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Abandoning the Agency Model of the Lawyer-Client Relationship: A New Approach for Deciding Authority Disputes

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I. INTRODUCTION

The lawyer-client relationship is generally characterized as an agency relationship, although one of a special kind. Unlike most agents, a lawyer is not subject to the same obligation to obey the principal’s instructions regarding how to carry out his services.

A primary issue in the lawyer-client relationship is identifying whether the lawyer or the client has the authority to make a particular decision. In a civil litigation context, this question is answered by distinguishing between procedural decisions (i.e., affecting the means of representation) and substantive ones (i.e., affecting the subject matter or the objectives of the representation). Typically, it is said that lawyers have authority to make procedural decisions and clients, substantive. Nevertheless, certain procedural decisions are considered so important that they are within the client's authority.

However, even the courts do not uniformly adhere to this model. In some cases, authority principles within the agency relationship are interpreted to enforce settlement agreements over the client’s protests. In other instances, the agency model is abandoned altogether, such as when a client is relieved of the prejudicial effects of his lawyer’s procedural errors, or when the lawyer is presumed to have both substantive and procedural authority. Because the contours of the line between lawyer and client authority are hazy, lawyers and clients cannot predict how courts will decide disputes regarding decisionmaking authority.

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1. This Article is limited to civil litigation for several reasons. Most reported authority disputes arise in this context. Disputes arising out of the office lawyering context, in contrast, rarely result in litigation. In criminal defense representation, the defendant’s sixth amendment rights create a different kind of lawyer-client relationship.
This Article contends that deciding these disputes by relying on the agency theory and the distinction between substance and procedure is inappropriate. The agency theory does not accurately describe the lawyer-client relationship because a lawyer possesses unique skills and expertise and owes competing duties to the client and to the judicial system. The substance/procedure distinction is designed to accommodate these considerations. However, by relying on an inaccurate model and an artificial distinction, this scheme obscures the interests that drive courts to make exceptions to the typical distribution of authority. In addition, by imposing this scheme on all clients, regardless of their degree of sophistication, important differences regarding the distribution of authority in individual lawyer-client relationships are ignored.

Instead of attempting to categorize decisions as procedural or substantive and then applying agency principles, the courts should openly decide these disputes by balancing the clients' interests in lawyer-client relationships with the interests of third parties and the public in judicial efficiency. This is particularly important in deciding whether to uphold a settlement in the face of a client's objections based on the client's interest in making the settlement decisions. A clearer statement of the important interests would also serve to educate lawyers on how they should interact with their clients, as well as third parties, to prevent these disputes from arising.

Part II of this Article reviews the authority principles under agency theory and the substance/procedure distinction in the lawyer-client relationship. It then analyzes how those principles are applied to decisions which reflect this allocation of authority. These decisions support the lawyer's authority in procedural matters, despite consequences to the client, and the client's authority in substantive and important procedural decisions, in particular over whether to accept or reject a settlement. Part III discusses the distortion and abandonment of the traditional agency model, by examining decisions which grant relief from the lawyer's procedural errors and decisions which uphold settlements despite the client's objections.

Part IV reviews other possible theoretical approaches to the lawyer-client relationship. Part V suggests a model, developed from empirical studies of the lawyer-client relationship and theoretical criticisms, to determine the outcome of lawyer-client authority disputes.

Part VI analyzes cases involving settlement disputes and contends that the suggested model explains the results in these cases better than the traditional agency model. The Article concludes that the proposed model provides a clear and accurate basis for analyzing questions of disputed authority in the lawyer-client relationship.
II. THE LAW OF AGENCY APPLIED TO LAWYERS

A. Defining the Lawyer as Agent

One important legal basis of the lawyer-client relationship is the law of agency.\(^2\) Agency law governs the ability of the attorney to bind his client to an agreement or stipulation.\(^3\) In a typical agency relationship, the principal controls the conduct of the agent regarding matters entrusted to him,\(^4\) and an agent is obligated to obey all reasonable directions regarding how to perform a service for which he has been engaged.\(^5\)

The Restatement of Agency recognizes that a client is limited in his control over his attorney. Despite the obligation to obey instructions, an attorney has complete control over court proceedings and may withdraw from the case if the client prevents him from acting as he thinks best.\(^6\) This important exception is based on the general notion that “the employer will not interfere with the method of conducting proceedings which are customarily left in the control of an agent.”\(^7\)

The Restatement also classifies lawyers as agents who are in fact independent contractors, and therefore not subject to a principal’s control of their physical conduct in the performance of services.\(^8\) Thus, it has long been recognized that when a lawyer is acting in his professional capacity, “he is an agent of a somewhat unusual sort.”\(^9\)

Once the client-lawyer relationship is established, questions arise about the extent of the lawyer’s authority\(^10\) as an agent to act for the


“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” RESTATEMENT (SECOND) OF AGENCY § 1(1)(1957).

The fiduciary aspects of the lawyer-client relationship include a duty of loyalty (devotion to the client and his cause as well as avoiding representation where other interests arise that might limit the lawyer’s devotion to the client), confidentiality, competence, trust, and protection of the client unfamiliar with the legal process. See C. Wolfram, supra, § 4.1.


\(^4\) RESTATEMENT (SECOND) OF AGENCY § 14 (1957).

\(^5\) Id. § 385(1)(1957).

\(^6\) Id. § 385 comment a (1957).

\(^7\) Id.

\(^8\) Id. § 14N comment a (1957).


\(^10\) “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.” RESTATEMENT (SECOND) OF AGENCY § 7 (1957). Issues of authority address whether an agent was supposed to, should, or should not bind a principal. H. Reuschlein & W. Gregory, supra note 2, § 13.
ABANDONING THE AGENCY MODEL

client, as well as the client's liability and responsibility for his lawyer's actions. Courts traditionally have held that lawyers have wide authority to act on behalf of their clients, particularly in procedural aspects of litigation. This authority may be actual (express or implied), incidental, or apparent (also called ostensible). These concepts are important in understanding how courts analyze the extent of a lawyer's authority.

Express actual authority is the power of the agent to perform an act on behalf of the principal based on the principal's specific and clear manifestations to the agent that a particular act be done. In addition to these express manifestations, authority may be created by implication, from words used in communications between a principal and agent, from custom, or from the relations of the parties. Thus implied actual authority can be created by directing an agent to take action which involves the performance of other acts in order to accomplish the direction. It may also be inferred from words or conduct which the principal has reason to know indicates to the agent that he is to do the act for the benefit of the principal.

Incidental authority is the authority to do all those acts which are incidental to conducting a transaction, usually accompany it, or are reasonably necessary to accomplish it. Thus, it is not necessary and may be impossible for the principal to spell out every detail in granting authority. Incidental authority may also be an aspect of implied authority.

11. See generally Restatement (Second) of Agency ch. 8 (1957). "A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it, or has been given a notification of it, under circumstances coming within the rules applying to the liability of a principal because of notice to his agent." Id. § 9(3) (1957).

12. E.g., "[u]nder Georgia law, an attorney is cloaked with apparent authority to enter into a binding agreement on behalf of a client." Glazer v. J.C. Bradford & Co., 616 F.2d 167, 168 (5th Cir. 1980). See also CAL. CIV. PROC. CODE § 283 (West 1982); C. WOLFRAM, supra note 2, § 4.2.

13. Restatement (Second) of Agency § 7 comment c (1957).


15. Id. § 8 (1957).

16. "It is well settled that an attorney may compromise his client's case when the client has given him the express actual authority to do so." Edwards v. Born, 792 F.2d 387, 389 (3d Cir. 1986). See also Restatement (Second) of Agency § 7 comments a, c (1957); H. Reuschlein & W. Gregory, supra note 2, § 14, at 35.

17. Restatement (Second) of Agency § 7 comment c (1957). "Authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Id. § 26 (1957).

18. Id. § 26 comment c (1957).

19. Id. § 35 (1957).


21. "Implied authority is actual authority circumstantially proven from the facts and circumstances attending the transaction in question and includes such incidental
dental authority has been defined as the authority "to do all acts in or out of court necessary or incidental to the prosecution or management of the suit, and which affect the remedy only, and not the cause of action."22

The final kind of authority is apparent or ostensible authority.23 "Apparent authority . . . is found where the 'agent' may or may not have actual authority to act for the principal, but because of the behavior of the 'principal' the third party believes, in good faith, that the 'agent' acts with authority."24

Apparent authority is often created when an agent is appointed to a position which includes implied authority to perform a variety of acts as defined by business customs, unless his authority to do those customary acts was forbidden by the principal. Implied authority may be converted to apparent authority with respect to third parties who know about an agent's position and have no reason to believe that the principal has limited the agent's authority.25 In the lawyer-client relationship, in most jurisdictions, an attorney does not possess the authority to compromise a matter solely by virtue of his representing a client in certain litigation.26

A client may vest his attorney with apparent authority to settle through his representations to the opposing party.27 As in other agency relationships, such representations may include the principal's written or spoken words or any other conduct which, reasonably interpreted, causes the third person to believe that the principal consents to the agent purporting to so act for him.28 Thus, like implied authority, apparent authority is created by the manifestations of the principal's authority as is necessary, usual and proper as a means of effectuating the purpose of the employment." H. REUSCHLEIN & W. GREGORY, supra note 2, § 14, at 41 (quoting Stevens v. Frost, 140 Me. 1, 32 A.2d 164 (1943)).

