations of the parties."[112]

Even though *The Law Governing Lawyers* suggests that a lawyer may bind a client through implied authority,[113] some state courts seemingly hold otherwise. For example, the Illinois Supreme Court has said that the "client's express authorization" is needed before a lawyer can settle a cause of action.[114] In addition, while referencing *The Law Governing Lawyers* on implied authority, a federal court required "express authority from the client" for a lawyer to make a contract on a client's behalf, under Tennessee law.[115]

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[109] Saxton v. Splettstoezer, 557 P.2d 1126, 1127 (Alaska 1976).

[110] Augustus v. John Williams & Assocs., Inc., 589 P.2d 1028, 1030 (N.M. 1979).

[111] THE LAW GOVERNING LAWYERS, *supra* note 27, § 38.

[112] RESTATEMENT OF AGENCY, *supra* note 28, § 7, cmt. c; *see also id.* § 26, cmt. c (stating that implied authority "may be inferred from words or conduct which the principal has reason to know indicate to the agent that he is to do the act for the benefit of the principal").

[113] THE LAW GOVERNING LAWYERS, *supra* note 27, § 38 cmt. a.

[114] Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331, 1334 (Ill. 1995). Whether such statements necessarily exclude the recognition of implied, apparent or other forms of lawyer civil claim settlement authority is often unclear. While the *Brewer* court did not discuss possible apparent authority, earlier appellate court precedents, such as *Sakun v. Taffer*, 643 N.E.2d 1271, 1277 (Ill. App. Ct. 1994), had employed the concept in factual circumstances similar to those in *Brewer*.

[115] West Knoxville Assocs. v. Ticor Title Ins. Co., No. 95-5931, 1997 WL 561420, at *12 n.6 (6th Cir. Sept. 9, 1997); *see also* Blanton v. Womancare, Inc., 696 P.2d 645, 650 (Cal. 1985) (stating that it is "well settled" that a lawyer must be "specifically authorized to settle"); *In re* Marriage of Helsel, 243 Cal. Rptr. 657, 661 (Cal. Ct. App. 1988) ("[I]t is equally clear that the *Blanton* court was of the view that a law-

There are inconsistent applications even among the jurisdictions where a client may be bound to a settlement by virtue of implied authority. Courts differ on the creation and conditions of a lawyer's implied authority. Thus, laws on the form of client conduct that may prompt implied authority, as well as on any necessary language, are unsettled.

Most courts hold that the "retention of an attorney" does not prompt implied authority "without more" conduct from the client.[116] As observed by the Kentucky Supreme Court, it "is almost universal that an attorney, clothed with no other authority than that arising from his relationship, has no implied power to . . . settle."[117] However, a few American courts do find that the retention of a lawyer is crucial to recognizing an "apparent" authority to settle, at least where settlement occurs in open court or is in writing.[118]

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yer has no apparent authority to compromise and settle the lawsuit without the client's approval"); Saxton v. Splettstoezer, 557 P.2d 1126, 1127 (Alaska 1976) (requiring that the authority of a lawyer "to terminate litigation . . . be explicit or ratified by subsequent conduct of the client").

[116] *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1302 (Ind. 1998) ("As a general proposition an attorney's implied authority does not extend to settling the very business that is committed to the attorney's care without the client's consent. The vast majority of United States jurisdictions hold that the retention of an attorney to pursue a claim does not, without more, give the attorney the implied authority to settle or compromise the claim.").

[117] Clark v. Burden, 917 S.W.2d 574, 576 (Ky. 1996). Similarly, the mere employment of a lawyer as an attorney of record in pending litigation often will not give rise to apparent authority for the lawyer to compromise. *Blanton*, 696 P.2d at 650.

[118] *See, e.g.*, Nelson v. Consumer Power Co., 497 N.W.2d 205, 212 (Mich. Ct. App. 1993) (finding that a retained lawyer has apparent authority under Michigan law to bind a client to a settlement if the settlement is in writing and signed by the attorney, though such authority arguably is presumptive rather than apparent or implied); Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 530-31 (6th Cir. 1986). In employing Michigan law the court stated:

> Generally, when a client hires an attorney and holds him out as counsel representing him in a matter, the client clothes the attorney with apparent authority to settle claims connected with the matter . . . . Thus, a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice. The third party may rely on the attorney's apparent authority unless he has reason to believe that the attorney has no authority to negotiate a settlement.

