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SETTLING IN NEW YORK: ABDICATING TRADITIONAL AGENCY PRINCIPLES IN THE CONTEXT OF SETTLEMENT DISPUTES

Dean C. Harvey, Esq.*

INTRODUCTION

Suppose a plaintiff, *P*, is represented by *A*, an attorney. *P* sues *T* for \$5,000,000, alleging that *T*'s negligence rendered him a paraplegic. *T* is also represented by an attorney. Suppose further that, after discovery has been had and the action — *P* v. *T* — is marked ready for trial, for one reason or another *P* is willing to accept just \$1,000,000 in settlement of his claim. He informs *A* that he will not accept less than this amount under any circumstances. Based on *T*'s financial condition and an assessment by his attorney of *T*'s exposure to liability in light of the information gleaned through discovery, *T* will not pay more than \$500,000 in exchange for a release and stipulation of discontinuance.

Imagine then that *A* and *T*'s attorney attend a mandatory settlement conference¹ in the trial judge's chambers on the day

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1. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 202.26 (1988), which provides in part:

(a) After the filing of a note of issue and certificate of readiness in any action, the judge shall order a pretrial conference, unless the judge dispenses with such a conference in a particular case.

....

(c) The judge shall consider at the conference with the parties or their counsel the following:

- (1) simplification and limitation of the issues;
- (2) obtaining admission of fact and of documents to avoid unnecessary proof;
- (3) disposition of the action, including scheduling the action for trial;
- (4) amendment of pleadings or bill of particulars;

that the trial was scheduled to begin. *A* begins the conference with a discussion of *P*'s injuries and the basis of *T*'s liability, and demands \$1,200,000 in settlement. *T*'s attorney responds by discussing *P*'s own comparative fault and, perhaps, the possible culpability of a third party not yet in the action, and offers only \$400,000. As the negotiation drags on, including the customary firm prompting towards settlement by the judge, — who, per hypothesis, has agreed with *T*'s attorney's assessment of the case — *A* has been browbeaten into settling the case for \$500,000. Unwilling to incur the disapprobation of the judge,² or the disdain of his adversary, *A* participates in dictating the settlement into the record without having disclosed any limitations upon, or conditions of, his authority to settle. The stipulation of settlement is made in open court, subscribed to by the attorneys, reduced to

(5) limitation of number of expert witnesses; and

(6) insurance coverage, where relevant.

Id. See also FED. R. CIV. PROC. 16 which provides in part:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating the settlement of the case.

Id.

2. There are many allusions in the case law involving settlement disputes to the coercion that might be exerted by trial judges during settlement conferences. See, e.g., *Herzfeld v. J & M Realty Assoc.*, 151 A.D.2d 644, 542 N.Y.S.2d 374 (2d Dep't 1989) (plaintiff argued that she accepted a settlement involuntarily because of judge's coercion); *Willig v. Rapaport*, 81 A.D.2d 862, 438 N.Y.S.2d 872 (2d Dep't 1981) (same); *Bernstein v. Salvatore*, 62 A.D.2d 945, 404 N.Y.S.2d 12 (1st Dep't 1978) (plaintiff moved to vacate settlement on ground that it was entered into as a result of "badgering" by court personnel).

the form of an order³ and entered.⁴ All the while, *A* hopes to convince *P*, just as the judge and, in turn, *A* himself were convinced, of the rectitude and propriety of the settlement agreement.

At first, *A* manages to mollify *P*, who trusts *A*'s judgment, and *P* acquiesces in the agreement. Subsequently, however, his family and friends, one of whom may know a lawyer, go to work on *P*, who becomes discontented.⁵ Within a month or so of the agreement, *P* calls *A* and tells him the agreement is unsatisfactory, and insists that *A* get him the full \$1,000,000. After repeatedly expostulating with *P* in a futile effort to dissuade him from his steadfast course, *A*, whether motivated by fear of a suit by *P* or of disciplinary sanctions,⁶ or by loyalty to *P*, makes a

3. See *Lynch v. Lynch*, 105 A.D.2d 1069, 482 N.Y.S.2d 177 (4th Dep't 1984) (party attempted to vacate settlement agreement even before it had been reduced to an order and the motion was denied).

4. See *infra* note 22 and accompanying text.

5. One judge suggests that many of these allegedly *ultra vires* settlements are probably authorized when made, and that only later does the client express dissatisfaction. *Martinez v. 348 East 104 St. Corp.*, 60 Misc. 2d 31, 300 N.Y.S.2d 992 (Sup. Ct. N.Y. County 1969). Thus the hypothetical in the text may well cast the disgruntled client in a more equitably appealing circumstance than reality frequently allows.

6. See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.26(e) (1988), entitled "Pretrial Conferences," which provides in part: "Failure to comply with this subdivision may be deemed a default under CPLR 3404. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this subdivision."

Id. See also FED. R. CIV. PROC. 16 which provides in part:

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

motion on *P*'s behalf to vacate the settlement and restore the matter to the trial calendar.

When a party seeks to vacate a settlement agreement on the ground that it was unauthorized, the courts in the State of New York approach the preceding situation by placing the burden of proving the existence of *A*'s authority on *T*.⁷ This approach raises some important concerns regarding the application of traditional agency principles in the context of settlement disputes and the attorney-client relationship. Foremost among these concerns is the extent to which traditional agency principles can equitably adjust the rights and liabilities of *P*, *A*, and *T*, especially considering that *T* is put to the burden of proving matters peculiarly within the knowledge of *P* and *A*.

It is the purpose of this paper to undertake an examination of the courts' application of traditional agency principles to the increasingly recurring situation wherein the attorney, *qua* agent, is alleged to have acted *ultra vires* when entering into a settlement agreement of a civil case which purports to bind his client, *qua* principal. The examination will first track the contours of traditional agency principles⁸ and, through an analysis of the leading case law in New York and the United States Court of Appeals for the Second Circuit, show the inadequacy of these traditional concepts in the context of the attorney-client relationship and settlement negotiations.⁹ The analysis will attempt to demonstrate the need to abdicate these traditional concepts.¹⁰ A prescription for change will be offered which incorporates an often-overlooked doctrine of agency law known

Id.

7. See, e.g., *Slavin v. Polyak*, 99 A.D.2d 466, 470 N.Y.S.2d 38 (2d Dep't 1984) (burden of proving authority is on the party who asserts its existence); *Silver v. Parkdale Bake Shop, Inc.*, 8 A.D.2d 607, 184 N.Y.S.2d 714 (1st Dep't 1959) ("If defendant had reason to believe that plaintiffs had authorized their attorney to enter into the settlement, it was their duty to come forward with proof in that respect.").

8. See *infra* notes 33-56 and accompanying text.

9. See *infra* notes 62-135 and accompanying text.

10. See *infra* notes 62-140 and accompanying text.

as inherent agency power.¹¹ As will be shown below,¹² unlike the traditional concepts of agency law, inherent agency power is capable of fully accommodating the unique aspects of the attorney-client relationship as an agency relation, and shaping equitable solutions to the problems arising in the context of settlement agreements. In addition, the doctrine can more appropriately allocate the burden of establishing the existence or non-existence of authority, while still providing for an appropriate remedy for the injured party. Finally, this paper analyzes the doctrine of actual authority as it is applied to the subsequent suit by the client against the attorney for the attorney's *ultra vires* settlement.¹³

I. BACKGROUND

In New York and the Second Circuit, settlement agreements are regarded by the courts as contracts.¹⁴ And, as a general proposition, the parties to a settlement agreement will be bound by its terms unless, under general principles of contract law, legally sufficient grounds exist to invalidate the agreement.¹⁵ For instance, settlement agreements have been invalidated upon a

11. RESTATEMENT (SECOND) OF AGENCY § 8A (1957) (hereinafter RESTATEMENT). See *infra* notes 136-54 and accompanying text.

12. See *infra* notes 136-54 and accompanying text.

13. See *infra* notes 155-76 and accompanying text.

14. See *Owens v. Lombardi*, 41 A.D.2d 438, 440, 343 N.Y.S.2d 978, 981 (4th Dep't 1973) ("Once made, a settlement agreement terminates the litigation and a new superseding agreement arises which is the measure of each party's obligation to the other."); *Steven R. J. v. Nancy J.*, 117 Misc. 2d 725, 459 N.Y.S.2d 249 (Fam. Ct. N.Y. County 1983) (stipulation is a contract); *Kohl Industrial Park Co. v. County of Rockland*, 710 F.2d 895 (2d Cir. 1982) (treats settlements and contracts as same).