This grant of authority is reflected in the ethical standards for lawyers. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a)(1983)("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); Id. Rule 1.2 comment ("in questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980)("In certain areas of legal representation not affecting the merits of the case 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").

22. H. REUSCHLEIN & W. GREGORY, supra note 2, § 54, at 54 (quoting Moulton v. Bowker, 115 Mass. 36, 40, 15 A.M. REP. 72 (1874)).

23. The two terms are synonyms. RESTATEMENT (SECOND) OF AGENCY § 8 comment e (1957).


27. Id.

pal, except that the receiver of this conduct is the third person rather than the agent.\(^29\) If the third person and the agent rely on the same information, or if the manifestation is entirely unambiguous, the apparent authority of the agent is the same as the authority of the agent.\(^30\)

Courts use two additional concepts to analyze a lawyer's authority. First, authority may be created by the principal's acquiescence to the actions of an agent. If the principal, having knowledge of the agent's conduct, fails to object to the continuance of that conduct, this acquiescence constitutes a manifestation to the agent that he is authorized to continue as he has been doing.\(^31\) When such acquiescence refers to a particular act previously done by the agent, then the principal is said to have ratified the act originally done without authority.\(^32\)

Second, an agency relationship may be created by estoppel.\(^33\) As in other applications of the estoppel doctrine, the third party must both rely upon and change position based on his belief that the agent acted on behalf of the principal.\(^34\) Moreover, if the principal knows of the third party's belief and knows that the party might act in reliance upon it, he may then be liable as a party to the transaction for remaining silent.\(^35\)

The following section will discuss how the agency model and associated authority principles are typically applied in a civil litigation context. In particular it will analyze the use of the substance/procedure distinction to allocate authority within the lawyer-client relationship.

### B. The Substance/Procedure Distinction

In seeking to define the limits of the lawyer's authority as an agent, courts have attempted to distinguish between procedure and substance. Courts recognize that lawyers are allowed much implied authority in civil litigation matters to take routine steps without consulting their clients. In contrast to other agency relationships, a lawyer has this broad control because of his unique legal training and expertise, as well as his obligations to the legal system. His authority is tempered by the court's control\(^36\) and the potential for disciplinary

\(^29\) Id. § 27 comment a (1957).
\(^30\) Id. § 27 comment e (1957).
\(^31\) H. Reuschlein & W. Gregory, supra note 2, § 15.
\(^32\) Restatement (Second) of Agency § 82 comment a (1957); H. Reuschlein & W. Gregory, supra note 2, § 27.
\(^33\) Restatement (Second) of Agency § 8 B & comment b (1957).
\(^34\) Id. comment b, § 8 comment d (1957). The difference between estoppel and ostensible authority is that the former only prevents harm to the third party while in the latter, the client has the rights of a principal under the agreement. Id. § 8 comment d.
\(^35\) See id. § 8 B comment d (1957).
\(^36\) In two cases settlements were overturned because lawyers failed to disclose cru-
action for misuse of authority. It is also limited to protect the client’s prerogative to make decisions about the conduct of his personal or business affairs. In order to define the limits of the lawyer’s authority, courts have divided decisions into three categories: substantive, substantial procedural, and routine tactical decisions.

1. Settlement Agreements as Substance.

Clients generally decide whether to accept or reject settlement agreements; these are the clearest examples of substantive decisions belonging to the client. Thus, in most jurisdictions, the rule prevails that an attorney has no implied authority to settle a client’s litigation solely because he represents that particular client. In cases where

[References to cases and statutes]

37. Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 77-78, 203 Cal. Rptr. 524, 534-35 (1984) (a lawyer is not liable to a third party for failing to persuade a client to settle a matter, noting that “a lawyer may strongly advise action by a client, action highly beneficial to the client or others . . . , but there is no duty on the part of the client to follow the lawyer’s lead — that is not the nature of the relationship. . . .”); Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, 313-15, 375 N.E.2d 118, 122 (1978) (a lawyer committed malpractice when he failed to make a settlement offer in spite of having specific authority to do so); Rizzo v. Haines, 520 Pa. 484, 501, 555 A.2d 58, 66 (1989) (a lawyer’s failure to investigate fully the meaning of a settlement offer and to convey the offer to the client gave rise to a claim for legal malpractice); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (“[a] lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (“in civil cases, it is for the client to decide whether he will accept a settlement offer . . . .”).

In another context, the decision whether to take an appeal is the client’s. Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361, 363 (10th Cir. 1958).

38. Matzo v. Postmaster Gen., 685 F. Supp. 260, 262 (D.D.C. 1987). Accord Neely v. Central Bank, 492 So. 2d 1008, 1011 (Ala. 1986) (defendant could not enforce oral settlement agreement entered into by plaintiff’s lawyer); Cross v. District Court, 643 P.2d 39, 41 (Colo. 1982) (plaintiff’s lawyer had no implied or special authority to settle matter when he stated at the defendant’s sentencing on a related criminal charge that the plaintiff would be satisfied with the payment of his medical bills); Henderson v. Great Atl. & Pac. Tea Co., 374 Mich. 142, 147, 132 N.W.2d 75, 78 (1965) (plaintiff was not bound by an agreement reached by her attorney without her knowledge and who then forged her signature to the settlement check and cashed it); Gucciardo v. Norman, 139 A.D.2d 562, 564, 527 N.Y.S.2d 62, 64 (1988) (an oral settlement agreement entered into by defendant’s attorney without his knowledge was unenforceable against defendant, unless plaintiff proved that defendant’s lawyer in fact had authority); Archbishop v. Kariak, 450 Pa. 535, 539-41, 299 A.2d 594, 596-97 (1973) (defendants’ lawyer did not have the implied or apparent authority to make admissions in a brief that led to the court’s ruling in the plaintiff’s favor because, “[i]n this Commonwealth the litigant is the complete master of his own cause of action in matters of substance; he may press it to the very end regardless of the facts and law arrayed against him”); New England
the client seeks relief from the lawyer's settlement actions, courts typically inquire whether the client gave his lawyer express or apparent authority, including whether the client may have ratified the settlement or done something which created an estoppel.

Various circumstances may serve to demonstrate that a lawyer lacked express authority to enter into a settlement agreement. For instance, the lawyer may not have informed the client before settling, or may have purported to have obtained approval from someone other than the client (such as a spouse or another client) who

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39. Bowden v. Green, 128 Cal. App. 3d 65, 73, 180 Cal. Rptr. 90, 94-95 (1982) (defendants' lawyer had no authority to dismiss their cross-complaint without express authorization from his clients). If a settlement agreement involves conveying an interest in real property, a lawyer must have express authority to enter the agreement. Garn v. Garn, 155 Ariz. 156, 745 P.2d 604 (1987) (husband could not authorize lawyer to enter a stipulation to convey or encumber community real property without wife's consent); Morr v. Crouch, 19 Ohio St. 2d 24, 29-30, 249 N.E.2d 780, 783-84 (1969) (a client overturned a settlement conveying real estate 19 months after its entry because the lawyer made the agreement absent specific authority); Ottawa County Comm'r's v. Mitchell, 17 Ohio App. 3d 208, 478 N.E.2d 1024 (1984) (lack of authority to convey an interest in real property).


41. Odomes v. Nucare, Inc., 653 F.2d 246, 252-53 (6th Cir. 1981) (employment discrimination plaintiff repudiated settlement before decree formalized or check cashed); Bowden v. Green, 128 Cal. App. 3d 65, 73, 180 Cal. Rptr. 76, 94 (1982); Robinson v. Hiles, 119 Cal. App. 2d 666, 671-72, 260 P.2d 194 196-97 (1953); Augustus v. John Williams & Assocs., Inc., 92 N.M. 437, 440, 589 P.2d 1028, 1031 (1979) (plaintiffs were not estopped from denying that their attorney lacked authority to settle on their behalf because their attorney advised the opponent's attorney that he lacked authority to settle without his client's approval); Henderson v. Great Atl. & Pac. Tea Co., 374 Mich. 142, 147, 132 N.W.2d 75, 78 (1965); Northwest Realty Co. v. Perez, 80 S.D. 62, 119 N.W.2d 114 (1963) (It is insufficient for a lawyer to rely on opposing counsel to keep his client advised or to obtain authority to settle as he did. It is also insufficient to rely on fact that opposing lawyer previously represented the opposing client).

could not approve the agreement on the client’s behalf. A client has likewise been relieved of a settlement when his lawyer fraudulently signed the client’s name to a settlement agreement, endorsed the settlement check, and then absconded with the funds, even though this may mean that the defendant will have to pay the claim twice.