Id. These two cases were distinguished in *Rheault v. Lufthansa German Airlines*, 899 F. Supp. 325 (E.D. Mich. 1995) (finding that the cases, at best, address apparent authority wherein manifestations by the client to the third party were crucial to sustaining the agreements reached by the lawyers who had no delegated authority). *See*

A more persistent problem lies in the identification of the forms of additional client conduct beyond the retention of a lawyer that are sufficient to prompt an implied authority in the lawyer to settle. One court found that in certain settings implied authority may be based on a client's admonitions to his lawyer that he had no settlement figure in mind and that upcoming settlement talks were the lawyer's "job" and "business."[119] Another court said that while implied authority is not "ordinary,"[120] a client's active participation in the particulars of settlement negotiations prompted implied authority, where the lawyer's settlement "took place under the client's watchful eyes" and the lawyer was not discharged until after the settlement was reached.[121]

Regretfully, Model Rule 1.2(a) gives no guidance on the types of client conduct that might implicitly delegate authority to settle.[122] Although "the Rules of Professional Conduct govern the relationship between attorney and client . . . they do not set forth the full parameters of the attorney's ability to bind the client in dealings with third parties. The client may not intend for the attorney to settle a claim but may nonetheless imply that intention to the attorney."[123]

The difficulty in ascertaining the type of client conduct that gives rise to implied authority is compounded by the fact that American governments have divergent laws and lawmakers addressing lawyer settlement authority issues. For example, a federal appeals court, applying Virgin Islands law, referenced section 26 of the *Restatement of Agency*, EC 7-7, and judicial precedent.[124] The court stated that the "attorney-client relationship

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also Giesel, *supra* note 5 (arguing retention-based authority is a form of apparent authority that comports with the ethical standard that settlement decisions are for the client).

119 Edwards v. Born, Inc., 792 F.2d 387, 391 (3d Cir. 1986) (using Virgin Islands law).

120 *Clark*, 917 S.W.2d at 576.

121 *Id.* at 576 (suggesting there was a ratification of an unauthorized settlement). *But see* Johnson v. Tesky, 643 P.2d 1344 (Or. Ct. App. 1982) (stating that a lawyer's authority to enter into settlement talks does not mean authority to settle has been delegated).

122 Indeed, as noted earlier, Model Rule 1.2(a) strongly suggests that a client's decision to settle is nondelegable. On "implied authority," the ABA Annotations refer only to the *Edward* case and then discuss ratification cases (involving retroactive authority). 1996 MODEL RULES, *supra* note 9, at 19; 1992 MODEL RULES, *supra* note 9, at 32.

123 Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1303 (Ind. 1998).

124 Edwards v. Born, Inc., 792 F.2d 387, 389-91 (3d Cir. 1986).

. . . is controlled by the principles of agency law," but that because of "ethical considerations peculiar to the adjudicatory process," agency principles need to be tempered by "judicial precedent for guidance."[125] In developing an implied authority standard, the court stated that it is the reasonableness of the lawyer's act rather than "the intent of the principal" which is the proper focus.[126] The Colorado Supreme Court referenced substantive contract law principles in analyzing a lawyer's implied authority, focused on the client (principal), and held that "[i]n order for a settlement to be binding . . . 'there must be a meeting of the minds' as to the terms and conditions of the . . . settlement."[127] While many courts analyze the lawyer-client relationship, and thus any acts or words made by the client, under general agency or contract laws,[128] others hold that a lawyer has a "superior agency status"[129] and is "vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court."[130] Thus, at times, the general laws governing agency or contract analysis are supplemented or superceded by special laws, such as professional conduct laws, civil procedure laws, special legal practice statutes, and common law decisions.[131]

B. Undelegated Authority

In assessing undelegated lawyer civil claim authority, the focus is not on the client's conduct with the lawyer; rather, the focus is the client's or the lawyer's communications or conduct to a third party or to a tribunal. Here the "interests of third persons and

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[125] *Id.* at 389.

[126] *Id.* (referencing RESTATEMENT OF AGENCY § 26 cmt. c).

[127] Cross v. District Court, 643 P.2d 39, 41 (Colo. 1982).

[128] *See, e.g.*, Blanton v. Womancare, Inc., 696 P.2d 645, 649 (Cal. 1985) ("As a general proposition the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency."); New England Educ. Training Servs., v. Silver St. Partnership, 528 A.2d 1117, 1119 (Vt. 1987) (stating that in determining an implied lawyer authority issue, agency law provides framework for analyzing attorney-client relationship).

[129] Clark v. Burden, 917 S.W.2d 574, 575 (Ky. 1996).