15. See, e.g., *In re Estate of Frutiger*, 29 N.Y.2d 143, 149-50, 272 N.E.2d 543, 546, 324 N.Y.S.2d 36, 39 (1971); *Trump v. Trump*, 179 A.D.2d 201, 204, 582 N.Y.S.2d 1008, 1009 (1st Dep't 1992); 1420 *Concourse Corp. v. Cruz*, 135 A.D.2d 371, 372, 521 N.Y.S.2d 429, 431 (1st Dep't 1987); *Przewlocki v. City of Lackawanna*, 112 A.D.2d 757, 758, 492 N.Y.S.2d 256, 257 (4th Dep't 1985).

showing that they were procured by fraud,¹⁶ collusion,¹⁷ mistake, or accident.¹⁸ There is also some authority which holds that a settlement agreement will be set aside if it contravenes public policy.¹⁹ In general, however, settlement agreements are favored by public policy.²⁰

In addition, New York's Civil Practice Law and Rules includes a section entitled stipulations, which provides that:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing

16. See *Paul v. Paul*, 177 A.D.2d 901, 576 N.Y.S.2d 658 (3d Dep't 1991), *appeal denied*, 79 N.Y.2d 756, 592 N.E.2d 800, 583 N.Y.S.2d 192 (1992) (nondisclosure claim insufficient to establish fraud in inducing settlement); *Rothenberg v. Kamen*, 735 F.2d 753 (2d Cir. 1984) (basis for fraud claim found where opposing party made false statements and misrepresentations, and the settlement was based thereon).

17. See *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1389, 1424 (D. Minn. 1987) (collusion between client's attorney and opposing party as against client); *George v. Perry*, 77 F.R.D. 421, 424 (S.D.N.Y.), *aff'd*, 578 F.2d 1367, *cert. denied*, 437 U.S. 947 (1978) (collusion between opposing parties as against unrepresented plaintiffs in class action).

18. See *Muller v. City of New York*, 113 A.D.2d 877, 493 N.Y.S.2d 604 (2d Dep't 1984) (where one attorney's understanding of the purported settlement agreement radically differs from that of his opponent and the judge, the court has the discretion to set it aside). *But see Buys v. County of Nassau*, 133 A.D.2d 94, 518 N.Y.S.2d 632 (2d Dep't 1987) (inexperience of counsel is not a ground which will overcome a valid settlement agreement); *Przewlocki v. City of Lackawanna*, 112 A.D.2d 757, 757, 492 N.Y.S.2d 256, 257 (4th Dep't 1985) (bare claim of unilateral mistake is insufficient to defeat settlement agreement); *Raphael v. Booth Memorial Hosp.*, 67 A.D.2d 702, 412 N.Y.S.2d 409 (2d Dep't 1979) (claim of mutual mistake must be based on mistake of facts as they existed at the time of entering the contract; mistakes in hindsight are merely bad bargains).

19. See *Concourse Corp. v. Cruz*, 135 A.D.2d 371, 521 N.Y.S.2d 432 (1st Dep't 1987) (court may refuse to enforce a settlement agreement if it finds that the agreement is inherently vicious, wicked or immoral, or shocking to the prevailing moral sense).

20. See *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 461 N.E.2d 285, 473 N.Y.S.2d 148 (1984) (settlement agreements implement, rather than contravene, public policy because they assist in clearing the congested civil calendars by simplifying disputes; parties can stipulate away statutory and even constitutional rights).

subscribed by him or his attorney or reduced to the form of an order and entered.²¹

This rule has been recognized as essentially a statute of frauds provision applicable solely to agreements entered into during the course of litigation.²² The express language of the rule suggests that the parties' attorneys can always bind their respective clients to a settlement agreement as long as it is entered into in open court.²³ The language also suggests that the attorneys can independently bind their respective clients as long as the agreement is reduced to a writing and subscribed to by the attorneys.²⁴

Even though it is quite unequivocal on its face, cases arising under Rule 2104 have not applied its terms consistently.²⁵ In

21. N.Y. CIV. PRAC. L. & R. § 2104 (McKinney 1976).

22. *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 8, 286 N.E.2d 228, 232, 334 N.Y.S.2d 833, 839 (1972). The court explained that § 2104 is more of an exception to the statute of frauds: "There is sparse but persuasive authority that if there is an open court stipulation with all the authenticity it carries based on a supporting transcript, then the Statute of Frauds is not applicable." *Id.* at 9, 286 N.E.2d at 232, 334 N.Y.S.2d at 839. Therefore, the statute of frauds requirement that an agreement must be signed by the parties, is not applicable to stipulations made in open court. *Stefaniw v. Cerrone*, 130 A.D.2d 483, 484, 515 N.Y.S.2d 66, 67 (2d Dep't 1987).

23. N.Y. CIV. PRAC. L. & R. § 2104 (McKinney 1976). *See* *Daniel D. Cole & Co. v. 630 Corp.*, 150 A.D.2d 328, 540 N.Y.S.2d 857 (2d Dep't 1989) (client who was present when settlement read into record bound by that settlement).

24. N.Y. CIV. PRAC. L. & R. § 2104 (McKinney 1976). *See* *Morrison v. Bethlehem Steel Corp.*, 75 A.D.2d 1001, 429 N.Y.S.2d 123 (4th Dep't 1980) (attorney's subscription on letters acknowledging settlement binding on client); *Malette v. Chichester*, 149 Misc. 2d 720, 568 N.Y.S.2d 534 (County Ct. Schoharie County 1991) (letter of settlement subscribed by attorney's *secretary* binding on client).

25. *Compare In re Galasso*, 35 N.Y.2d 319, 320 N.E.2d 618, 361 N.Y.S.2d 871 (1974) (open court agreement between attorneys not binding upon clients where settlement is not definite and complete) *with* *Bella Vista Dev. Corp. v. Birnbaum*, 85 A.D.2d 891, 446 N.Y.S.2d 753 (4th Dep't 1981) (open court stipulation binding on clients where record established that attorneys did not disclose that it was subject to client approval). *See also* *Lynch v. Lynch*, 105 A.D.2d 1069, 482 N.Y.S.2d 177 (4th Dep't 1984) (if

general, settlement agreements entered into in open court will bind the parties to the underlying law suit.²⁶ Open court includes the judge's chambers.²⁷ However, the New York State Court of Appeals has held that even where the provisions of the rule have been met, a settlement agreement will not be enforced if it appears indefinite or incomplete.²⁸

On the other hand, a party may be estopped from vacating a settlement agreement even where the provisions of Rule 2104 have not been met.²⁹ In addition, a party who is deemed to have

agreement is complete when dictated, party is bound even though he seeks to disavow it before order is signed).

26. *See, e.g.,* *Rivera v. Triple M Roofing Corp.*, 116 A.D.2d 561, 497 N.Y.S.2d 416 (2d Dep't 1984) (oral stipulation will not be enforced unless definite and in open court); *Ressler v. Druck*, 40 Misc. 2d 654, 243 N.Y.S.2d 552 (Sup. Ct. N.Y. County 1963) (same); *Lee v. Rudd*, 120 Misc. 407, 198 N.Y.S.2d 628 (Sup. Ct. Onondaga County 1923) (same).

27. *See* *Popovic v. New York City Health and Hosp. Corp.*, 180 A.D.2d 493, 493, 579 N.Y.S.2d 399, 400 (1st Dep't 1992) ("Open court" as used in CPLR 2104, is a technical term that refers to the formalities attendant upon documenting the fact of the stipulation and its terms, and not to the particular location of the courtroom itself.") *See also In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228 (1972) (judge's chambers qualify as "open court" within the meaning of Rule 2104 as long as there is some formal recording of the agreement); *Owens v. Lombardi*, 41 A.D.2d 438, 343 N.Y.S.2d 978 (4th Dep't 1973) (same). *But see* *Kushner v. Mollin*, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't 1988) (when the mother of a plaintiff who suffered from Down's Syndrome read settlement agreement into record out of judge's presence, agreement was not made in "open court" within the meaning of Rule 2104); *Signer v. Abramowitz*, 45 A.D.2d 677, 356 N.Y.S.2d 301 (1st Dep't 1974) (unrecorded agreement reached in judge's robing room was not made in "open court").

28. *Galasso*, 35 N.Y.2d at 321, 320 N.E.2d at 619, 361 N.Y.S.2d at 872 (court noted that surrogate below had remarked at time agreement was dictated into record that he still was not sure the case had been settled). *See also* *Rotella v. Rotella*, 178 A.D.2d 755, 577 N.Y.S.2d 342 (3d Dep't 1991) (where both parties failed to meet conditions precedent established in settlement, agreement could not be enforced).

29. *Conlon v. Concord Pools, Ltd.*, 170 A.D.2d 754, 754-55, 565 N.Y.S.2d 860, 862 (3d Dep't 1991) (A party is estopped from vacating a settlement "where there is no dispute between the parties as to the terms of a settlement agreement" and the other party has been "misled or deceived by the agreement to his detriment, or [] has relied upon the agreement."); *Veith v.*

ratified an otherwise non-conforming agreement will not be heard to assert its invalidity.³⁰

The most significant reason for the courts' inconsistency in applying the rule, however, is that agency principles must be brought to bear where an attorney purports to enter into an agreement on behalf of his client.³¹ The case law applying agency principles in the context of settlement disputes involving Rule 2104 is confusing at best. Some cases seem to suggest that, as long as the requirements of 2104 have been met, the resulting agreement will bind the clients regardless of whether or not the attorneys were authorized to reach the agreement.³² A more

ABC Paving Co., 58 A.D.2d 257, 396 N.Y.S.2d 556 (4th Dep't 1977) (an estoppel is present where a party represents that he will execute a written agreement, the party intends the other to rely on the representation, and the other party does rely to his prejudice as a result of the trial's termination and dismissal of the jury in response to the representation) (citing *Gass v. Arons*, 131 Misc. 502, 227 N.Y.S. 282 (City Ct. Bronx County 1928) (defendant represented that he would sign settlement agreement and subsequently refused)); *Hansen v. Prudential Lines, Inc.*, 118 Misc. 2d 568, 461 N.Y.S.2d 670 (Sup. Ct. Kings County 1983) "[W]here there is no dispute as to terms it is eminently reasonable to refuse to permit use of the rule against a party who has been misled or deceived by the oral stipulation to his detriment or who has relied upon it." *Id.* at 575, 461 N.Y.S.2d at 675 (citing 2-A JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE § 2104.04, at 21-33 (1992)).