To preserve the client’s realm of authority, courts narrowly construe instructions which might otherwise suggest that a lawyer had express or implied authority to settle on the client’s behalf. Like-

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43. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894 (10th Cir. 1975)(two clients could not be forced to accept a settlement approved by other 16 plaintiffs despite retainer agreement that provided that majority rule would govern acceptance of a settlement); Garn v. Garn, 155 Ariz. 156, 745 P.2d 604, 610 (1987)(husband could not bind wife to a settlement affecting community property); Jeffery S. II v. Jeffery S., 76 Cal. App. 3d 65, 142 Cal. Rptr. 623 (1977)(six years after execution of the agreement and three years after defendant in a paternity action became of age, defendant set aside a settlement agreement executed by his father, who was not his guardian ad litem); Rothrock v. Ohio Farmers Ins. Co., 233 Cal. App. 2d 616, 43 Cal. Rptr. 716 (1965)(insurer’s settling an action against the insured was overturned because it prejudiced the insured’s action arising out of the same accident); Blake v. Pepsi-Cola Bottling Co., 241 Kan. 795, 799-800, 740 P.2d 79, 82 (1987)(two co-conservators cannot speak for a third); Kinkaid v. Cessna, 49 Md. App. 18, 24, 430 A.2d 88, 91 (1981)(wife could not bind husband in personal injury settlement).


However, in Alvarado Community Hosp. v. Superior Court, 173 Cal. App. 3d 476, 483, 219 Cal. Rptr. 52, 55 (1985), after a lawyer absconded with the settlement of a wrongful death action and the client sought relief from the bar’s client security fund, the court held that such an action ratified the client’s unauthorized settlement because the fund acts as an insurer of the attorney’s conduct for the client’s benefit and the same issues were focused on in the fund’s hearing. Instead of denying the client’s motion to set aside the dismissal of the lawsuit, the court gave the client the option to return the money to the fund and pursue the underlying lawsuit. Id. at 484, 219 Cal. Rptr. at 56. The court declined to compound the thievery of her first lawyer with her second lawyer’s error of failing to advise her that she would lose her rights by pursuing the action against the fund. Id.

45. Lockette v. Greyhound Lines, Inc., 817 F.2d 1182, 1185-86 (5th Cir. 1987)(when
wise, courts examine the terms of a settlement to determine whether a lawyer would have been expected to obtain the consent of the client before settlement, and other surrounding circumstances.

Similarly, courts restrict the indicia of apparent authority in order to relieve clients from settlement agreements. For instance, it has

client told lawyer that she had to “consult with someone else” before accepting a settlement, she revoked whatever authority she had given to the lawyer when she had told him to “use his best judgment” to settle matter; Turner v. Burlington N.R.R., 771 F.2d 341, 345 (8th Cir. 1985)(client’s statement, “I suppose I’m going to have to settle and I’ll call you,” was not an acceptance of an offer conveyed orally to the client by his lawyer); Bice v. Stevens, 160 Cal. App. 2d 223, 233, 325 P.2d 244, 251-52 (1958)(plaintiff’s leaving “the procedure of the trial” to the lawyer did not give the lawyer the authority to dismiss the action with prejudice); Burns v. McCain, 107 Cal. App. 291, 290 P. 623 (1930)(client was not bound to settlement because she instructed her lawyer to settle other related litigation before accepting settlement); Bursten v. Green, 172 So. 2d 472, 475 (Fla. 1965)(letter authorizing attorney to “negotiate settlement thereof” did not unequivocally authorize lawyer to enter binding stipulation); McAllister v. Hayes, 165 Ill. App. 3d 426, 428, 519 N.E.2d 71, 72 (1988)(counsel’s acceptance of personal injury settlement was not binding because authorization to accept was conditioned on a doctor’s reexamination of plaintiff); Michigan Nat’l Bank v. Patmon, 119 Mich. App. 772, 776-77, 327 N.W.2d 355, 357 (1985)(questionable whether client gave lawyer specific authority to settle); Szabo v. City of New York, 127 Misc. 2d 1027, 1028, 487 N.Y.S.2d 1007, 1008-09 (1985)(even if client authorized her lawyers “to settle on whatever terms they deemed reasonable,” she was still entitled to reject agreement); Johnson v. Tesky, 57 Or. App. 133, 136-37, 643 P.2d 1344, 1347 (1982)(client’s authorizing lawyer to conduct settlement negotiations was not tantamount to authorization to enter into binding agreement).

Greater Kansas City Laborers Pension Fund v. Paramount Indus. Inc., 829 F.2d 644, 646 (8th Cir. 1987)(defendants were entitled to a hearing on whether their attorney had authority to enter into settlement when they were not present in court and which imposed personal liability on defendants through guarantees); Bradford Exch. v. Trein’s Exch., 600 F.2d 99, 102 (7th Cir. 1979)(onerous and costly notice requirements in stipulated injunction made it dubious that client would have given lawyer authority to agree to its terms); DeGroat v. Ingles, 143 Cal. App. 3d 320, 327 Cal. Rptr. 761 (1983)(the terms of the settlement agreement were conditional on the state compromising its lien; when state refused to compromise, plaintiff was not bound to settlement even though defendant offered to increase amount of payment); Northwest Realty Co. v. Perez, 80 S.D. 62, 66, 119 N.W.2d 114, 116 (1963)(terms were complex and important and should have been in writing).


Edwards v. Born, Inc., 792 F.2d 387, 392 (3d Cir. 1986). The following factors were insufficient to prove apparent authority: 1) that the same lawyer had represented plaintiffs throughout the suit; 2) that the lawyer had transmitted all communications between the defendants and plaintiffs; 3) that the pretrial order required the lawyer to appear with the client or with authority to settle; and 4) that the client had allowed the lawyer to select the examining physician. Id. at 390. On
been held that a local court rule requiring lawyers attending a pretrial conference to have full settlement authority did not automatically create apparent authority to settle without the client’s approval.49 Where an estoppel argument is invoked to establish authority and enforce a settlement agreement, courts have tended to set aside the agreement when the client objects relatively quickly.50 Where the client was unaware of the settlement,51 however, or if unusual circumstances such as duress52 were alleged, even delay does not bar relief. Finally, courts

remand the defendants agreed that there was no apparent authority because the plaintiffs had not directly contacted them. Edwards v. Born, 22 V.I. 426 (1986). Accord Fennell v. TLB Kent Co., 865 F.2d 498, 502-03 (2d Cir. 1989)(no apparent authority even though: 1) lawyer had represented plaintiff in dealing with other side; 2) lawyers were authorized to appear at conferences; 3) plaintiff knew that settlement was being discussed; 4) plaintiff did not tell his lawyer to stop discussing settlement; 5) plaintiff would have taken more money; and 6) plaintiff did not tell opposing counsel that his lawyer’s authority was limited).


50. Bradford Exch. v. Trein’s Exch., 600 F.2d 99, 101 (7th Cir. 1979)(client acted within nine days to amend a stipulated injunction which included onerous notice provisions); Rice v. Stevens, 160 Cal. App. 2d 222, 224-25, 325 P.2d 244, 246 (1958)(clients moved to correct lawyer’s dismissal with prejudice in 46 days and before the trial on the merits was calendared); Robinson v. Hiles, 119 Cal. App. 2d 666, 673-74, 260 P.2d 194, 197-98 (1953)(three months was a reasonable time to move to set aside dismissal with prejudice); Burns v. McCain, 107 Cal. App. 2d 294, 290 P. 623, 624-25 (1930)(client acted within 18 days of learning of stipulation); Cross v. District Court, 645 P.2d 39, 40 n.2 (Colo. 1982)(plaintiff’s lawyer informed defendant’s counsel within hours of making erroneous statement that he had no authority to settle matter); Bursten v. Green, 172 So. 2d 473, 473-74 (Fla. 1965)(client repudiated agreement one day after it was approved by court); McAllister v. Hayes, 165 Ill. App. 3d 426, 428, 519 N.E.2d 71, 72 (1988)(defendant’s attorney was advised five days after settlement that plaintiff wanted medical reexamination before agreeing to settlement); Kinkaid v. Cessna, 49 Md. App. 18, 19-20, 430 P.2d 244 (1968)(client rejected settlement eight days after filing and filed motion within three months); Northwest Realty Co. v. Perez, 80 S.D. 62, 64, 68, 119 N.W.2d 114, 115, 117 (1963)(client moved "promptly" [within one month] to vacate unauthorized stipulations).


52. Wuest v. Wuest, 53 Cal. App. 2d 339, 127 P.2d 934 (1942)(plaintiff waited nearly one year to file motion to vacate decree after lawyer agreed to settlement under threat from judge, and client was unaware of terms of agreement); In re J.H., 144 Vt. 1, 3, 5, 470 A.2d 1182, 1184-85 (1983)(agreement relinquishing parental rights obtained under pressure was overturned more than one year after execution). See also Oakes v. Kanatz, 391 N.W.2d 51, 53-54 (Minn. Ct. App. 1986)(client states a claim for malpractice if she can show, inter alia, that her
may grant relief by finding that the opposing side would not be prejudiced by declining to enforce the agreement and reinstating the action.53

2. Important Procedural Matters as Substance

As the California Supreme Court declared in Linsk v. Linsk,54 "[t]he attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action but he may not impair the client's substantial rights or the cause of action itself."55 The court, therefore, reversed a divorce judgment which was entered pursuant to a stipulation, made over the client's express objection, that a judge who had not presided over the trial could decide the case on the written record. The Court stated that "the right of a party to have the trier of fact observe his demeanor, and that of his adversary and other witnesses . . . is so crucial to a party's cause of action that an attorney cannot be permitted to waive by stipulation such right as to all the testimony in a trial when the stipulation is contrary to the express wishes of his client."56

It has proven difficult for courts to draw the line between routine57
and substantial procedural rights. To compound the problem, decisions in various jurisdictions are difficult to reconcile. For example, the North Dakota Supreme Court upheld a lawyer's authority to enter into the same kind of stipulation disapproved of in Linsk. In contrast, since Linsk, the California Court has gone even further to reject an attorney's authority to bind a client in areas affecting substantial procedural rights.