[130] *Id.*

[131] *See, e.g.*, Federal Land Bank of Omaha v. Sullivan, 430 N.W.2d 700, 702 (S.D. 1988) (finding that a lawyer had actual authority to settle by a client's acquiescence after referencing RESTATEMENT OF AGENCY section 26 and S.D. CODIFIED LAWS section 59-3-2 which states "actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess").

the convenience of the judicial system . . . may override the interests of clients."[132]

1. *Apparent Authority*

One way a lawyer may bind a client to a settlement agreement absent delegated authority is through apparent authority. Section 39 of *The Law Governing Lawyers* provides:

> [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.[133]

The Law Governing Lawyers cross-references section 8 of the *Restatement of Agency* which states: "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."[134] As well, some courts use sections 27[135] and 49[136] of the *Restatement of Agency* when discussing lawyers as apparent agents for their clients.

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[132] THE LAW GOVERNING LAWYERS, *supra* note 27, Topic 4: Lawyer's Authority To Act For Client, Introductory Note at 92.

[133] *Id.* § 39 (on apparent authority); *see also* United States v. International Bhd. of Teamsters, 986 F.2d 15, 20 (2d Cir. 1993); *Sullivan*, 430 N.W.2d at 701 (using the term "ostensible authority").

[134] RESTATEMENT OF AGENCY, *supra* note 28, § 8. Section 8 of the RESTATEMENT OF AGENCY is frequently referenced by courts. *See, e.g.*, Fennell v. TLB Kent Co., 865 F.2d 498, 502 (2d Cir. 1989); Parillo v. Chalk, 681 A.2d 916, 919 (R.I. 1996).

[135] RESTATEMENT OF AGENCY, *supra* note 28, § 27 ("[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."). *See, e.g.*, *Fennell*, 865 F.2d at 502 (referencing section 27 for the proposition that the client must manifest to the third party that he consents to have the act done on his behalf by the person purporting to act for him); System Inv. Corp. v. Montriew Acceptance Corp., 355 F.2d 463, 467 (10th Cir. 1966) (referencing section 27 and finding apparent authority for a lawyer to bind a client to sales of shares of corporation); Hallock v. State, 474 N.E.2d 1178, 1181 (N.Y. 1984).

[136] RESTATEMENT OF AGENCY, *supra* note 28, § 49. Rules applicable to the interpretation of authority are applicable to the interpretation of apparent authority; the keys are that (a) manifestations of the principal to the other party to the transaction are interpreted in light of what the other party knows or should know instead of what the agent knows or should know and that (b) if there is a latent ambiguity in the manifestations of the principal for which he is not at fault, the interpretation of apparent authority is based on the facts known to the principal. *Id.*; *see also* Rosenblum v. Jacks or Better of Am. W. Inc., 745 S.W.2d 754, 762 (Mo. Ct. App. 1988)

Unfortunately, Model Rule 1.2(a) neither mentions nor intimates apparent authority. Some courts will reference Model Rule 1.2(a), or its state law equivalent, as the guiding legal standard, but then proceed to find apparent authority.[137] Besides the ALI pronouncements, courts employing the doctrine of apparent authority for lawyer settlements may reference court rules[138] or employ an equity analysis.[139]

Regardless of the lawmaking technique and lawmaker, the term apparent authority can be used incorrectly when referring to what the ALI calls implied authority or presumptive authority. For example, one Illinois appellate court affirmed a finding that a lawyer had apparent authority to settle, as his authority was deemed "the logical implied extension of his express authority."[140] And, the New Mexico Supreme Court enforced a settlement, in part, based on apparent authority where there was a presumption that a lawyer has the authority to settle in a courtroom. Here, the client's representative stood by without objection when the lawyer settled, leading the court to infer "apparent authority" from the principal's "knowingly" permitting its lawyer to act.[141]

Additionally, whatever the lawmaking technique and whoever the lawmaker, legal standards which look quite comparable can be employed quite differently from jurisdiction to jurisdiction. In some situations, the retention of a lawyer for purposes of civil

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(referencing section 49 of the RESTATEMENT OF AGENCY in its apparent authority analysis).

[137] *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1303-04 (Ind. 1998); Clark v. Burden, 917 S.W.2d 574, 575 (Ky. 1996).

[138] *See, e.g.*, Nelson v. Consumer Power Co., 497 N.W.2d 205, 209 (Mich. Ct. App. 1993); *Hallock*, 474 N.E.2d at 1182.

[139] *See, e.g.*, *Clark*, 917 S.W.2d at 576.

[140] Sakun v. Taffer, 643 N.E.2d 1271, 1278 (Ill. App. Ct. 1994); *see also* Brumbelow v. Northern Propane Gas Co., 308 S.E.2d 544, 546 (Ga. 1983):

> [U]nder Georgia law an attorney of record has apparent authority to enter into an agreement on behalf of his client and the agreement is enforceable against the client by other settling parties .... This authority is determined by the contract between the attorney and the client and by instructions given the attorney by the client, and in the absence of express restrictions the authority may be considered plenary by the court and opposing parties .... The authority may be considered plenary unless it is limited by the client and that limitation is communicated to opposing parties.