30. *Continental Casualty Co. v. Chrysler Constr. Co.*, 80 Misc. 2d 552, 363 N.Y.S.2d 258 (Sup. Ct. Orange County 1975) (long acquiescence and silence (over one year) by client is sufficient justification for inferring ratification); *Brumberg v. Chan*, 25 Misc. 2d 312, 204 N.Y.S.2d 315 (Dist. Ct. Nassau County 1960) (there is an inference of ratification where there has been a long period of acquiescence and silence after acquiring knowledge of the settlement).

31. *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 160 N.E. 778 (1928) (*see infra* note 61) (unauthorized settlement agreement entered into by attorneys is a nullity); *Spungin v. Spungin*, 124 A.D.2d 690, 507 N.Y.S.2d 921 (2d Dep't 1986) (client not bound by his own agreement when his attorney was not present during the negotiations or signing of the agreement); *Fasano v. City of New York*, 22 A.D.2d 799, 254 N.Y.S.2d 133 (2d Dep't 1964) (where settlement is unauthorized, the client will not be bound).

32. *Stefaniw v. Cerrone*, 130 A.D.2d 483, 515 N.Y.S.2d 66 (2d Dep't 1987) (court held that attorney's stipulation to waive all affirmative defenses was binding against his client because it satisfied the requirements of Rule

sound application acknowledges the attorney's role as agent when considering the enforceability of a settlement agreement made pursuant to Rule 2104. These traditional agency principles and their application to the context of settlement disputes will be taken up below.

II. TRADITIONAL AGENCY PRINCIPLES

Attorneys acting on behalf of their clients are agents.³³ Without authority to enter into agreements on behalf of their clients, their clients will not be bound.³⁴ Under traditional agency principles, the principal may be bound by his agent's contracts if the latter has actual authority,³⁵ or when the agent has been cloaked by his principal with apparent authority.³⁶ The actual authority of an agent to contract becomes an issue in suits between the principal and his agent usually where the former seeks indemnification on contracts alleged to have been made beyond the scope of the agent's authority.³⁷ Apparent authority is typically in issue in suits between a principal and a third party, and is designed to protect the innocent third party when dealing with an agent who allegedly acts *ultra vires*.³⁸ In order to provide a frame of reference for the courts' application of traditional agency

2104; the attorney's authority to make such a stipulation was not discussed as a factor).

33. RESTATEMENT § 1(3) cmt. e.

34. See, e.g., *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir. 1989); *Hallock v. State of New York*, 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1181, 485 N.Y.S.2d 510, 513 (1984); *Countryman v. Breen*, 241 A.D. 392, 394, 271 N.Y.S. 744, 746 (4th Dep't 1934), *aff'd*, 268 N.Y. 643, 198 N.E. 536 (1935).

35. RESTATEMENT § 7. For a discussion of the principles of actual authority in the context of settlement disputes, see *infra* notes 156-74 and accompanying text.

36. RESTATEMENT § 8.

37. See *infra* notes 156-74 and accompanying text.

38. See Steven A. Fishman, *Inherent Agency Power--Should Enterprise Liability Apply to Agents' Unauthorized Contracts?*, 19 RUTGERS L.J. 1, 6-7 n.31 and articles cited therein (1987).

principles, the elements of apparent authority will be set forth below.

According to the Restatement, “[a]pparent 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 person.”³⁹ Clearly, this section requires that the manifestation to the third party flows, not from the agent, but directly from the principal.⁴⁰ The manifestation may be made by either words or other conduct of the principal,⁴¹ and the same rules applicable to the reasonableness of the agent’s interpretation of his principal’s manifestation of consent in the context of actual authority are also applicable to the reasonableness of the third party’s interpretation in the context of apparent authority.⁴²

The Restatement sets forth a liberal sprinkling of potential sources from which a principal’s conduct may provide a reasonable basis for a third party’s perception that the agent was authorized to act on the principal’s behalf.⁴³ For example, the principal may manifest his consent to the third party that the agent has authority to act on his behalf by authorizing the agent to represent his authority to the third party.⁴⁴ Another way in

39. RESTATEMENT § 8.

40. *Id.*

41. RESTATEMENT § 27 cmt. a.

42. RESTATEMENT §§ 8 cmt. a, 27, 49.

43. RESTATEMENT § 27 cmt. a.

44. RESTATEMENT § 27 cmt. c. Absent some type of written memorandum or other communication in which the principal explains to the third party that the agent can represent the extent of his own authority, this particular type of manifestation would appear to make no sense in the context of apparent authority because the manifestation to the third party flows from the agent. *See, e.g.,* Ford v. Unity Hosp., 32 N.Y.2d 464, 346 N.Y.S.2d 238, 299 N.E.2d 659 (1973) (one dealing with an agent does so at his own peril); Koss Co-Graphics, Inc. v. Cohen, 166 A.D.2d 649, 561 N.Y.S.2d 76 (2d Dep’t 1990) (attorney’s misrepresentations to court and opposing counsel of his authority to settle without client’s approval could not be a basis for apparent authority).

In addition, this type of manifestation for apparent authority purposes is particularly inappropriate in the context of negotiating a settlement to a law

which a principal may manifest his consent to the third party sufficient to establish apparent authority is to appoint an agent to a position which entails commonly recognized duties.⁴⁵ Yet another method of binding the principal under the doctrine of apparent authority is for the third party to show that the principal permitted the agent to act so as to create the reputation in a given context that the agent was authorized to act.⁴⁶ Another method

suit. If it were sufficient for an attorney at a settlement conference to represent the scope of his own authority to the other side, then a client could not logically be subsequently heard to argue that the attorney was unauthorized. The mere fact that the courts in the state of New York and the Second Circuit are entertaining motions to vacate demonstrates that a third party relying on the representations of an attorney at the negotiating table will not, without more, be able to establish the existence of apparent authority, and thus bind the client.

45. RESTATEMENT § 27 cmt. a. At first blush, this method of establishing the appearance of authority would appear particularly appropriate in the context of lawyers negotiating settlements on behalf of clients. Everyone in the legal community is aware of the common practice of lawyers settling cases for their clients. It is a universally recognized function. However, it has long been established that merely retaining an attorney does not confer upon that attorney the authority to compromise his client's claim. *See, e.g., United States v. Beebe*, 180 U.S. 343, 352 (1900) ("Indeed, the utter power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed."); *Peguero v. Grant*, 90 Misc. 2d 580, 394 N.Y.S.2d 818 (Civ. Ct. N.Y. County 1977) ("The rule is almost universal that an attorney who is clothed with no authority other than that arising from his employment in that capacity has no implied power by virtue of his general retainer to compromise and settle his client's claim" (quoting 3 N.Y. JUR. *Attorney and Client* § 34 (1958))). Therefore, since the other side, or, the third party, is usually represented by an attorney, the third party could not reasonably assert that he believed the attorney who settled was authorized to do so by virtue of his position as attorney for the other side. Something more than mere status as the client's attorney would have to be shown. The "appointment to a position" argument will not bind the client as principal under the principle of apparent authority.

46. RESTATEMENT § 27 cmt. a. In the situation where an attorney enters into an unauthorized settlement agreement, the third party attempting to prove apparent authority by showing that the client permitted the attorney to act in such a manner that he was reputedly authorized to settle, will probably encounter the same difficulties as the third party relying on the appointment concept set forth above. *See supra* note 45. The sort of conduct on the part of a client that would amount to a manifestation of consent to the agent's

by which the principal may be bound by apparently authorizing his agent to act is by failing to disclose to the third party any limitations on the agent's authority.⁴⁷

Once the existence of apparent authority has been established, the principal will be bound in contract to the third party just as if the agent had been actually authorized.⁴⁸ In addition to those methods of creating apparent authority set forth above, the Restatement further provides:

Apparent 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

authority is difficult to imagine. However, it might be argued that by authorizing the attorney to enter into settlement negotiations, the client created the attorney's reputed authority to settle. However, it has been held that a client's inaction cannot be the basis for a third party to infer that the attorney is apparently authorized. *Fennell v. TLB Kent Co.*, 365 F.2d 498, 502 (2d Cir. 1989). Furthermore, even in the unlikely event that the client somehow communicated to the third party that the attorney was authorized to settle, thus satisfying the requirement for a manifestation by the principal to the third party, there can be no guarantee that the attorney will act within the authority actually bestowed. Additionally, it is unclear what exactly must be apparently authorized by the client's manifestation. Case law suggests that the third party ought to know the extent of the attorney's authority before entering into a settlement agreement. *See supra* note 7. If indeed this is what is required to be shown by the third party in order to bind the client, the third party's burden would be insurmountable. An attorney might very well be authorized to settle, and the third party may receive some direct communication to this end from the client, but there can be no doubt that the client would not disclose the extent of the lawyer's actual authority. If it were otherwise, there would be no need to negotiate.