In Linsk, the lawyer lacked both actual and apparent authority because the client made it clear to both the judge who accepted the stipulation and the attorneys that she opposed the procedure. However, in a more recent decision, Blanton v. Womancare, Inc., the same court ruled that a lawyer lacked both implied and apparent authority to subject his client to binding arbitration, even if the opposing attorney was unaware of the client's objections. The Court reiterated that implied

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58. The cases contain many examples of procedural steps that implicate a client's substantial rights. E.g., a county district attorney has no authority to enter into a stipulated judgment with a nursing homes operator which precluded the state attorney general, the Department of Health, and other district attorneys from performing their statutory enforcement duties. People v. Hy-Lond Enters., Inc., 93 Cal. App. 3d 734, 747, 155 Cal. Rptr. 880, 887 (1979). A lawyer cannot stipulate away his client's lien rights on the judgment which were its only interest in the litigation. Harness v. Pacific Curtainwall Co., 235 Cal. App. 2d 484, 491, 45 Cal. Rptr. 454, 458 (1965). A lawyer lacks authority to stipulate to waive a statutory defense which would be a complete bar to plaintiff's action. De Long v. Owsley's Ex'x, 308 Ky. 128, 130, 213 S.W.2d 805, 807 (1948). The court upheld the client's decision to knowingly and deliberately waive her claim for present alimony, but to request that the issue be held open in case she became disabled in the future, even though her lawyer continued to insist on immediate alimony. Torrisi v. Sanzaro, 308 Md. 515, 520-21, 520 A.2d 1080, 1082-83 (1987). In a landlord-tenant action, a lawyer has no authority to waive in a letter the plaintiff's claim for rent. Gordon v. Town of Esopus, 107 A.D.2d 114, 116, 486 N.Y.S.2d 420, 421 (1985). A stipulation, entered into by the defendant's lawyer that a judgment for plaintiff would be a "landlord's lien" on half of defendant's livestock, was invalidated on the grounds that, even though it was procedural, it also surrendered a substantial right because under the law the plaintiff was not entitled to that kind of lien. Noska v. Mills, 141 S.W.2d 429, 432 (Tex. Civ. App. 1940). See also Fresno City High School Dist. v. Dillon, 34 Cal. App. 2d 637, 94 P.2d 86 (1939).

59. Gasior v. Wentz, 89 N.W.2d 886, 889-90 (N.D. 1958). The court ruled that a lawyer has procedural authority to bind away the rights of his client, and the stipulation was not prejudicial to any substantial right of plaintiff. The court apparently did not believe the plaintiff's statement that he was unaware of the stipulation, in part, because the plaintiff waited until after the new judge ruled to voice his objection.

60. Linsk v. Linsk, 70 Cal. 2d 272, 279, 449 P.2d 760, 764, 74 Cal. Rptr. 544, 548 (1969). See also Brucar v. Rubin, 638 F.2d 987, 992 (7th Cir. 1980)(client's objection in open court to a particular judge presiding at a contempt hearing in light of her lawyer's silence preserved the client's rights to assert a transfer for prejudice motion).

61. 38 Cal. 3d 396, 407, 696 P.2d 645, 652, 212 Cal. Rptr. 151, 158 (1985). Since the client had told her attorney beforehand that she would not agree to binding arbitration, the lawyer lacked express authority. Id. at 399, 696 P.2d at 647, 212 Cal.
authority covers only tactical or procedural matters.\textsuperscript{62}

In analyzing apparent authority,\textsuperscript{63} the Court ruled that it made no difference that the opposing attorney was unaware of the client's objection because "in this case the lack of justifiable reliance is clear."\textsuperscript{64} The stipulation to arbitrate waived substantial rights by eliminating the chance for a judicial trial, providing for the opposing party's unilateral choice of the arbitrator, limiting damages to $15,000, and entailing all but minimal judicial review. The mere hiring of a lawyer to engage in litigation does not enlarge his authority to bind a client to an agreement with such substantial consequences.\textsuperscript{65} For these reasons the opposing attorney could not assume that the lawyer had the authority to bind his client to mandatory arbitration. Some procedural matters may be so important as to be treated as "substantive". Thus, they are beyond the scope of the lawyer's implied authority.

Just as clients have authority to decide whether to exercise important rights, they also have authority over stipulations which determine the major issues in litigation. For instance, a defendant’s attorney did not have authority, without informing the client or obtaining his consent, to stipulate to vicarious liability or to the extent of the plaintiff's injuries.\textsuperscript{66} Accordingly, courts may relieve the client of his lawyer's admissions against the client's interests made in the course of litigation because they are outside the lawyer's implied or incidental authority.\textsuperscript{67} Moreover, stipulations which affect the client's cause of

\begin{itemize}
    \item \textsuperscript{62} Id. at 400, 696 P.2d at 647, 212 Cal. Rptr. at 153.
    \item \textsuperscript{63} Id. at 404, 696 P.2d at 650, 212 Cal. Rptr. at 156.
    \item \textsuperscript{64} Id. at 404, 696 P.2d at 650, 212 Cal. Rptr. at 156.
    \item \textsuperscript{65} Id. at 406, 696 P.2d at 650, 212 Cal. Rptr. at 157.
    \item \textsuperscript{66} Id. at 408, 696 P.2d at 652, 212 Cal. Rptr. at 158.
    \item \textsuperscript{67} Id. at 407-08, 696 P.2d at 652, 212 Cal. Rptr. at 157.
\end{itemize}

In a case cited by the concurring opinion in Blanton, the Washington Supreme Court agreed that withdrawing a demand for a jury trial without the client's consent was invalid because the right to a jury is a substantial right. Graves v. P.J. Taggares Co., 94 Wash. 2d 298, 305, 616 P.2d 1223, 1226 (1980). The court of appeals that decided this case at a lower level noted that the withdrawal of the demand for a jury without the consent of the client was, in this case, of constitutional dimensions. Graves v. P.J. Taggares Co., 25 Wash. App. 118, 125-26, 605 P.2d 348, 353 (1980). Contra Powell v. Pennsylvania Railroad Co., 166 F. Supp. 448 (E.D. Pa. 1958); Shores Co. v. Iowa Chem. Co., 222 Iowa 347, 268 N.W. 581 (1936); and McLyman v. Miller, 52 R.I. 374, 161 A. 111 (1932), in which the lawyer's procedural authority to waive a jury was upheld.


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    \item \textsuperscript{66} Graves v. P. J. Taggares Co., 94 Wash. 2d 298, 305, 616 P.2d 1223, 1226 (1980).
    \item \textsuperscript{67} E.g., Vaccaro v. Alcoa S.S. Co., Inc., 405 F.2d 1133, 1137 (2d Cir. 1968)(excluding plaintiff's doctor's handwritten notes of a meeting with plaintiff's lawyer in which the lawyer made a statement that would have shown that defendant was not liable for the accident, because a lawyer's conversation with his client's doctor was not made in the "management of the litigation."); Wieder v. Towmotor Corp.
\end{itemize}
action and which are entered into by mistake, either by a lawyer or with the opposing party, may be set aside if it is possible to restore or maintain the status quo.

Finally clients have authority over other procedural choices which involve their substantive rights. For example, a lawyer does not have plenary power to accept service of process on behalf of a client unless the client expressly appoints the lawyer as his agent or the lawyer has apparent authority, based on the client's actions. If a strategy decision involves a potential conflict of interest between a lawyer and a client, then the lawyer must specifically advise his client of the advantages and disadvantages of the alternative strategies and obtain his consent to pursue a particular strategy which may benefit the lawyer more than the client.

3. Tactical Decisions as Procedure

In contrast to those stipulations which deal with the client's important rights or the substance of the client's claim, tactical decisions are one class of procedural matters that fall within the scope of the lawyer's special expertise. The lawyer has implied authority to manage

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568 F. Supp. 1058, 1064 (E.D. Pa. 1983)(in a closing argument plaintiff's lawyer's statement that a third party "caused this accident" was not an unequivocal admission relieving defendant of liability when analyzed in light of the lawyer's argument about proximate cause); Price v. McComish, 22 Cal. App. 2d 92, 99, 70 P.2d 978, 982 (1937)(plaintiff's attorney's oral statement that his client would be satisfied with nominal damages in his favor was not binding on client, even when made in open court in the presence of the client because it affected the subject matter of the dispute); Couch v. Landers, 316 S.W.2d 588, 593 (Mo. 1958)(a defense lawyer's statement in a motion to dismiss that "this defendant stands ready and has always stood ready . . . to pay the court costs herein involved and the sum of $14,000 to plaintiff . . . ." is not binding on his client because he did not have the implied or apparent authority to acknowledge his client's debt); Estabrook v. American Holst & Derrick, Inc., 127 N.H. 162, 180, 498 A.2d 741, 752 (1985)(counsel's statement made in asking a question in a deposition was not an admission binding on his client).