[141] Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc., 749 P.2d 90, 92-93 (N.M. 1988); *see also* Parillo v. Chalk, 681 A.2d 916, 919-20 (R.I. 1996) (stating that apparent authority cannot "necessarily be implied" because an attorney attends depositions).

litigation or of client representation at a pretrial conference can be enough client conduct to trigger apparent authority. A Michigan court concluded that an attorney had apparent authority to settle by referencing a court rule which required that some person attending a pretrial conference for each side have settlement authority.[142] Likewise, a Missouri court, referencing section 49 of the *Restatement of Agency*,[143] found apparent authority where the client "knowingly permitted her attorney to occupy the position of exclusive negotiator in the settlement process."[144] Conversely, other courts require more positive manifestations from the client to a third party before an attorney is cloaked with apparent authority to settle.[145] The California Supreme Court, like most other courts, has found that "an attorney, merely by virtue of his employment as such has no apparent authority to bind his client."[146] More significantly, a federal appeals court, applying Virgin Islands law, did not find apparent authority where a lawyer settled at a pretrial conference because the record was "devoid of communications directly from the plaintiffs to defense counsel, much less representations."[147] Another federal appeals court did not find apparent authority even though a client knew that his lawyer was actively engaging in settlement negotiations, never told his lawyer to discontinue settlement talks, and never communicated a limit on his lawyer's settlement authority.[148] As

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[142] *Nelson*, 497 N.W.2d at 209 (referencing MICH. CT. R. 2.507 (H)); *see also Hallock*, 474 N.E.2d at 1182. *But see* THE LAW GOVERNING LAWYERS, *supra* note 27, § 39, illus. 3 (no apparent authority).

[143] If a principal puts an agent into, or knowingly permits him to occupy, a position which according to the ordinary habits of persons in the locality, trade or profession, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise. RESTATEMENT OF AGENCY, *supra* note 28, § 49, cmt. c.

[144] Rosenblum v. Jacks or Better of Am. W. Inc., 745 S.W.2d 754, 763 (Mo. Ct. App. 1988).

[145] *See, e.g.*, Fennell v. TLB Kent Co., 865 F.2d 498, 502-03 (2d Cir. 1989) (stating that a lawyer did not have apparent authority to settle where the client did not positively manifest to the third party that his lawyer had authority to settle); New England Educ. Training Servs. v. Silver St. Partnership, 528 A.2d 1117, 1120-21 (Vt. 1987) (holding that a defendant's earlier express grant of authority to lawyer to settle for a certain amount, coupled with "an atmosphere of offers" by that same lawyer was no "substitute" for required acts by client necessary to trigger apparent authority).

[146] Blanton v. Womancare, Inc., 696 P.2d 645, 653 (Cal. 1985).

[147] Edwards v. Born, Inc., 792 F.2d 387, 391 (3d Cir. 1986).

[148] *See Fennell*, 865 F.2d at 502. The *Fennell* court held: "These findings involve only discussions between Fennell and his attorneys. . . . None of these findings relates to positive actions or manifestations by Fennell to defendants' counsel . . . ."

a New Jersey court noted, courts "differ as to whether the principal's communication of apparent authority can be inferred from his conduct in permitting an attorney to represent him in the litigation or whether a positive manifestation by words or conduct of the principal is required."[149]

Many courts generally agree that communication from the lawyer is insufficient by itself. Thus, the Indiana Supreme Court declared that a "communication of authority by the agent [lawyer] is insufficient to create an apparent agency relationship."[150] However, a few courts consider whether a client is bound to a lawyer's settlement under apparent authority by examining only the conduct of the lawyer.[151] One court justified the finding of apparent authority based only on the lawyer's statement that he had authority to settle by reasoning that otherwise, prudent litigants could not rely on opposing counsel's representations and that fears of later assertions that counsel lacked settlement authority would require litigants to go directly to the opposing party in order to verify authorization for every settlement offer by a lawyer.[152]

Some courts employ the apparent authority doctrine based upon notions of equity. The apparent authority analysis in *Clark v. Burden* is exemplary where the Kentucky Supreme Court stated if:

> [I]t should be determined that third parties who may be dealing with such attorneys would be substantially and adversely affected by unauthorized attorney settlements, then the client employing the attorney should be bound. On the other hand,

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Id. But see Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 530-31 (6th Cir. 1986) (holding that the client was bound by lawyer's settlement because the client held the lawyer out as having authority to represent the client); Terrain Enters. v. Western Cas. and Sur. Co., 774 F.2d 1320 (5th Cir. 1985) (binding client to lawyer's settlement agreement because lawyer was retained to handle all aspects of the litigation).