47. RESTATEMENT § 27 cmt. a. This, again, overlooks the special nature of the attorney-client relationship as an agency relation. Since most third parties in the settlement context are represented by their lawyers, liability should not be imposed upon the reticent client merely because he fails to speak up. The lawyer will instruct his client not to speak with the other side. The client trusts the judgment of his attorney; that is why he hired him. The obedient client will probably not mention anything that concerns him about the settlement negotiation until alone with his attorney. But by the same token, this same standard should protect the third party. The third party knows that he is not at liberty to speak directly with the other side, and his reliance on the attorney's representations should therefore be justified.

48. RESTATEMENT § 8 cmt. a.

that the principal consents to have the act done on his behalf by the person purporting to act for him.⁴⁹

The third party's interpretation of the principal's manifestations is to be judged in light of what the third party reasonably believes the manifestations to mean.⁵⁰ This appears to make allowance for those factors which would reasonably shape the perceptions of the particular type of third party involved in the transaction. For example, the beliefs of an attorney cast in the role of the third party would be judged by the standard of a reasonable attorney in a similar situation.⁵¹ Again, "apparent authority exists only to the extent that the third party reasonably believes the agent is authorized."⁵²

Finally, in addition to any direct manifestations a given principal might make to a third person, the Restatement provides that the third party will also be able to establish the existence of apparent authority based on any reasonable inferences from such manifestations.

[A]cts are interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in 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. The content of such apparent authority is a matter to be determined from the facts.⁵³

49. RESTATEMENT § 27.

50. Section 49 of the Restatement provides:

The rules applicable to the interpretation of authority are applicable to the interpretation of apparent authority except 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

(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.

RESTATEMENT § 49.

51. *Id.*

52. RESTATEMENT § 8 cmt. c.

53. RESTATEMENT § 49 cmt. c.

It is important to bear in mind here that, when determining the scope of the *actual* authority of the agent, as contrasted with the *apparent* authority, one must consider what the *agent* would reasonably perceive to be implied by the principal's words or conduct, whereas with apparent authority, one must look to the reasonableness of the *third party's* perception of the principal's manifestations.⁵⁴ The question of whether the agent's authority is premised on principles of actual or apparent authority has important consequences regarding who must bear the burden of proving the validity of the agreement. Typically, where the actual authority of the agent to contract on the principal's behalf is in question, the suit will be between the principal and his agent.⁵⁵ On the other hand, where apparent authority is in issue, the suit will be between the principal and the third party.⁵⁶

III. THE APPLICATION OF TRADITIONAL AGENCY CONCEPTS IN THE CONTEXT OF A MOTION TO VACATE A SETTLEMENT AGREEMENT

At the trial court level, one of the most important judicial functions is to expedite the resolution of civil law suits through the mechanism of the pre-trial settlement conference.⁵⁷ The device is important for several reasons. It provides the litigants with a forum which is less hostile, hence less stressful, than a full-blown trial, with all of the rigors of cross-examination;⁵⁸ it provides the trial judge with an opportunity to speedily clear off

54. RESTATEMENT § 8 cmt. a.

55. RESTATEMENT § 7.

56. RESTATEMENT §§ 8, 27 and 49. The courts' application of the concept of apparent authority is discussed below. See *infra* notes 64-137 and accompanying text.

57. *Fox v. Weiner Laces, Inc.*, 105 Misc. 2d 672, 673, 432 N.Y.S.2d 811, 812 (Sup. Ct. N.Y. County 1980) (process of settlement conferences has attained greater importance during the current "massive judicial efforts to combat undue civil calendar delay").

58. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); cf. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984).

the ever-burgeoning civil trial dockets; it saves the litigants the added expense of trying an often lengthy case before a jury; and it saves the taxpayers the money which would otherwise have to be spent to try the case.⁵⁹ In general, then, public policy strongly favors pre-trial settlement.⁶⁰

However, in recent years, there has been a proliferation of cases wherein one of the parties seeks to vitiate the settlement agreement and restore the matter to the trial calendar. In addition to frustrating the policy which favors putting a case to rest,⁶¹ the growing number of cases involving such motions raises important substantive concerns. Foremost among these concerns is who should bear the risk of loss when an attorney settles a case allegedly without authority from, or in excess of the authority granted by, his client. The traditional concepts of agency liability are inadequate, standing alone, to deal with these important concerns. Indeed, the courts that have applied these traditional agency principles have often overlooked, or perhaps ignored, other important factors which must be considered due to the

59. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L.J. 1643, (1985); David M. Trubek et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

60. See *Hallock v. State of New York*, 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1180, 485 N.Y.S.2d 510, 512 (1984) ("Stipulations of settlement are favored by the courts and not lightly cast aside.").

61. See *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 396 N.E.2d 1029, 421 N.Y.S.2d 556 (1979). The New York Court of Appeals refused to follow the rule of *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 160 N.E. 778 (1928), which held that an action is terminated as soon as a settlement is reached, even though there was no stipulation of settlement or entry of judgment by the court. *Id.* at 445-46, 160 N.E. 781-82. The *Teitelbaum Holdings* court, in holding that an action is not terminated at that point, stated: "Whatever its theoretical underpinnings, the *Yonkers* rule drew its justification from the practical notion that there must ultimately be an end to litigation Compelling as this rationale might have been at the time of that decision, it has been substantially eroded over the intervening decades." *Teitelbaum Holdings*, 48 N.Y.2d at 55, 396 N.E.2d at 1031, 421 N.Y.S.2d at 558.

special nature of the attorney-client relationship.⁶² Hence, as will be shown below,⁶³ this area of agency law is largely muddled.

In the context of a settlement agreement entered into by an attorney, the nature of the attorney's authority becomes an issue when the client claims that the agreement is unauthorized.⁶⁴ The procedural device with which the client challenges the agreement is a motion to vacate the settlement and restore the matter to the trial calendar.⁶⁵ In his motion, the client will argue either that his attorney had no authority to settle, or that the settlement is beyond the authorized parameters.⁶⁶ The procedural device of a motion to vacate requires that the dispute over the attorney's authority be played out between the parties to the litigation underlying the settlement agreement, and will not involve the attorney who is alleged to have acted *ultra vires*.⁶⁷ Consequently, the third party will be forced to oppose the motion by arguing that the principal should be bound by the terms of the settlement agreement because the attorney who purportedly acted on the principal's behalf was apparently authorized to do so.⁶⁸

Once the client moves to vacate the settlement agreement on the ground that it was unauthorized, the party opposing the motion has the burden of proving the existence of the attorney's

62. See *infra* notes 137-55 and accompanying text.

63. See *infra* notes 64-135 and accompanying text.

64. See, e.g., *Melstein v. Schmid Laboratories*, 116 A.D.2d 632, 497 N.Y.S.2d 482 (2d Dep't 1986) (stipulation entered into by attorney without client's knowledge or consent is unauthorized and not binding on client).

65. DAVID D. SIEGAL, *HANDBOOK ON NEW YORK PRACTICE*, § 204, at 242 (1978).

66. See, e.g., *Fennell v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1989) (plaintiff claimed that his attorney acted beyond his authority in accepting a settlement offer that was too low).

67. In *Fox v. Weiner Laces, Inc.*, 105 Misc. 2d 672, 432 N.Y.S.2d 811 (Sup. Ct. N.Y. County 1980), the court acknowledged the impropriety of this procedural device by asserting that the suit should be between the attorney and the client when the client alleges an unauthorized settlement, not between the third party and the client. *Id.* at 676, 432 N.Y.S.2d at 815.

68. Proving the actual authority of the attorney in the motion papers and accompanying affidavits, especially when the attorney is rarely a party to the motion, presents an insurmountable burden to the third party. See *infra* notes 69-71 and accompanying text.

authority to settle.⁶⁹ Until recently, the trial court would hold a plenary trial on the issue of the attorney's authority to settle his client's case.⁷⁰ The current approach, however, appears to be to resolve the issue, either with or without a hearing, on the basis of motion papers, typically filed by the very attorney who is alleged to have settled *ultra vires*.⁷¹ In any event, the third party's burden of proving the existence of authority is a tremendous one. A discussion of the courts' application of traditional agency principles should demonstrate the need to abandon this procedure of forcing the innocent third party to establish authority, especially when both opposing counsel and his client assert that none exists.

A recent Second Circuit Court of Appeals case, *Fennell v. TLB Kent Co.*⁷² grappled with the problem of applying general agency principles to the context of an attorney's alleged *ultra vires*

69. *Slavin v. Polyak*, 99 A.D.2d 466, 470 N.Y.S.2d 38 (2d Dep't 1984) (party opposing the motion bears the burden of proof); *Brumberg v. Chan*, 25 Misc. 2d 312, 204 N.Y.S.2d 315 (Dist. Ct. Nassau County 1959) (party asserting the existence of authority has the burden of proving it).