68. Graen's Mens Wear, Inc. v. Stille-Pierce Agency, 329 N.W.2d 295, 300 (Iowa 1983)(A defense lawyer stipulated to the admission of an insurance policy, but failed to examine it. At trial it was learned that the policy included theft coverage which the plaintiff had never previously contended it covered. The appellate court ruled that the trial court would have been justified in setting aside the stipulation based on surprise.).

69. In Re Estate of Frutiger, 29 N.Y.2d 143, 150, 272 N.E.2d 543, 546, 324 N.Y.S.2d 36, 41 (1971)(objectors to a will could withdraw stipulated waivers of notice and consents to probate, signed in front of the executor and his lawyer, but not filed or revealed by the proponent to the objectors' lawyers for 32 months).


71. Waters v. Bourhis, 40 Cal. 3d 424, 438, 709 P.2d 469, 478-79, 220 Cal. Rptr. 666, 676 (1985)(lawyer must inform the client of the consequences of choosing between different causes of action: one which limits recovery, but also limits contingency fees, and one with unlimited recovery, but unlimited contingency fees).
the lawsuit, and a client does not have the right to control the way the lawyer conducts litigation.

"The trial attorney is in full charge of the client's cause or defense. When representing the defendant the attorney must determine in the first instance what defenses shall be averred and what potential ones shall be omitted. At the trial the attorney must have and exercise discretion to make such tactical decisions as the exigencies of the combat may dictate." The attorney has the legal knowledge and skill that must be consulted in that connection.

Consequently, strategy decisions made by a lawyer in the course of litigation are generally immune from the client's subsequent attack on appeal. A client may have a malpractice claim because of the lawyer's asserted failure to exercise the requisite skill or care in handling the trial of an action. However, this failure does not give the client the basis to overturn an unfavorable judgment because the lawyer acted outside his authority.

72. Duffy v. Griffith Co., 206 Cal. App. 2d 780, 787, 24 Cal. Rptr. 161, 165 (1962)(upholding a lawyer's implied authority to withdraw a defense from the jury's consideration during his closing argument even though the client alleged that it was made without requesting authority from client). The court in First Am. Bank & Trust Co. v. George, 239 N.W.2d 284 (N.D. 1976) described the lawyer's authority as follows, "counsel owes to the courts . . . a duty to exercise an informed and professional restraint in raising and litigating issues which are either without merit or barely arguable and without prospect of success." Id. at 288-89. See also Schleiger v. Schleiger, 137 Colo. 239, 324 P.2d 370 (1958)(waiver by counsel of request to have court reporter transcribe proceedings within his implied authority as a procedural choice in the course of litigation, even though client alleged that she did not expressly enter into the waiver and she could not use the transcript to show that the judge had not ruled on all issues before the court); Goodman v. Aero Enters., a Div. of ARA Servs., 469 So. 2d 835, 837 (Fla. Dist. Ct. App. 1985)(employee's lawyer's stipulation that the losing party would pay attorney's fees upheld even though the controlling statute provided that only an employer who did not prevail would be liable for fees); Grocery & Food Warehousemen Local Union No. 635 v. Kroger Co., 364 Pa. 195, 197, 70 A.2d 218, 219 (1950)(lawyer's implied plenary authority included authority to stipulate that court determine issues on pleadings).


74. Bury v. McIntosh, 540 F.2d 835, 836 (5th Cir. 1976)(rejecting plaintiff's claim that his lawyer conspired with defense attorneys to keep favorable evidence away from jury); Kim v. Orellana, 145 Cal. App. 3d 1024, 1028-27, 193 Cal. Rptr. 827, 828-29 (1983)(the court rejected the client's appeal in which he claimed that he was denied a fair trial due to his attorney's misconduct during the trial); In re Marriage of Wipson, 113 Cal. App. 3d 136, 144, 169 Cal. Rptr. 664, 668 (1980)(lawyer's ineffective negotiation strategy was not grounds to set aside interlocutory judgment). See also Mekdeci ex rel Mekdeci v. Merrell Nat'l Laboratories, 711 F.2d 1510, 1522-23 (11th Cir. 1983)(rejecting the proposition that ineffective counsel was grounds for a new trial in a civil matter); Rosa v. Oliveira, 115 R.I. 277, 287, 342 A.2d 601, 606 (1975)(rejecting the client's complaints that he was denied due process because of the various procedural steps taken by his counsel). However, ineffective assistance of counsel supports a client's motion for a new trial in civil
Courts have upheld a great variety of tactical decisions made by lawyers in the face of subsequent attacks by clients who alleged that the decisions were made without their authority. A lawyer can stipulate to withdraw a defense pleaded in an answer. Lawyers have the authority to decide which witnesses to call or to stipulate that the testimony of one witness would be the same as a previous witness. Similarly, a lawyer can stipulate that a matter need not be tried because it will be determined by other pending test cases. A lawyer also has the implied authority to ask for a jury trial over the client’s objections or to stipulate that certain facts are undisputed, that a certain issue is dispositive and how to resolve it, or that evidence is admissible. Since the lawyer is the client’s agent, his verification of a


Some states reject a cause of action for negligence in the attorney’s choice of trial tactics or conduct of the matter (e.g., seeking a change of venue or transcribing depositions) because of the lawyer’s higher duty to the court and truth and justice. Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. App. 1976).

75. See, e.g., Valley Line Co. v. Ryan, 771 F.2d 366, 376 (8th Cir. 1985)(upholding the lawyer’s stipulations regarding jurisdiction and limitations on damages in a federal admiralty action). In Tushinksy v. Arnold, 195 Cal. App. 3d 666, 241 Cal. Rptr. 103 (1987), a lawyer filed a petition for a restraining order under the Domestic Violence Prevention Act against the client’s husband based on the client’s false allegations that the husband was sexually abusing their child. Based on the petition, the husband was then prosecuted for child molestation. Had the lawyer filed the petition in the domestic relations court, no such criminal prosecution would have followed. The court held that the lawyer was not liable for any damages to the client for violating the client’s instructions to do nothing that would result in the husband’s criminal prosecution. The lawyer followed the law’s primary goal in child abuse cases: to protect the child. Id. at 674, 241 Cal. Rptr. at 108.

79. Hillman v. Commissioner, 687 F.2d 164 (6th Cir. 1982).
pleading or execution of an affidavit is the same as the client’s.84 A lawyer can extend orally the time in which an answer must be filed.85

Even tactical stipulations that work to the client’s detriment are frequently upheld as being within the lawyer’s implied authority. For example, on cross-motions for summary judgment, when the plaintiff’s lawyer entered into a stipulation accepting the defendants’ statement of uncontested facts, the stipulation was binding, and summary judgment granted to the defendants was upheld.86 Similarly, a lawyer can bind a client to allow and pay for a site inspection of the client’s land as a procedural step in a dispute about riparian rights.87

Courts have generally upheld the wide implied authority of lawyers in civil litigation matters to take routine steps without consulting their clients. In contrast, decisions that involve important procedural rights or substantive matters are reserved to the client. The next section will discuss the ways in which the lawyer’s procedural authority may negatively affect the client’s substantive claim.

C. Consequences of the Lawyer’s Procedural Errors

The lawyer’s use or abuse of implied authority to control the procedural aspects of litigation can adversely affect a client’s complaint or defense.88 As the client’s agent, the lawyer has the power to bind the client, and the lawyer’s negligent acts in handling litigation are imputed to his client.89 Thus, even though the client need not be consulted on procedural matters, he, as the principal, may bear the brunt of his agent/lawyer’s procedural mistakes.90 These mistakes may

84. Massey v. Educators Inv. Corp. of Ala., 420 So. 2d 77, 78 (Ala. 1982) (lawyer’s affidavit that client had not violated any aspect of consumer act met statutory requirements because the lawyer had the implied authority to execute affidavits);

Beverly Bank v. Coleman Air Transp., 134 Ill. App. 3d 699, 704-05, 481 N.E.2d 54, 57 (1985) (answer to a complaint verified by the attorney and admitting the existence of a personal guarantee was binding on the client even though the client alleged that he had never read the answer nor been consulted about it).


88. E.g., Wei v. Hawaii, 763 F.2d 370 (9th Cir. 1985) (the lawyer’s inadvertence in not serving the complaint because he did not calendar the date was not good cause for failing to comply with the 120 day limit mandated by FED. R. CIV. P. 4(j), and the complaint was dismissed).