[149] Seacoast Realty Co. v. West Long Branch Borough, 14 N.J. Tax 197, 203 (1994).

[150] Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1304 (Ind. 1998); *see also* Trustees of UIU Health & Welfare Fund v. New York Flame Proofing Co., 828 F.2d 79, 84 (2d Cir. 1987).

[151] *See, e.g.*, Triple B & G, Inc. v. City of Fairmont, 494 N.W.2d 49 (Minn. Ct. App. 1992) (holding that a lawyer had apparent authority based, in part, on his statements to city attorney that he had authority to settle); Hayes v. National Serv. Indus., 196 F.3d 1252 (11th Cir. 1999) (holding that the lawyer had apparent authority to settle since lawyer's authority is plenary, where no limitation was expressed to opposing party and lawyer said he had authority to settle for $15,000).

[152] Nelson v. Consumer Power Co., 497 N.W.2d 205, 208 (Mich. Ct. App. 1993).

> if it is determined that no substantial harm will befall third parties, then ultimate control should remain with the client.[153]

Some courts that reference equity in finding apparent authority for a lawyer to settle sometimes do so reluctantly by finding the legal doctrine "regretful," "unfortunate," and "ambiguous and conflicting."[154] As one California Supreme Court Justice stated, "clear guidance" on the scope of an attorney's apparent authority is needed.[155] Regrettably, neither the ABA nor the ALI provide much help.

2. *Inherent Authority*

Inherent authority is another form of undelegated lawyer civil claim settlement authority. Here, unlike actual authority or apparent authority, the focus usually is not on the manifestations made by the client to the lawyer or to a third party; rather, the focus is on the manifestations of the lawyer to the court. As there is no provision in *The Law Governing Lawyers* addressing inherent authority, the *Restatement of Agency* provides a useful touchstone. Section 8A of the *Restatement of Agency* captioned "Inherent Agency Powers" states that inherent agency power is the "power of an agent . . . which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."[156] Inherent authority runs the most afoul of Model Rule 1.2(a) or EC 7-7 since it permits a lawyer to bind a client regardless of client consent and regardless of any manifestations by the client to the lawyer or to third parties.[157] Not surprisingly, a lawyer's inherent authority to settle is disfavored and the doctrine is expressly disavowed in many states.[158] Some courts state in quite resolute terms that a lawyer

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153 Clark v. Burden, 917 S.W.2d 574, 576 (Ky. 1996); *see also* Cohen v. Goldman, 132 A.2d 414, 417 (R.I. 1975) (finding apparent authority because "where two innocent parties are involved, justice requires that of the two the least culpable should not be made to suffer").

154 *See, e.g.*, Barton v. Snellson, 735 S.W.2d 160, 162-63 (Mo. Ct. App. 1987).

155 Blanton v. Womancare, Inc., 696 P.2d 645, 654 (Cal. 1985) (Bird, C.J., concurring); *see also* Giesel, *supra* note 5, at 578 ("conflicting messages" from courts on lawyer's apparent authority to settle).

156 RESTATEMENT OF AGENCY, *supra* note 28, § 8A.

157 *See* Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1306 n.8 (Ind. 1998) (explaining that an attorney's inherent agency power "results from the agency relation itself," not from any other acts of the client beyond retention of the attorney).

158 *See, e.g.*, Mitchum v. Hudgens, 533 So. 2d 194, 199 (Ala. 1988) (holding that a lawyer is a special agent and has no implied or inherent authority to settle); *In re*

has no inherent authority to settle.[159] However, there are some courts which do bind a client to an unauthorized settlement by virtue of a lawyer's inherent authority. At times, where a lawyer's inherent authority to settle is permitted, the stated legal guidelines are unsettling. Thus, some courts mention Model Rule 1.2(a) in one breath and in the next breath allow a lawyer to do exactly what the rule seemingly forbids: enter into a settlement agreement without abiding by the "client's decision."

The Indiana Supreme Court's recognition of a lawyer's inherent agency authority to settle is a good example of inherent authority, and thus of the dramatic curtailment of a client's right to control settlement.[160] The court cited Indiana Professional Conduct Rule 1.2(a),[161] which follows Model Rule 1.2(a), as well as section 8A of the *Restatement of Agency*[162] in determining that a lawyer has "inherent agency power" to settle "derived not from authority, . . . but solely from the agency relation" and that this exists "for the protection of persons harmed by or dealing with a servant or other agent."[163] In finding a "longstanding general rule" that a lawyer "may without express authority, bind his client by agreement" though the attorney knows the client has a good defense,[164] the court pointed to the need for "structural integrity of court procedures and the protection of third parties who rely on the finality of those procedures."[165] The court said to hold otherwise "would impede the efficiency and finality of courtroom proceedings and permit stop and go disruption of the

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Campbell, 536 A.2d 544, 547 (Vt. 1987) ("[A]ttorneys in Vermont lack inherent authority to compromise or settle a case and may not act beyond the scope of specific authority.").