70. *See Ragen v. City of New York*, 45 A.D.2d 1046, 358 N.Y.S.2d 62 (2d Dep't 1974) (conflicting affidavits are insufficient to vacate a stipulation of discontinuance); *Ariel v. Ariel*, 5 A.D.2d 168 (1st Dep't 1958) (court reasoned that since a settlement agreement is a contract, creating new rights and liabilities for the parties thereto, a decision based on affidavits would be inappropriate, rather, a new suit should be commenced).

71. *See Mazzella v. American Home Constr. Co.*, 12 A.D.2d 910, 211 N.Y.S.2d 131 (1st Dep't 1961) (vacating settlement agreement solely on basis of statement by attorney bringing the motion that he was unauthorized after court accepted the attorney's factual argument that the settlement was made subject to his client's approval). In this regard it is interesting to note that an attorney bringing such a motion runs the serious risk of incurring disciplinary sanctions. N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102 provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he *shall* withdraw from representation in the trial"

Id. (emphasis added). There can be little doubt that the party seeking to prove, and the party denying, the attorney's authority would be inclined to call the attorney to the stand.

72. 865 F.2d 498 (2d Cir. 1989).

settlement of his client's case and handed down a decision which fosters uncertainty and inequity, and miserably fails to account for the unique nature of the situation.

In *Fennell*, the plaintiff brought suit against his former employer alleging that he had been wrongfully discharged.⁷³ The case was marked ready for trial in the District Court for the Southern District of New York as of January 6th, 1987. Shortly thereafter, the attorneys for both the plaintiff and the defendants reached a settlement agreement⁷⁴ wherein the defendants agreed to pay \$10,000 to the plaintiff in return for a release and stipulation of discontinuance.⁷⁵ The agreement was reported to the trial court via a telephone conference call with the attorneys for both sides,⁷⁶ and the court ordered the case dismissed.⁷⁷

73. *Id.* at 500.

74. *Id.* The agreement was not signed by the plaintiff personally. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* As Chief Judge Feinberg pointed out in his concurring opinion, there was no need for the court to delve into a discussion of agency principles in this case. *Id.* at 503 (Feinberg, C.J., concurring). The district court judge's order provided as follows:

ORDERED, that this action be, and the same hereby is, dismissed with prejudice but without costs; provided, however, that within sixty days of the date of this order any party may apply by letter for restoration of the action to the trial calendar of the undersigned.

Id. at 503-04 (Feinberg, C.J., concurring). The plaintiff in *Fennell* did just that. And when the trial judge ruled against the plaintiff's motion for restoration, he commented as follows:

These orders are entered as a matter of routine in appropriate circumstances, and they serve a useful function of allowing parties to agree on the terms of a settlement and to perform the paperwork involved in completing a settlement, that is usually the exchange of releases and the exchange of cash, while retaining access to the court in case there should be a difficulty with the consummation of the settlement, and if the settlement should not be approved or be illusory, the immediate access or re-access to the court for purposes of trial.

Id. (Feinberg, C.J., concurring) (emphasis supplied).

As Chief Judge Feinberg pointed out, the settlement did indeed prove illusory and, in accordance with the terms of its own order, the trial court should have restored the matter to the trial calendar. There thus should have been no need to resort to a discussion of agency principles. *Id.* (Feinberg, J., concurring).

Subsequently, plaintiff wrote to his attorneys, informing them of his dissatisfaction with the settlement and with the attorneys themselves, and dismissed them.⁷⁸ These same attorneys then wrote to the trial judge "requesting that the matter be restored to the calendar as the settlement which was authorized and accepted by our client is no longer acceptable to him."⁷⁹

In June of 1987, the trial court conducted a hearing in order to determine whether the matter should be restored to the trial calendar.⁸⁰ After the hearing, the trial court refused to vacate the settlement because the plaintiff's attorneys had been clothed with apparent authority to settle the case, and therefore "to allow a client to reject a settlement which has been agreed upon by his attorney with apparent authority is to open the door to a mild form of chaos."⁸¹ In reaching its conclusion that the attorneys had been clothed with apparent authority, and that the defendants had, therefore, reasonably believed that the plaintiff's manifestations to them amounted to a showing that the attorney was authorized, the trial court made the following factual findings:

1) that [the attorney] and his associates represented [plaintiff] "in dealing with the other side," 2) that they were authorized to appear at conferences for him, 3) that [plaintiff] knew that settlement was being discussed, 4) that [plaintiff] did not tell his counsel not to continue discussing settlement, 5) that [plaintiff] would have accepted a higher settlement figure (\$50,000 - 75,000), and 6) that [plaintiff] did not tell defendants' counsel that the authority of plaintiff's counsel was limited in any way.⁸²

78. *Id.* at 500.

79. *Id.* It is interesting to note here that the record was silent as to whether or not these original attorneys had any form of written authorization from the client stating the least he would have been willing to take in return for his release. This starkly demonstrates the difficult, if not impossible burden upon the defendant in the underlying action to prove the *actual* authority of the attorneys to settle for the \$10,000.

80. *Id.*

81. *Id.*

82. *Id.* at 502.

On appeal to the Second Circuit, the plaintiff argued that, in light of the district court's order, it was an abuse of discretion not to restore the matter to the trial calendar.⁸³ The defendants argued that plaintiff was bound by the settlement because his attorney had apparent authority to act.⁸⁴ The Second Circuit undertook to decide the case under general principles of agency law.⁸⁵

Initially, it was noted that it is the client's, and not the attorney's, decision to settle the case.⁸⁶ Nevertheless, the court pointed out that "if an attorney has apparent authority to settle a case, and the opposing counsel has no reason to doubt that authority, the settlement will be upheld."⁸⁷ The court went on to explain that:

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." Further, in order to create apparent authority, the *principal 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."⁸⁸

In light of the fact that the record was devoid of any direct manifestations from which the defendant's counsel could

83. *Id.* at 500. *See also supra* note 77.

84. *Fennell*, 865 F.2d at 500.

85. *Id.* at 501. In addition, the court avoided the question of whether New York or federal law applied by stating that the result would be the same in either case. *Id.*

86. *Id.* at 501-02 (citing *United States v. Beebe*, 180 U.S. 343, 352 (1901); *Barthelmas v. Fidelity-Phenix Fire Ins. Co.*, 103 F.2d 329, 331 (2d Cir. 1939); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 (1980)).

87. *Id.* at 502 (citing *International Telemeter Corp. v. Teleprompter Corp.*, 592 F.2d 49, 55 (2d Cir. 1979)). Under the provisions of the Restatement, § 8 cmt. a, if the opposing counsel does have reason to doubt, there can be no apparent authority. RESTATEMENT, § 8 cmt. a. Apparent authority depends upon the reasonableness of the third party's belief in the agent's authority to settle. *Id.* *See* discussion, *supra* notes 39-53 and accompanying text.

88. *Fennell*, 865 F.2d at 502 (citing RESTATEMENT, §§ 8, 27).

reasonably believe that plaintiff's attorney was authorized to settle, the trial judge's order was reversed.⁸⁹

Superficially, the decision in *Fennell* may appear sound. The court correctly rejected the district court's finding that the client's failure to inform the defendants of any limitations on the attorney's authority to settle constituted a basis for apparent authority.⁹⁰ The court further stated that something the client did not say could not be construed as a manifestation sufficient to establish apparent authority.⁹¹ In addition, to the extent that the district court's findings of fact relied on the client's inaction as predicates for apparent authority, they were rejected by the Second Circuit Court of Appeals.⁹² "None of these findings relates to positive actions or manifestations by [plaintiff] to defendant's counsel that would reasonably lead that counsel to believe that [plaintiff's] attorneys were clothed with apparent authority to agree to a definitive settlement of the litigation."⁹³ The court thus implicitly rejected the concept that apparent authority could be derived solely from omissions of the principal.⁹⁴

As stated above,⁹⁵ such factors do not properly belong in the context of settlement disputes arising within the attorney-client relationship. But equally incongruous in the context of settlement disputes is the court's implied holding relating to the sort of conduct of the client that would be sufficient for a finding of apparent authority. The court reversed the lower court because there were no "positive actions or manifestations" that would lead the other side to reasonably believe the attorney was authorized.⁹⁶

It would be tempting to assert that one such positive action or manifestation might be the client's presence at the settlement

89. *Id.*

90. *Id.*

91. *Id.*

92. *See supra* note 82 and accompanying text.

93. *Fennell*, 865 F.2d at 502.

94. *See supra* note 47 and accompanying text.

95. *See supra* text accompanying note 89.

96. *Id.*

conference. Justification for such an assertion can be found in the somewhat enigmatic⁹⁷ warning issued by the court: "A party who relies on the authority of an attorney to compromise an action in his client's absence," the court said, "deals with such an attorney at his own peril."⁹⁸ But it is equally enticing to assume that the client's presence will not be sufficient if he remains silent. The court in *Fennell* rejected the factual findings of the district court as predicates for apparent authority because they related merely to things the plaintiff "did *not* say to opposing counsel."⁹⁹ Presence at the settlement negotiation, then, without verbal communications between the client and opposing counsel presumably will not be independently sufficient to create apparent authority.