89. Martin v. Cook, 68 Cal. App. 3d 799, 137 Cal. Rptr. 434 (1977). In Martin, the lawyer misunderstood a term in a stipulation which waived the statutory two year period in which to bring a matter to trial, but not the five year period contained in another subsection of the same statute. This error did not provide grounds for the client to avoid dismissal of the action at the end of the five years for mistake or excusable neglect. Id. at 809-10, 137 Cal. Rptr. at 449.

90. Baumann v. Marinaro, 95 N.J. 380, 394, 471 A.2d 395, 403 (1984) (“Failure to call witnesses, failure to inform defendants of the date of a hearing, failure to object to a directed verdict, failure to file timely motions are all careless mistakes evi-
arise in a host of areas such as dismissals, general dilatoriness, failure to prosecute or defend, discovery, and admissions.

Courts have upheld the lawyer's authority to dismiss a client's action. Because a dismissal with prejudice terminates a lawsuit and is tantamount to a substantive decision, a plaintiff's lawyer typically must have express authority to take this step. Nevertheless, some cases have recognized a presumption that a client has given a lawyer the express authority to enter such a dismissal. The burden then shifts to the client to prove lack of authority. Likewise, even if a defendant objects to filing a motion to dismiss for lack of prosecution, the lawyer has the authority to make this procedural motion without the client's approval, particularly if the court suspects collusion between the plaintiff and the defendant.

Just as the lawyer can deliberately end the client's action without his approval, the lawyer's procedural misconduct can also lead inadvertently to the same result. In affirming the dismissal of a case because of the lawyer's general dilatoriness and in particular his failure to appear at a pre-trial conference, the United States Supreme Court wrote in *Link v. Wabash Railroad*, that there was no merit to the contention that dismissal of the petitioner's claim because of his counsel's unexcused conduct imposed an unjust penalty on the client. The *Link* court added that the trial court's power to dismiss a case for failure to prosecute is necessary in order to prevent undue delays and to avoid congestion in court calendars.

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94. *Link v. Wabash R.R.*, 370 U.S. 626 (1962). The Court stated, Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Id.* at 633-34 (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)).
95. *Link v. Wabash R.R.*, 370 U.S. 626 at 629-30 (1962). *See also* Chira v. Lockheed Aircraft Corp., 634 F.2d 664 (2d Cir. 1980) where the court, in affirming the dismissal of plaintiff's complaint for failure to prosecute and complete discovery, stated, [i]t is with reluctance that an appellate court will approve a dismissal with prejudice. But fairness to other litigants, whether in the same case or merely in the same court (as competitors for scarce judicial resources), requires us to affirm and endorse the district court's action here. Burgeoning filings and crowded calendars have shorn courts of the luxury of tolerating procrastination. *Id.* at 668.
The agency principle that each party is considered to have "notice of all facts, notice of which can be charged upon the attorney" is applied in other circumstances, to the client's detriment. For example, in determining when a statute of limitations began to run, a client was charged with knowledge of all facts that a lawyer learned in the course of his investigation of the client's case. Service of a judgment on a lawyer may be sufficient to bind the client to its terms. A lawyer's receipt of a notice of a procedure for concluding a trial was likewise binding on the client. Finally, a second lawyer's failure to investigate the client's status in a lawsuit was imputed as the client's ratification of the unauthorized acts that a first lawyer took on behalf of the same client.

97. Owens v. Lac D'Amiante du Quebec, LTTE., 656 F. Supp. 981, 983 (E.D. Pa. 1987) (the statute of limitations for an asbestos-related personal injury matter began to run when the worker's compensation lawyer first received the medical diagnosis of asbestos-related condition, even if the client never learned of the diagnosis until nine months later); Clark Equip. Co. v. Wheat, 92 Cal. App. 3d 503, 527-58, 154 Cal. Rptr. 874, 886-87 (1979) (client was imputed with the lawyer's knowledge that the defendant did not have possession of certain machinery that was the subject of a replevin action; consequently the lawyer's seeking a contempt order against this defendant gave rise to a cause of action for abuse of process against both the lawyer and the client). But cf. Palmer v. Ted Stevens Honda, Inc., 193 Cal. App. 3d 530, 539, 238 Cal. Rptr. 874, 886-87 (1987) (client is not vicariously liable for the lawyer's tortious litigation strategy merely for hiring the lawyer; the opposing party must show that the client was actively involved in the pretrial litigation strategy).
98. NLRB v. Sequoia Dist. Council of Carpenters, 568 F.2d 628, 633 (9th Cir. 1977) (at a hearing on a contempt citation, the union officers were bound by the judgment's terms when it was served on the union's lawyer).
99. Townsend v. Gray Line Bus Co., 767 F.2d 11, 18 (1st Cir. 1985) (when the opposing counsel mailed a notice to the attorney of record that a new judge would decide the matter on the transcript and exhibits from proceedings held before a deceased judge, the notice was binding on the client).

However, courts have been more sympathetic to clients in employment discrimination matters, interpreting the remedial nature of civil rights statutes to require that the client, not his attorney, must receive personal notice of adverse decisions before the appeals period begins to run. Brown v. Nat'l Highway Traffic Safety Admin., 673 F.2d 544 (D.C. Cir. 1982); Cooper v. Lewis, 644 F.2d 1077 (5th Cir. 1981).

100. Sei Corp. v. Norton & Co., 631 F. Supp. 497 (E.D. Pa. 1986). In Sei, three weeks before trial the client was informed by a lawyer that he was representing him in a lawsuit without his authority. At that time the client contacted his own counsel and informed the counsel of the lawsuit. His counsel failed to inform the first lawyer, plaintiff, or the court that the first lawyer had had no authority to accept service of process or file an answer on behalf of the client or to make admissions affecting his liability until the third day of a jury trial. The client was held to have ratified the first lawyer's actions by the failure of his authorized counsel to inform all parties and to ascertain the status of the case against him. Therefore the client could not obtain relief from judgment entered against him, especially where plaintiff justifiably relied on first lawyer's representations of his authority to represent the client in proceeding to trial. Id. at 502-03.
In affirming dismissals for failure to prosecute or defend, courts point to a pattern of delay and dilatoriness\textsuperscript{101} that should have put the client on notice of the lawyer's poor behavior\textsuperscript{102} or that prejudiced the opposing party's ability to comply with court rules.\textsuperscript{103} In other circumstances, the failure of a lawyer to file an answer was not sufficient grounds to relieve a client from default or a motion for summary judgment.\textsuperscript{104} Similarly, a client could not avoid a late filing penalty be-

\textsuperscript{101} Leblanc v. INS, 715 F.2d 685 (1st Cir. 1985). In Leblanc, the petitioners' lawyers filed frivolous claims and dilatory motions which were the grounds for the Board's denying their request to reopen their case. The court noted that tactical decisions can "ultimately fizzle and redound to the client's detriment." \textit{Id.} at 694. In Smith v. Stone, 308 F.2d 15 (9th Cir. 1962), plaintiff's lawyer failed to serve all defendants, did not file opposition to summary judgment or a motion to dismiss, sent a substitute attorney to request a continuance on the arguments on the motions and failed to contact the court about his alleged illness or vacation.

\textsuperscript{102} Callip v. Harris County Child Welfare Dep't, 757 F.2d 1513 (5th Cir. 1985). There, the court pointed out that the lawyer had missed nine deadlines, that lesser sanctions had been tried, and that plaintiff contributed to the delay by beginning and abandoning an appeal. \textit{Id.} at 1521-22. In Townsend v. Gray Line Bus Co., 767 F.2d 11, 16-19 (1st Cir. 1985), defendant's lawyer stalled in discovery, failed to file proposed conclusions of law, did not attend status conference when case was transferred to new judge after death of trial judge, failed to respond to notice about how new judge would proceed and moved from Boston to California without clarifying his relationship with his client. In Chira v. Lockheed Aircraft Corp., 634 F.2d 1513 (2d Cir. 1980), the court noted that the plaintiff was himself a lawyer and could not shift all the blame on his attorney for delaying the litigation.

\textsuperscript{103} Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863 (3d Cir. 1984). There the court ruled that the trial court did not abuse its discretion because the defendant had to file a pretrial statement without plaintiff's answers to interrogatories and without plaintiff's pre-trial statement, there was a pattern of dilatoriness, and the defendant had a prima facie complete defense in the statute of limitations. In limiting the application of the results in Link v. Wabash R.R., 370 U.S. 626 (1962), this court laid out six factors to be considered in reviewing a trial court's discretion in dismissing a case or refusing to lift a default: extent of the party's personal liability; prejudice to the adversary; a history of dilatoriness; whether the attorney's conduct was willful or in bad faith; alternative sanctions; and meritiousness of the claim. \textit{Id.} at 868-70.