[159] *See, e.g.*, *Clark*, 917 S.W.2d at 576.

[160] *Koval*, 693 N.E.2d at 1304-07; *see also* Tiernan v. Devoe, 923 F.2d 1024, 1037 n.9 (3d Cir. 1991) (applying Pennsylvania law the Court stated that an "agent may also derive certain powers . . . from the agency relation . . . this inherent agency power is not construed as constituting actual authority, but stands in its stead to bind the principal to acts of his agent"); Farris v. J.C. Penney Co., 2 F. Supp. 2d 695, 700 (E.D. Pa. 1998) (finding that a more rational approach might be to adopt inherent agency doctrine as an alternative basis to uphold a settlement in cases where express authority is lacking, and the principal has made no manifestations of authorization to the third party, but the attorney has taken various steps indicating that he has authority to settle, i.e., attending a settlement conference limited by the court to attorneys authorized to bind their clients should the clients not attend).

[161] *Koval*, 693 N.E.2d at 1303 n.6.

[162] *Id.* at 1304.

[163] *Id.* (quoting RESTATEMENT OF AGENCY § 8A).

[164] *Id.* at 1305.

[165] *Id.*

court's calender."[166]

3. *Presumptive Authority*

Presumptive authority is another form of undelegated lawyer civil claim settlement authority. Such authority arises when the required conditions under law are met triggering a presumption that a lawyer has been delegated settlement authority. Similar to inherent authority, the focus is usually on conduct of the agent (lawyer), not on the conduct of the principal (client). Often, the deciding factor involves the place where the settlement agreement was reached by the lawyer. Here, courts frequently need to differentiate between in-court and out-of-court proceedings. While the ALI *Law Governing Lawyers* recognizes that there are presumptions relating to a lawyer's authority "to represent" a client,[167] it fails to recognize the more particular presumptions which operate on the delegation of civil claim settlement authority. Without much ABA or ALI guidance, several difficulties have arisen with the use of presumptive lawyer settlement authority. First, courts differ on how any in-court presumptions may be rebutted. Second, key distinctions between in-court and out-of-court proceedings are often difficult to draw. Finally, courts sometimes confuse the principles of presumptive authority with apparent authority and other forms of lawyer authority.

One presumption exists in Illinois where "the existence of the attorney of record's authority to settle in open court is presumed."[168] There, it is presumed that the client has delegated express authority to the lawyer to settle while in-court unless express authority is "rebutted by affirmative evidence."[169] Such affirmative evidence marshalled by the client can simply involve affidavits (from client and lawyer) indicating that the client did not delegate settlement authority.[170] Elsewhere, the burden of proof needed to rebut a presumption of in-court settlement au-

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166 *Id.* at 1306.

167 THE LAW GOVERNING LAWYERS, *supra* note 27, § 37.

168 Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331, 1334 (Ill. 1995) (common law presumption); *see also* Sorenson v. Consolidated Rail Corp., 992 F. Supp. 146, 149 (N.D.N.Y. 1998) (holding that when attorney of record enters into a settlement agreement, there is a presumption that the attorney had authority to do so); Bradford Exch. v. Trein's Exch., 600 F.2d 99, 102 (7th Cir. 1979) (stating that an attorney of record is presumed to have his client's authority to settle litigation).

169 *Brewer*, 649 N.E.2d at 1334.

170 *Id.*; *see also* Hayes v. Eagle Picher Indus., 513 F.2d 892, 893 (10th Cir. 1975) (in-court presumption "is rebutted easily").

thority is more substantial.[171]

At times, courts have difficulty distinguishing between in-court and out-of-court proceedings for presumptive authority purposes. Is an off-the-record conference in a judge's chambers an in-court proceeding?[172] With the explosion of court-annexed and contractually or legislatively demanded alternative dispute resolution forums, what are courts for in-court presumption purposes?[173]

Confusion about presumptive authority also arises because some courts speak of apparent authority when what they mean (or should mean) to speak of is an in-court presumption about lawyer settlement authority. For example, in a New York case, a court applied a local court rule requiring that a lawyer or other person from each side attending a pretrial conference have settlement authority.[174] Through this local rule, a client who did not attend a conference was bound to a settlement agreement arranged by his lawyer at the conference without evidence of client consent. The court used an apparent authority analysis.[175] However, in the absence of any evidence on the personal conduct of the client (such as knowledge of the conference), this local court rule should have been read to indicate that an in-court presumption arises at such a conference.