By implying that a client must communicate directly with opposing counsel in order to create apparent authority, *Fennell* raises serious concerns about the application of the doctrine to the context of settlement disputes. Such a requirement would be in sharp conflict with the ethical obligation prohibiting direct communication between counsel and an opposing client known to be represented by an attorney.¹⁰⁰ In addition, requiring a direct communication between the third party and the principal in order for the third party to have a legitimate apparent authority defense with which to oppose the principal's motion to vacate, renders

97. This warning is enigmatic because it assumes that attorneys, who are threatened with drastic sanctions in the event they deviate from the ethical norms and the duty of care imposed by their profession, can be trusted no further than they can be thrown.

98. *Fennell*, 865 F.2d at 503 (quoting *Slavin v. Polyak*, 99 A.D.2d 466, 467, 470 N.Y.S.2d 38, 39 (2d Dep't 1984)). Such a statement is unjustified in light of the fact that attorneys dealing with attorneys in settlement negotiations will rightly rely upon each other's ethical obligations. Each knows that the other is not at liberty to compromise his respective client's claim without explicit authority from the client. See N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (McKinney 1992).

99. *Fennell*, 865 F.2d at 502 (emphasis supplied).

100. N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104, EC 7-18 (McKinney 1992). See also *In re Shapiro*, 90 A.D.2d 22, 455 N.Y.S.2d 604 (1st Dep't 1982) (attorney suspended for communicating with opposing party known to be represented by counsel).

the very doctrine of apparent authority redundant. If the client is required to disclose the extent of his attorney's authority to the other side, then the other side would necessarily have knowledge of the actual authority of the attorney. In this instance, apparent authority and its "reasonable belief" requirement would have no role to play. Furthermore, if the opponent is expected to know the extent of the attorney's authority, and *both* sides are represented by counsel, then presumably both sides would have knowledge of the extent of the other's authority. Such a situation would render settlement negotiations meaningless.

With abundant clarity, the court's analysis in *Fennell* illustrates the inappropriateness of the doctrine of apparent authority to the situation where the principal moves to vacate a settlement agreement on the ground that it was unauthorized. Regardless of whether or not the court reached the right result, its application of traditional agency principles was just plain wrong. In *Fennell*, the court held that the client was not bound by his attorney's settlement because the client had had no direct communication with the other side, and thus there was no appearance of authority.¹⁰¹ On the other hand, the leading case from the New York State courts, *Hallock v. State of New York*,¹⁰² which was in fact cited by the *Fennell* court,¹⁰³ held that the client *was* bound by his attorney's litigation settlement, even though in fact there had been no communication between the client and the third party.¹⁰⁴ A discussion of *Hallock* will serve to further demonstrate the incongruity of traditional agency principles in this area of agency law.

The relevant facts in *Hallock* are as follows.¹⁰⁵ On the day the case was set for trial, plaintiff Hallock was ill.¹⁰⁶ His attorney

101. *Fennell*, 865 F.2d at 502.

102. 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984).

103. *Fennell*, 865 F.2d at 502.

104. *Hallock v. State of New York*, 64 N.Y.2d 224, 231-32, 474 N.E.2d 1178, 1182, 485 N.Y.S.2d 510, 514 (1984).

105. *Hallock* actually involved two plaintiffs, one of whom was present during the settlement negotiation, and one of whom was not. *Id.* at 228-29, 474 N.E.2d at 1180, 485 N.Y.S.2d at 512. Since the reasoning and result in the case applied to both, this discussion will focus predominantly upon the one

appeared in court and, along with defendant's attorney, negotiated a settlement which was then dictated into the record.¹⁰⁷ Subsequently, Hallock expressed his dissatisfaction with the terms of the settlement and moved to have it vacated.¹⁰⁸ Hallock contended that his attorney had acted without authority by agreeing to the very settlement that he had been instructed to reject.¹⁰⁹

A unanimous court of appeals denied Hallock relief, and instead ordered specific performance of the agreement.¹¹⁰ The court found, *as a matter of law*,¹¹¹ that the record sufficiently demonstrated facts from which to conclude that the plaintiff's attorney had been clothed with apparent authority.¹¹² Citing the Restatement sections on apparent authority¹¹³ with approval, the court established the test for finding apparent authority as follows:

Essential to the creation of apparent authority are the words or *conduct of the principal*, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter a transaction. *The agent cannot by his own acts imbue himself with apparent authority.* "Rather, the existence of '*apparent authority*' depends upon a *factual showing* that the third party relied upon some misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent."¹¹⁴

who was not present, thus more starkly pointing out the complete lack of any manifestation from client to third party upon which to predicate a finding of apparent authority.

106. *Id.* at 228, 474 N.E.2d at 1180, 485 N.Y.S.2d at 512.

107. *Id.* at 229, 474 N.E.2d at 1180, 485 N.Y.S.2d at 512. The settlement complied with CPLR § 2104. *See supra* notes 21-30 and accompanying text.

108. *Id.* at 229, 474 N.E.2d at 1180, 485 N.Y.S.2d at 512.

109. *Id.* at 231, 474 N.E.2d at 1181, 485 N.Y.S.2d at 513.

110. *Id.* at 232, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

111. *Id.* at 231, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

112. *Id.* at 232, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

113. *See supra* notes 36-56 and accompanying text.

114. *Hallock*, 64 N.Y.2d at 231, 474 N.E.2d at 1181, 485 N.Y.S.2d at 513 (citing *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 473, 299 N.E.2d 659, 664, 346 N.Y.S.2d 238, 244 (1973)) (emphasis added).

The facts in the record relied upon by the court in order to find apparent authority as a matter of law were these: *the attorney* had represented Hallock throughout the litigation;¹¹⁵ *the attorney* had attempted to negotiate a settlement of the case prior to the occasion in question;¹¹⁶ and *the attorney* had appeared at the final pretrial conference.¹¹⁷ The court went on to state that the defendant's reliance on this appearance of authority was "entirely reasonable" because *the attorney* had not disclosed any limitations on his authority to settle.¹¹⁸

While it may indeed be true that the defendant's reliance on the attorney's appearance of authority may have been reasonable, and that Hallock should have been bound by the settlement, the doctrine of apparent authority does not provide the basis for such conclusions. Of those facts relied upon by the court to find "words or conduct of the principal, communicated to the third party,"¹¹⁹ not one related to any words or conduct on the part of Hallock. The principal in *Hallock* made no manifestations of consent to the other side.¹²⁰ Contrary to the clear and unequivocal terms of the test adopted by the court, each fact relied upon to find apparent authority involved conduct of the attorney/agent.¹²¹ Apparent authority should not have been applied to the facts in *Hallock*. Since the court expressly stated that "the agent cannot by his own acts imbue himself with apparent authority,"¹²² the decision to bind Hallock cannot be justified unless some other doctrinal basis can be advanced.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 232, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

119. *See supra* notes 115-18 and accompanying text.

120. *See* RESTATEMENT § 8, discussed *supra* at notes 39-56 and accompanying text.

121. *See supra* note 119 and accompanying text.

122. *Hallock*, 64 N.Y.2d at 231, 474 N.E.2d at 1181, 485 N.Y.S.2d at 513.

It should be pointed out that the court placed some weight on the applicability of a local trial court rule,¹²³ which required that only those attorneys with authority to bind their clients in settlement can attend settlement conferences.¹²⁴ In accordance with the provisions of the rule,¹²⁵ the court found that the attorney's mere presence at the conference constituted an "implied representation by Hallock to defendant that [his attorney] had authority to bind him."¹²⁶ The rule itself, however, was not the *ratio decidendi*; apparent authority was. The rule, which speaks not at all to the conduct of the client, merely adds to the reasonableness of the third party's reliance on the attorney's conduct in supposing authority to settle the case.

Since the court of appeals handed down its decision in *Hallock*, the influence of its application of the doctrine of apparent authority has been pervasive. Indeed, the Second Circuit in *Fennell*¹²⁷ addressed the *Hallock* decision in its own application of apparent authority. But even though *Hallock* was decided as a matter of law,¹²⁸ each of the cases applying *Hallock's* apparent authority test, including *Fennell*, has taken a *sui generis* approach to the particular facts.¹²⁹

123. N.Y. COMP. CODES R. & REGS. tit. 22 § 861.17 (since rescinded, and replaced generally by Uniform Civil Rules for New York State Trial Courts, N.Y. COMP. CODES R. & REGS. tit. 22 §§ 202.1-202.68 (1986)).

124. *Hallock*, 64 N.Y.2d at 228, 474 N.E.2d at 1179, 485 N.Y.S.2d at 512.

125. Effective on January 6, 1986, New York adopted uniform rules applicable in its trial courts. Section 202.26(e) is the same as the rule considered by the court in *Hallock*. It provides that: "Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations . . . will be permitted to appear at a pretrial conference." N.Y. COMP. CODES R. & REGS. tit. 22 § 202.26.