\textsuperscript{104} Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573 (4th Cir. 1973)(lawyer failed to file an answer on behalf of his client or oppose a summary judgment because of his agreement with counsel for a second defendant that the other client would pay the obligation and the second lawyer would keep the first lawyer informed about the status of the case); Transit Ads, Inc. v. Tanner Motor Livery, Ltd., 270 Cal. App. 2d 275, 75 Cal. Rptr. 848 (1969)(lawyer failed to file an answer because of illness and failed to give co-counsel clear instructions after receiving continuances from plaintiff's counsel); Delta Equip. and Constr. Co. v. Royal Indem. Co., 186 So. 2d 454, 458 (La. Ct. App. 1966)(a lawyer did not commit malpractice when a default judgment was entered against his client after the lawyer, who was retained by the client's worker's compensation carrier to defend a compensation claim only, returned to the carrier a second lawsuit for wages attached to the compensation claim without advising his client of the lawsuit because the lawyer owed no duty to the client on the second lawsuit and had no authority to act on its behalf); Union Storage & Transfer Co. v. Smith, 79 N.D. 605, 610-11, 58 N.W.2d 782, 786 (1953)(defendant bound by his lawyer's waiving a rule that a complaint
cause he relied on his tax counsel to file the tax return in a timely fashion.  

Failure to make discovery can also lead to severe repercussions for a client. Dismissal of a complaint may follow the failure to comply with discovery orders, or a client may be precluded from offering proof on a key issue which may be tantamount to dismissing the plaintiff's claim. Even alleging that the dismissal of a case was due to a lawyer's willful failure to make discovery may not convince the court to relieve the client of his poor choice of counsel.

Admissions by a lawyer in different procedural stages of litigation may also bind the client even though the result may limit the client's recovery. For example, a lawyer's admission in a letter written to opposing counsel that his client owes a certain sum has been held to be

105. United States v. Boyle, 469 U.S. 241 (1985). This decision is partially based on the need for a "bright-line" test in matters of filing tax returns where the burden is placed on the taxpayer, not an agent, in order to have an efficient tax system. Id. at 248. Even though the client supplied all the necessary records and periodically checked with the lawyer as to the status of the return, he was still penalized for his lawyer's late filing. Id. at 242-43.

106. E.g., in Tolliver v. Northrop Corp., 786 F.2d 316, 318-19 (7th Cir. 1986), the court dismissed the action because the client failed to answer interrogatories or appear for her deposition after the court personally ordered her to do so when she was acting as her own attorney, and it denied her motion under FED. R. CIV. P. 60(b) even though she claimed that she had given a draft of her answers to a new attorney, because she was responsible for the lawyer's misdeeds.

107. Chira v. Lockheed Aircraft Corp., 634 F.2d 664 (2d Cir. 1980)(plaintiff, after a court order to complete discovery and file pre-trial statement within six months, did nothing, except to object to 120 questions in his deposition); Carroll v. Abbott Laboratories, Inc., 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982)(plaintiff in minor's personal injury matter failed to supply medical records or baby book after two orders); Bell v. Inland Mut. Ins. Co., 332 S.E.2d 127 (W. Va. 1985)(default entered against insurance company for failure to respond to interrogatories despite client's assertion that it was unaware that either discovery had been served or orders issued). See also CAL. CIV. PROC. CODE § 2034 (West 1983) and FED. R. CIV. P. 37.

108. Cine Forty-Second St. Theater v. Allied Artists Pictures, 602 F.2d 1062 (1979). In Cine, the plaintiff was precluded from entering evidence as to damages even though counsel committed "gross professional negligence" by failing to comply with an order to answer interrogatories, because the client "was aware of every aspect of discovery and intimately involved with the progress of the case." Id. at 1068 & n.10. In Schicchi v. J.A. Green Constr. Corp., 100 A.D.2d 509, 510-11, 472 N.Y.S.2d 718, 720-21 (1984), plaintiff's failure to respond to a request for a bill of particulars due to a law office failure led to a preclusion order and dismissal; the court held that this failure to respond indicated an intent to abandon the claim.

binding on the client. Similarly, a lawyer's factual admission in an opening statement or his commitment to limit damages at a hearing on a preliminary motion to stay proceedings have been binding on clients as procedural matters within the scope of the lawyer's implied authority.

After a client chooses a lawyer to represent him in civil litigation, the lawyer assumes authority over the procedural aspects of the representation. Under this regime, the client has only limited control over his lawyer's actions but, nevertheless, absorbs the potentially detrimental impact of the lawyer's behavior. Thus, strict adherence to this agency model may severely prejudice the client. Following is a discussion of those situations where the courts have abandoned or distorted the agency model to either protect the client or further other objectives.

III. DISTORTION AND ABANDONMENT OF THE AGENCY MODEL IN PRACTICE

The agency model and its allocation of authority pursuant to the substance/procedure line has frequently proven unacceptable in practice. In some instances dissatisfaction with the model has led to its manipulation and distortion by the courts. In other cases the model has been overtly abandoned. As a result, courts frequently enforce settlement agreements over the client's objections. In other situations courts have relieved clients of their lawyers procedural errors.

A. Upholding Settlement Agreements

Even though the decision to settle is the prototype substantive de-
cision supposedly reserved to the client, many cases uphold settle-
ments despite later complaints by clients who claim that their
attorneys acted beyond the scope of their authority. In support of
these decisions, courts typically cite strong judicial policies favoring
voluntary settlement of lawsuits “to get money into the hands of a
victim of tortious conduct” and “to reduce the burden on and expense
of maintaining courts.” Some decisions apply traditional authority
principles to find a rationale for upholding a settlement agreement.
Other cases have completely abandoned the agency model.

1. Distortion of the Agency Model

In some circumstances, courts are suspicious of clients who seek to
withdraw from settlements because the settlement turns out to be less
advantageous than they expected. In other situations courts con-
sider the harm to the interests of other parties who would be forced to
continue an action they thought was settled.

Courts sometimes uphold settlement agreements by finding that,
despite a client’s protests to the contrary, express authority to settle
was given to the lawyer. By so finding, the courts recognize that set-
tlement is a substantive matter within the client’s realm of authority,
but that the authority was in fact properly delegated to the attorney.
A retainer agreement may grant express authority to the lawyer to
settle on the client’s behalf, even when the client never personally

115. E.g., Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 854 (1st Cir.
1987)(defendant bound to a settlement reached when plaintiff accepted defend-
ant’s offer after a Supreme Court decision which allegedly barred the claim be-
cause defendant’s lawyer failed to put a time limit on the offer and each party
was a sophisticated entity represented by seasoned counsel); Worthy v. McKesson
Corp., 756 F.2d 1370, 1372 (8th Cir. 1985)(client sought to withdraw from an oral
settlement in EEOC matter after consulting another attorney for “second opin-
ion”); Williams v. Int’l Ass’n of Machinists, 484 F. Supp. 917, 923 (S.D. Fla.
1978)(client objected to an adverse ruling in an arbitration procedure held four
months after signing stipulation to arbitrate); Cohn v. Zarowitz, 501 A.2d 1235,
1238 (Del. 1985)(the plaintiff’s interests as preferred stockholders were ade-
quately represented in settlement negotiations to end a class action lawsuit aimed
at stopping a merger and the agreement was fair to them).
ent who settled lawsuit to further business interests of associate and defendant in
related lawsuit may not withdraw from the settlement); Argo Plastics Prods. Co.
v. City of Cleveland, 15 Ohio St. 3d 389, 391, 474 N.E.2d 323, 331 (1984)(defendant
may not set aside a settlement on the grounds that the defendant’s attorney set-
tled for an amount vastly beyond his authority because to overturn the judgment
would only harm the plaintiffs); Cohen v. Goldman, 85 R.I. 434, 439-40, 132 A.2d
414, 417 (1957)(client who hired lawyer and cloaked him with apparent authority
to settle should suffer the loss when the lawyer absconded with the settlement
payment rather than shift loss to the defendant by reopening the case).
accepted the settlement and immediately repudiated it. More typically, it is found that the client was consulted before the lawyer contacted the opposing counsel or during the settlement negotiations and understood the terms of the agreement without objecting. Another court found that a lawyer had authority to enter into a settlement, in spite of the lawyer’s own testimony that he lacked that authority, because the client was participating and being kept informed as the negotiations progressed.

When overriding a client’s objections to a settlement, courts may find a grant of express authority in the communication between the lawyer and the client in the context of the particular relationship. For instance, where a corporate client hired an attorney to explore a

117. First Fed. Sav. & Loan v. C.P.R. Constr., Inc., 70 Or. App. 296, 302, 689 P.2d 981, 984 (1984) (The language in a retainer agreement which granted the law firm the authority “to execute all settlements as defendants would ourselves” was held to expressly authorize the law firm to enter into a binding settlement. The court enforced the agreement despite the fact one lawyer in the firm denied that he told the lawyer who formally accepted the proposal that the clients had accepted it).

118. Norberg v. Fitzgerald, 122 N.H. 1080, 1081-82, 453 A.2d 1301, 1302-03 (1982) (the court rejected the client’s testimony that she objected to the agreement by telephone and in a letter as soon as she received a copy of the agreement).