Likewise, in Missouri the courts have struggled with presumptive authority. One appellate court declared that where a party's attorney of record represented that he had authority from the client and then reached an agreement with the other party's lawyer to settle, the first party must prove that his attorney lacked authority to settle since settlement authority is "presumed prima facie to be authorized."[176] Subsequently, another appellate court seemed confused, stating that the presumption "stems primarily

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[171] *See, e.g.*, *Sorenson*, 992 F. Supp. at 149 (stating that a client seeking to rebut an in-court presumption bears the burden to rebut such a presumption and the burden is "not insubstantial").

[172] *See, e.g.*, Infante v. Bridgestone/Firestone, Inc., 6 F.Supp. 2d 608, 610 (E.D. Tex. 1998) (holding that under court rules a settlement must be in writing unless "made in open court."

[173] *See, e.g.*, Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1307 (Ind. 1998) (holding that a mediation governed by the Indiana Rules of Alternative Dispute Resolution was an "in court proceeding"); Miller v. Ryan, 706 N.E.2d 244, 252 (Ind. Ct. App. 1999) (holding that a medical review panel meeting is an "in-court proceeding," in part because the presiding official is a statutorily-approved panel chairman).

[174] Hallock v. State, 474 N.E.2d 1178, 1179 (N.Y. 1984).

[175] *Id.* at 1182.

[176] Leffler v. Bi-State Dev. Agency, 612 S.W.2d 835, 837 (Mo. Ct. App. 1981).

from a failure to properly distinguish between implied and apparent authority."[177] And, another appellate court critiqued the presumption as it "has led our courts to an anacoluthon in the law of agency."[178] That court explained that the focus of the presumption was on the "acts" or "representations" made by the lawyer, instead of the client. This court created a "mutation," a new species of authority rather than the serviceable concept of apparent authority.[179]

4. *Retroactive Authority*

Undelegated lawyer civil claim settlement authority may also arise after-the-fact. Retroactive authority, also termed "ratification," occurs where the client undertakes post-settlement conduct which effectively ratifies or "retroactively" authorizes a lawyer's previously unauthorized settlement.[180] Section 38 of *The Law Governing Lawyers* says that a "lawyer's act is considered to be that of a client in proceedings before a tribunal or in dealings with third parties when . . . the client ratifies the act."[181] There is a cross-reference to section 82 of the *Restatement of Agency*[182] which is expressly followed by a number of jurisdictions.

The primary focus with ratification is on the principal's (client's) actions involving an earlier unauthorized settlement agreement completed by the agent (lawyer). Problems about forms of client conduct that are sufficient to ratify do arise. The problems are exacerbated by the fact that Model Rule 1.2(a) provides little

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[177] Barton v. Snellson, 735 S.W.2d 160, 162-163 (Mo. Ct. App. 1987).

[178] Rosenblum v. Jacks or Better of Am. W. Inc., 745 S.W.2d 754, 761 (Mo. Ct. App. 1988).

[179] *Id.* at 760-62.

[180] *See, e.g.*, Hawai'i Hous. Auth. v. Uyehara, 883 P.2d 64, 71 (Haw. 1994) (holding that when an unauthorized act of an agent is ratified it is as binding on the principal as would be an original express grant of authority).

[181] THE LAW GOVERNING LAWYERS, *supra* note 27, § 38.

[182] Within section 82 of the RESTATEMENT OF AGENCY, *supra* note 28, comments b and c, the ALI says:

> Ratification is not a form of authorization, but its peculiar characteristic is that ordinarily it has the same effect as authorization. . . . The concept of ratification is not a legal fiction, but denotes the legal consequences which result from a series of events beginning with a transaction inoperative as to the principal, and ending in an act of validation. The statement that there is a relation back to the time of the original act is fictitious in form, but in effect, it is a statement of liabilities.

Id. § 82, cmts. b, c.

help as it makes no mention of ratification and by the fact that *The Law Governing Lawyers* classifies ratification as an instance of "actual authority."[183]

In employing retroactive lawyer civil claim settlement authority, some courts focus on the timing of client conduct. For example, a federal appeals court has held that a client's immediate repudiation of the settlement agreement within a few days or a "reasonable time" is a bar to ratification.[184] Another federal appeals court, applying federal common law, held that clients had ratified their lawyer's unauthorized settlement agreement by waiting "sixteen months after the date of the settlement before attempting to deny" their attorney's authority.[185]

Elsewhere, timing seems less important. For example, the Arkansas Supreme Court has held that a client can ratify an attorney's earlier unauthorized settlement when the client "has knowledge of the unauthorized acts of his agent, and remains silent, when he should speak, or accepts the benefit of such acts. . . ."[186] A federal appeals court also held that a client had not ratified his lawyer's unauthorized settlement agreement even though accepting benefits for "at least four years," because "one essential prerequisite to a principal's ratification of an unauthorized act is that at the time of the ratification the principal have knowledge of all material facts."[187]

CONCLUSION

While often presumed or declared to be quite settled, many of

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[183] Section 38 of THE LAW GOVERNING LAWYERS, *supra* note 27, is entitled "Lawyer's Actual Authority," notwithstanding its commentary in section 82 of the RESTATEMENT OF AGENCY, *supra* note 28, and the employment by many courts in this setting of actual authority to mean either express or implied authority.