126. *Hallock*, 64 N.Y.2d at 231-32, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

127. *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502-03 (2d Cir. 1989).

128. *Hallock*, 64 N.Y.2d at 231, 474 N.E.2d at 1182, 485 N.Y.S.2d at 514.

129. See *Melstein v. Schmid Labs., Inc.*, 116 A.D.2d 632, 633-34, 497 N.Y.S.2d 482, 483 (2d Dep't 1986) (attorney's stipulations on behalf of client not binding on client even though attorney had similar indicia of authority as those found in *Hallock*). See also *Gordon v. Town of Esopus*, 107 A.D.2d

In any event, in neither *Hallock* nor *Fennell* can the reasonableness of the third parties' conduct in settling with the attorney really be called into question.¹³⁰ As indicated above,¹³¹ the absence of the client's manifestations for the purpose of apparent authority are to be expected. Indeed, this is why the doctrine makes no sense in the context of settlement disputes.¹³² However, the reasonableness of the third party's reliance in this setting should not depend solely, if at all, on whether there have been sufficient manifestations by the opposing client. Because the third party is invariably represented by counsel, the third party should be justified in relying on the other attorney's compliance with the ethical rules.¹³³ Moreover, the third party may justifiably perceive an implied representation of authority from the presence of such court rules as the one in *Hallock*, requiring that the attorney only attend settlement conferences when he has authority.¹³⁴ In addition, the third party should also be justified in relying on the deterrent effect of a malpractice suit which should be lodged against the wayward attorney for his *ultra vires* settlement practices.¹³⁵

114, 116, 486 N.Y.S.2d 420, 421 (3d Dep't 1985) (Surprisingly, the court held that *Hallock* is only applicable to stipulations of settlement and only if the stipulation was entered into in open court. An attorney's out of court waiver of claim, the court apparently held, only involves actual authority analysis, not apparent authority analysis.).

130. See *supra* note 47 and *infra* notes 145-55 and accompanying text.

131. See *supra* notes 91-100 and accompanying text.

132. See *supra* notes 91-100 and 115-22 and accompanying text.

133. Attorneys are obligated to communicate all settlement offers to their clients because it is the clients' prerogative to settle the case. See N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (McKinney 1992).

134. See *supra* note 125 and accompanying text.

135. See *Fox v. Weiner Laces, Inc.*, 105 Misc. 2d 672, 676, 432 N.Y.S.2d 811, 813 (Sup. Ct. N.Y. County 1980).

IV. DOCTRINE OF INHERENT AGENCY POWER IN PROVING CLIENTS' OBLIGATION TO ACCEPT THEIR ATTORNEYS' SETTLEMENTS WITH THIRD PARTIES

The foregoing discussion should amply point out the need to abandon the doctrine of apparent authority in the context of settlement disputes. Furthermore, by applying the doctrine, and causing the third party and not the movant's attorney to respond to the motion to vacate, the possibility always exists that the attorney was in fact *actually* authorized to settle, while the third party is unable to show that he was *apparently* authorized. Placing the burden upon the third party to demonstrate apparent authority, even in the probable circumstance where the attorney was in fact *actually* authorized to settle, will likely leave the third party unable to show that he was apparently authorized to do so.¹³⁶ Apparent authority should be abandoned so that those in the best position to know the extent of the attorney's actual authority, the client and his attorney, are put to the test of proving the existence or non-existence of authority. By adopting the doctrine of "inherent agency power," the innocent third party who reasonably and in good faith relies on the representations of the attorney in settling the case will no longer be forced to prove that which is peculiarly within the knowledge and control of the other side.

The principle of inherent agency power¹³⁷ does not depend upon any express grant of authority conferred upon the agent by

136. *See Fennell v. TLB Kent Co.*, 865 F.2d 498, 500 (2d Cir. 1989). As explained *supra* at note 79, the record in *Fennell* was silent as to whether the original attorneys in that case had any written authorization to settle the action. It is quite possible that these attorneys in fact had actual authority but the opposing party could not prove it.

137. RESTATEMENT § 8A provides:

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

the principal,¹³⁸ or upon any manifestation of consent running from the principal to the third party.¹³⁹ It is derived “solely from the agency relation” itself.¹⁴⁰ This doctrine was adopted in the Restatement in order to provide a basis for protecting the third party where traditional agency principles were insufficient or inappropriate to bind the principal to his agent’s unauthorized contracts.¹⁴¹ According to the Restatement, if the third party enters into a transaction with the agent, and the transaction is one which would “usually accompany” or is “incidental to” transactions the agent is authorized to conduct, the principal will be bound by such a transaction regardless of any showing of authority — actual or apparent — relating to the particular transaction itself.¹⁴² It is required only that the third party be without notice of any lack of authority and reasonably believes that the agent is authorized.¹⁴³ Again, unlike the requirements for showing apparent authority, the reasonableness of the third party’s perception does not depend upon any manifestation of the principal to that third party; it depends rather upon the nature of the agency relationship itself and the third party’s reasonable conduct in response thereto.¹⁴⁴

The doctrine of inherent agency power is a particularly appropriate basis upon which to permit the reasonable third party to retain the benefit of his settlement agreement and shift the risk of loss back to those in the best position to know the actual extent of what the attorney was authorized to do. In the context of litigation, the third party is himself represented by an agent — an attorney. As such, each agent has a shared understanding of the

Id.

138. *See infra* notes 156-74 and accompanying text (discussing actual authority).

139. *See supra* notes 39-53 and accompanying text (discussing apparent authority).

140. RESTATEMENT § 8A.

141. Fishman, *supra* note 38, at 39.

142. RESTATEMENT § 161. *See also id.* at cmt. b (entitled: *Inherent Power Distinguished From Apparent Authority*).

143. RESTATEMENT § 161.

144. *Id.* at cmt. a.

constraints imposed upon the other's liberty to enter into a binding agreement. Each knows that the other is under an ethical obligation to report settlement offers to his principal.¹⁴⁵ Each knows that the other cannot ethically enter into a binding agreement without prior approval from the principal.¹⁴⁶ Both know that direct communication with the other's principal is taboo.¹⁴⁷ They are both aware that attorneys are constantly settling cases on behalf of clients. And, significantly, both are aware of the sanctions, such as disciplinary action by the bar¹⁴⁸ and/or a malpractice suit by the client,¹⁴⁹ for conduct in violation of the ethical rules and failure to comply with the wishes of the client. In light of these factors which help shape the perception of the third party when the settlement is being negotiated, it is entirely reasonable for the third party to believe the attorney is authorized to settle. These factors are inherent in the attorney-client relationship in the context of settlement agreements. Therefore, it is undoubtedly reasonable for the third party to believe his counterpart is authorized to settle based on his perception of the agency relation itself.¹⁵⁰

145. See N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 (1980); *supra* note 133 and accompanying text. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2a ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.").

146. See *supra* note 145.

147. See *supra* note 100 and accompanying text.

148. See Debra T. Landis, Annotation, *Conduct of Attorney in Connection with Settlement of Client's Case as Grounds for Disciplinary Action*, 92 A.L.R.3d 288 (1979).

149. See RONALD E. MALLIN, VICTOR B. LEVIT, *LEGAL MALPRACTICE* § 100, at 169 (2d ed. 1981). "Most actions brought by clients against their attorneys are for negligence, breach of contract or fraud." *Id.* Clients may also sue their attorneys for a breach of fiduciary duties. *Id.* at § 121, at 169.

150. In an appropriate case, the reasonableness of the third party's conduct element might require that he inquire as to whether or not the attorney is authorized. Such a case may present itself, perhaps, when there is some indication that the attorney is reputed to be only marginally ethical in a given legal community.

In addition, New York's adoption of local court rules,¹⁵¹ which provide that the mere presence of an attorney at a settlement conference constitutes an implied representation by the client that the attorney is authorized,¹⁵² lends support to the reasonableness of the third party's perception. Implicit in these local rules governing settlement is New York's acknowledgment of the fact that attorneys generally act in conformity with the ethical requirements and other norms of their profession. In addition, the rule facilitates the clearance of the overwhelming congestion in New York's civil calendars, thus implementing the policy favoring settlement.¹⁵³

In neither *Hallock* nor *Fennell* was there any suggestion of disingenuousness on the part of the third party or his attorney. In both cases the doctrine of inherent agency power should have been invoked to bind the client and shift the focus of the dispute back to him and his attorney. The inconsistencies borne out of the Second Circuit's and New York's application of traditional agency principles to the context of settlement disputes would leave every settlement agreement subject to later attack by the client.¹⁵⁴ Traditional agency concepts cannot properly adjust the rights and liabilities of the respective parties when the client moves to vacate the agreement. The application of inherent agency power would remedy this problem by binding the principal to the third party as a matter of law.

151. N.Y. COMP. CODES R. & REGS. tit. 22 § 202.26; *see supra* note 125 and accompanying text.

152. *Id.* ("[O]nly attorneys . . . authorized to make binding stipulations . . . will be permitted to appear at a pretrial conference.").

153. *See Fox v. Weiner Laces, Inc.*, 105 Misc. 2d 672, 673, 432 N.Y.S.2d 811, 813 (Sup. Ct. N.Y. County 1980).

154. *See id.* at 676, 432 N.Y.S.2d at 814.

V. DOCTRINE OF ACTUAL AUTHORITY IN PROVING ATTORNEYS' LIABILITY TO CLIENTS FOR SETTLEMENTS ENTERED INTO WITH THIRD PARTIES

The client, of course, would not be left without a remedy if in fact his attorney did act *ultra vires* in settling the case. As one lower court has recognized,

[i]f the [principal] encounters prejudice or difficulty in being held to a settlement in this case, the fault lies not in the other party, but in the dereliction of his own attorney. Any recourse which should be made available to said [principal] would appropriately be procurable from the culpable attorney.¹⁵⁵

The dispute between the aggrieved client and his attorney will center upon the existence or non-existence of actual authority.

The Restatement provides that the actual authority of an agent to bind his principal is derived from the principal's manifestation of consent that the agent have such authority.¹⁵⁶ The principal's manifestation of consent must be made *to the agent* in order to create actual authority.¹⁵⁷ The principal's consent may be manifested by either his words or conduct.¹⁵⁸ Actual authority bestows upon the agent the power to bind the principal through the performance of such acts as are both expressed and implied in the principal's manifestation of consent.¹⁵⁹ Actual authority is expressed when the principal specifies exactly what the scope of the authority bestowed upon the agent consists of, and any limitations imposed thereon.¹⁶⁰ For the most part, the agent's power to bind the principal consists of those acts which are implied in the principal's expressed manifestation of consent.¹⁶¹

155. *Id.* at 676, 432 N.Y.S.2d at 815.

156. RESTATEMENT § 7.

157. *Id.* at cmt. a.

158. *Id.* at cmt. b.

159. *Id.* at cmt. c.

160. *Id.*

161. *Id.*

Implied authority “generally means the authority which ordinarily accompanies, is incidental to, or is necessary to accomplish the authority expressly granted to an agent, or the authority which normally accompanies the position to which the agent has been appointed.”¹⁶²

Litigation involving the extent of an agent’s actual authority will usually be between the principal and his agent.¹⁶³ This makes good sense because the principal and the agent are in the best position to know the extent of the authority actually bestowed. In order for the agent to establish that the agreement he entered into fell within the scope of his actual authority, he must establish that he reasonably believed his acts to have been authorized by the principal.¹⁶⁴ Here, of course, the principal’s manifestation of consent will be a significant factor for consideration.¹⁶⁵ The “manifestation of consent” requirement in the context of actual authority has obvious potential to create misunderstandings between the principal and his agent because the agent is empowered to bind the principal through acts *implied* in the principal’s communications to the agent.¹⁶⁶ For example, the principal may subjectively intend to consent to the actual authority of the agent to do one thing, such as negotiate a settlement, but not intend the agent to bind him without the opportunity to finally approve its terms.¹⁶⁷ Quite feasibly, in this context the agent may reasonably perceive the principal’s manifestation of consent to negotiate as including by implication

162. Fishman, *supra* note 38, at 70.

163. A typical situation might involve a suit brought by a third party, with whom the agent has dealt, against the principal to enforce an agreement, or a suit by the principal against the third party to rescind an agreement. In either case, the principal will sue or implead the agent in order to seek indemnification in the event that the third party prevails against the principal. In both situations, the principal will assert that the agent acted beyond the scope of his authority.

164. RESTATEMENT § 7 cmt. b.

165. *See, e.g.*, RESTATEMENT §§ 33, 34.

166. RESTATEMENT § 7 cmt. c.

167. *See* *Suslow v. Rush*, 161 A.D.2d 235, 554 N.Y.S.2d 620 (1st Dep’t 1990). “Authority of attorney to enter into settlement negotiations does not necessarily constitute authority to enter into a binding settlement” *Id.*

the power to bind the principal in contract. Arguably, the principal should rightly bear the risk of loss in such a situation because he failed to specify any limitations on the agent's authority. On the other hand, both agent and principal are in a position to establish the true nature of the authority with appropriate documentation.

An analysis of the principal's manifestation of consent alone does not end the inquiry into the reasonableness of the agent's perception of the scope of his actual authority. As indicated above,¹⁶⁸ the inquiry into the reasonableness of the agent's interpretation of the manifestation of consent will entail an examination of other factors, both internal and external to the agency relationship, which serve to shape the reasonableness of the agent's belief.¹⁶⁹ As a general principle with which to interpret the principal's authorization, the Restatement provides that:

[A]n agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in light of the principal's manifestations and the facts as he knows or should know them at the time he acts.¹⁷⁰

The "facts" referred to in the above-quoted provision will include, among other things, the type of agency relationship involved, the customs of the agent's business, the nature of the subject matter of the relationship, and the legality of the act involved.¹⁷¹

168. See *supra* note 31 and accompanying text.

169. RESTATEMENT §§ 33, 34.

170. RESTATEMENT § 33.

171. Section 34 of the Restatement provides:

An authorization is interpreted in light of all accompanying circumstances, including among other matters:

- (a) the situation of the parties, their relations to one another, and the business in which they are engaged;
- (b) the general usages of business, the usages of trades or employments of the kind to which the authorization relates, and the business methods of the principal;
- (c) facts of which the agent has notice respecting the objects which the principal desires to accomplish;

These rules for interpreting the reasonableness of the agent's interpretation of his authority are sufficiently broad to incorporate the special factors which serve to influence the perceptions of an attorney when acting on behalf of his client in the context of settlement negotiations. One such special factor which shapes the perception of the attorney as agent is the Code of Professional Responsibility.¹⁷² For instance, when an attorney is instructed to enter into settlement negotiations by his client, and the client says nothing about the final terms of the settlement, the attorney knows or should know that he does not have any implied power to bind his client.¹⁷³ The attorney must have explicit authority from his client before compromising his claim.¹⁷⁴ In addition, the fact that the attorney knows or should know that he must report all settlement offers to his client further serves to restrain any unwarranted inferences from the client's instructions. Therefore, the attorney should not be heard to assert the existence of authority to settle absent an express grant from his client. Furthermore, the reasonable attorney would not leave the matter to chance; in an appropriate case he would reduce the grant of authority to a writing.

CONCLUSION

The persistent application of traditional agency principles to the context of settlement disputes is inappropriate because these principles fail to consider the special nature of the attorney-client relationship as an agency relation. In addition, by entertaining the client's motion to vacate the settlement agreement on the ground that the attorney was unauthorized to enter into it, the courts

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- (d) the nature of the subject matter, the circumstances under which the act is to be performed and the legality or illegality of the act; and
 - (e) the formality or informality, and the care, or lack of it, with which an instrument evidencing the authority is drawn.

RESTATEMENT § 33.

172. N.Y. JUD. LAW APPENDIX (McKinney 1986).

173. N.Y. JUD. LAW APPENDIX, CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 (McKinney 1986). *See supra* notes 133 and 145 and accompanying text.

174. *See supra* note 173.

seem to be tacitly assuming that the disgruntled client is telling the truth. The third party is put to the test of proving what appeared to be the case while what is in fact the case is known only to the client and his attorney. If indeed the client is telling the truth and his attorney had no authority to settle, the wayward attorney should not be permitted to wriggle off the hook and avoid a suit in malpractice and sanctions from the bar association. Furthermore, if the client is telling the truth, and his attorney was in fact unauthorized, traditional doctrine might still bind him if the third party can establish that certain manifestations of that client created the reasonable, yet, per hypothesis, erroneous belief that the attorney was authorized. And of course, he should not be permitted to deprive the innocent third party of the benefit of his bargain merely because the latter cannot summon sufficient proof that the attorney who *was* authorized also *appeared* to be.

The doctrine of inherent agency power was developed in order to provide a doctrinal basis for explaining those cases where traditional agency principles were inappropriate.¹⁷⁵ Inherent agency power should be applied in the context of allegedly unauthorized settlement agreements because it incorporates consideration of all of those factors which serve to constitute the reasonable perceptions of the parties and would relieve the third party of the proof problems indicated above by returning the dispute to those who should rightly be parties to it: the attorney and his client.

If the dispute over authority were played out between those in the best position to know, there should not be too much difficulty for one or the other to prove the existence or non-existence of the actual authority. The competent lawyer, in accordance with ethical rules and customary practice, would not neglect to confirm the authority specified by his client with an appropriate letter and memorandum. In the absence of compliance with the code of ethics and the customs of good practice, the attorney, as agent, would be hard pressed to assert the reasonableness of his interpretation of his client's manifestations of consent in the event the client later sues alleging unauthorized settlement. In order for

175. *See supra* note 141.

the attorney to establish that he had actual authority to settle his client's case, his perception must be reasonable.¹⁷⁶ A failure on the part of the attorney to ensure that what he perceived and what the client intended coincide should render the attorney's perception per se unreasonable. Good practice requires that the reasonable attorney leave a paper trail which conclusively establishes the existence and scope of his actual authority to settle his client's claim.

176. RESTATEMENT § 7.