[184] Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894 (10th Cir. 1975) (four years held to be an unreasonable time); *see also* Blanton v. Womancare, Inc., 696 P.2d 645, 653 (Cal. 1985) (holding that ratification did not occur when immediately upon learning of the arbitration agreement the plaintiff fired her attorney and engaged new counsel to set it aside); Clark v. Burden, 917 S.W.2d 574, 577 (Ky. 1996) (holding that an unauthorized settlement may be ratified by a client's silence unless disapproved within a reasonable time).

[185] United States v. International Bhd. of Teamsters, 986 F.2d 15, 20 (2d Cir. 1993).

[186] Brady v. Bryant, 894 S.W.2d 144, 146 (Ark. 1995) (employing sections 94, 98 and 99 of the RESTATEMENT OF AGENCY).

[187] Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 530 (6th Cir. 1986) (referencing sections 91 and 98 of the RESTATEMENT OF AGENCY, though not discussing any duty of inquiry by the client).

the guidelines on lawyer civil claim settlement authority are unsettled, leaving unresolved questions for lawyers, clients, and the courts. The upcoming publication and general circulation by the ALI of *The Law Governing Lawyers* will help, as may any attention directed toward settlements by the ABA Ethics 2000 Commission, now at work considering possible alterations of the *Model Rules of Professional Conduct*. Recent experience suggests that state and federal court rulings are not likely to settle much of the present uncertainty.

Our review of the prevailing lawyer civil settlement guidelines suggests the need for certain new initiatives. First, the guidelines should predominantly originate in state supreme courts. At the very least, their general parameters should usually appear in written rules on the professional conduct of lawyers. For now, federal courts should defer to these state rules unless there are very significant federal interests.

Second, as a starting point, state courts should carefully consider the ALI pronouncements in *The Law Governing Lawyers*. Lawyers generally are not like other agents, nor are lawyer retainer and subsequent legal service agreements generally like other contracts. Unlike most other agents, the conduct of lawyers with third persons on behalf of clients is governed not only by the directives of clients, but also by mandatory professional conduct standards. Furthermore, unlike most other contracts, lawyer-client legal service agreements are constrained by public policies found in these same standards, including obligations on information disclosure (from lawyer to client) and on confidentiality (by the lawyer). Thus, lawyers should keep clients informed of settlement talks even if the relevant legal services agreement does not expressly indicate such an obligation. Moreover, lawyers should not reveal the nature of their delegated authority to the adversaries of their clients even when these adversaries have good reason to know.

In employing the ALI pronouncements, sensitivity to terminology will be necessary. Distinctions between delegated and undelegated authority, as well as between the varying forms of both delegated and undelegated authority should be set forth. These distinctions need not appear in written laws, but rather may simply be recognized in accompanying commentaries (which hopefully will dispel any notions that clients always make the civil claim settlement "decisions").

Third, in civil claim settlement settings involving the interests of two or more American governments, issues of lawyer civil claim settlement authority should normally be resolved with the lawyer professional conduct laws of the state where the relevant civil claim is pending. Otherwise, the choice of law standards in Model Rule 8.5(b) should resolve this issue. The interests of another state government are rarely so compelling as to usurp the need for a trial court to apply the law of its own government to lawyer conduct during pending civil litigation. And to date, there has been little federal interest in overriding the usually applicable state professional conduct standards for lawyers involved in federal civil litigation, though certain readings of Federal Civil Procedure Rule 16, for example, may some day establish at least one uniform federal approach. Outside of civil litigation, typically the licensing states are most interested in the application of their professional conduct standards to lawyer activity.

Fourth, when the general written rule (or code) provisions on lawyer conduct are supplemented (and, at times, overridden), the general laws should cross-reference, to the extent feasible, the special laws so there can be appropriate integration of all applicable standards. Similar to FOWBPA, simple recognition of these special laws is difficult at times because of the language used. At other times, difficulties arise because relevant lawmaking powers are shared, leading to special laws being scattered throughout a variety of sources including court rules, statutes and case decisions.