119. Worthy v. McKesson Corp., 756 F.2d 1370, 1372-74 (8th Cir. 1985) (A few days after he agreed to it, the plaintiff objected to a settlement in the amount of the defendant’s offer and which his lawyer approved; the client had consulted another attorney who told him the case “had possibilities”). Accord International Telemeter Corp. v. Teleprompter Corp., 592 F.2d 49, 55-56 (2d Cir. 1979) (lawyer kept clients fully informed of the progress of the negotiations by sending copies of correspondence which they failed to disavow); Haldeman v. Boise Cascade, 176 Cal. App. 3d 230, 233-34, 221 Cal. Rptr. 412, 413-14 (1985) (The court rejected the client’s claim that in phone conversations during protracted settlement conferences, she did not give her lawyer authority to settle for $9,500. Rather the trial court exercised its discretion and believed her lawyer who testified that the client told him “to do what you think is best”); Fox v. Wiener Laces, Inc., 105 Misc. 2d 672, 675-76, 432 N.Y.S.2d 811, 814 (1980) (The lawyer reached an agreement in a settlement conference, read it to his client on the phone, and stated to the court and his adversary that the client approved it without reservation. The lawyer then dictated it into the record without referring to any additional conditions or terms. The agreement was fully enforceable because the lawyer had both implied and express authority to settle and had not revealed the client’s other conditions); Federal Land Bank v. Sullivan, 430 N.W.2d 700, 702 (S.D. 1988) (client failed to object to offers of settlement contained in letters sent by its lawyer to opposing counsel and copied to the client).


121. E.g., in Smedley v. Temple Drilling Co., 782 F.2d 1357 (5th Cir. 1986), the defendant used a claims adjusting company to handle and settle claims against it, even those in excess of deductible. When insurance was involved, the adjustors obtained authority directly from insurer to settle. Additionally, the adjustors had a trust account to pay deductible amounts and hired lawyer to represent defendant. The court held that through this arrangement, the adjustor and its lawyer had actual authority to settle without any further approval from the client. More-
negotiated settlement of a lawsuit, the president, who was also board
chairman and 96% owner of the corporation, was held to have given
the lawyer express authority to settle when he dictated the terms of
the offer to the lawyer and told him that the board had originated and
approved the offer's terms.\textsuperscript{122} If the client consented to the agree-
ment, courts are not sympathetic to an argument that the lawyer did
not adequately explain the terms of the agreement to the client.\textsuperscript{123}

Other decisions find implied authority from the client's behavior in
the particular situation. Where the client was unavailable to the law-

yer at the time the stipulation was reached and the lawyer acted to
protect his client's interests, the settlement was upheld from the cli-

122. Bergstrom v. Sears, Roebuck & Co., 532 F. Supp. 923, 933 (D. Minn. 1982). \textit{See also} Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985). In \textit{Dillon}, the court upheld a settlement of a worker's compensation claim because in closed session, the city council gave its privately retained lawyer authority to settle the case for up to $150,000 to be paid in installments. No other limits or conditions were placed on this attorney. Moreover, the city corporate counsel and the mayor, a lawyer, were present and they stated that the city would be bound if a settlement was reached. Some councilman's statement that this was like labor negotiations, i.e., that the attorney would come back to them with a figure, could not be under-
stood by the lawyer as a limit on his authority because he had never done labor negotiations for them. However, the lawyer had no authority to add terms about reimbursement for sick leave or continuing group health insurance to the agree-
ment, and those terms were deleted. \textit{Id.} at 924-25.

123. Interspace, Inc. v. Morris, 650 F. Supp. 107, 110 (S.D.N.Y. 1986)(defendant could not invalidate a settlement because his counsel gave him poor advice about the effect on his personal liability of signing the consent judgment); Acheson v. White, 195 Conn. 211, 217, 487 A.2d 197, 200 (1985)(client could not set aside settle-
ment on grounds that her consent was fatally tainted because of a conflict of interest arising out of her lawyer's joint representation of a co-defendant and that the attorney did not discuss possible defenses with her and discouraged her from obtaining independent counsel); \textit{In re} Marriage of Burkey, 36 Wash. App. 487, 675 P.2d 619 (1984)(wife cannot vacate portions of marital property settlement agreement on grounds of manifest injustice because her lawyer gave her erroneous advice about the valuation of the marital property).

Even if the agreement stands, the client may be able to sue the lawyer for malpractice. \textit{E.g.}, Lieberman v. Employers Ins., 171 N.J. Super. 39, 51, 407 A.2d 1255, 1261 (1979)(lawyer hired by the insurer committed malpractice by failing to advise the insured of the possible implications and consequences of a dispute with the insurer, including a probable conflict of interest for the lawyer, over the insured's withdrawal of a grant of settlement authorization to the insurer).
ent's attack. For example, a client who was unavailable for trial and told his lawyer to “do the best you can under the circumstances,” gave the lawyer implied authority to settle the matter.

Another group of decisions finds apparent or ostensible authority in upholding settlements. Here the courts focus on the client's conduct that causes a reasonable third party to believe that the lawyer had authority to enter into a settlement. In one such case, the defendant retained a lawyer specifically to negotiate a settlement of a patent infringement lawsuit. Even though express authority was absent, the defendant was bound because the settlement was made within the attorney's apparent authority, and the defendant's in-house counsel did not deny or reject the agreement.


126. “Under Georgia law, an attorney is cloaked with apparent authority to enter into a binding agreement on behalf of a client . . . only if the client had specifically limited his attorney's authority to settle and the opposing attorneys were aware of this limitation would the settlement agreement have been unenforceable.” Glazer v. J.C. Bradford & Co., 616 F.2d 167, 168-69 (5th Cir. 1980). There, the court upheld a settlement agreement in an action involving disputed brokerage commissions and defamation despite the substantial factual issue about the extent of authority the client had given the lawyer to negotiate. Id. at 168. Accord Potomac Leasing v. First Nat. Bank, 180 Ga. App. 255, 348 S.E.2d 907 (1986).

While rejecting the notion that the mere hiring of an attorney implies the authority to compromise his client's case, another court ruled that an opposing party may justifiably rely on an attorney's apparent authority to settle if that attorney was engaged as an agent to handle a particular matter and that agency was not revoked. Cohen v. Goldman, 85 R.I. 434, 439, 122 A.2d 414, 417 (1957).

127. In re Paolino, 72 Bankr. 323, 329, aff'd, 75 Bankr. 553 (E.D. Pa. 1987) (lawyer hired by debtor/husband had apparent authority to bind debtor/wife because the husband made all the decisions regarding bankruptcy including the hiring of counsel, the wife was aware that the lawyer was representing her, all the issues were the same and she did nothing to communicate to the law firm or anyone else that they did not represent her); United States Plywood Corp. v. Neidlinger, 41 N.J. 66, 72, 194 A.2d 730, 734 (1963) (the following facts raised the issue of whether plaintiff's lawyer had apparent authority to settle a claim with defendant: plaintiff knew that a meeting had been specifically called to consider a settlement of creditors' claims; it sent its lawyer—he acted throughout the meeting on its behalf; he was appointed to the committee which took over the defendant's assets; and plaintiff never questioned his connection with the committee).

129. Id. at 933-34.
Other types of client conduct can also create apparent authority. Where a client hired a lawyer to represent it in a variety of claims arising out of a single incident, it was held that a third party could reasonably believe that the lawyer had authority to negotiate a settlement on all claims related to the same incident. In another case, apparent authority for a lawyer to agree not to enforce a judgment against a defendant was created when the client introduced the defendant to the client's lawyer and urged the third party's assistance in a lawsuit. Similarly, a judgment creditor could not simultaneously file an appeal from a judgment and negotiate a settlement to fix the

authority to settle based on the following facts: plaintiff hired the lawyer and he handled the case; he attended and took depositions, corresponded with counsel for defendant, did discovery, and participated in all pretrial conferences and orders. Applying Mississippi law, the court ruled that the plaintiff failed to meet its burden to overcome the presumption that their lawyer had the authority to settle. Moreover, defendant justifiably relied on the offer based upon the lawyer's previous actions on the plaintiff's behalf; Hallock v. State, 64 N.Y.2d 224, 231, 474 N.E.2d 1178, 1182, 485 N.Y.S.2d 510, 514 (1984)(Plaintiff had imbued a lawyer with apparent authority on which the defendant reasonably relied because: 1) the lawyer had represented the client throughout the litigation; 2) he had engaged in prior settlement negotiations for him; and 3) he appeared at the final pretrial conference which by state rule represents that he has authority to bind him. Moreover the attendance of the other plaintiff with two lawyers also enforced the appearance. Under such circumstances the lawyer or other client should have spoken up if the lawyer's authority was limited.).

131. Capital Dredge and Dock Corp. v. City of Detroit, 800 F.2d 525, 530-31 (6th Cir. 1986). See also Smedley v. Temple Drilling Co., 782 F.2d 1357, 1361 (5th Cir. 1986)(defendant clothed its claims adjustor, who hired defendant's attorney, with apparent authority by giving him general authority to settle without any limits and by not handling the litigation itself); Main Line Theatres, Inc. v. Paramount Film Distrib. Corp., 298 F.2d 801, 803 (3d Cir. 1962)(counsel who had authority to reach cash settlement also had apparent authority to waive claims for an injunction); In re Scott, 82 Bankr. 760, 762 (E.D. Pa. 1988)(it was within scope of debtor's attorney's authority to sign an addendum to a settlement agreement); Patterson v. Southern Ry., 41 Ga. App. 94, 95, 151 S.E. 818, 819 (1930)(where, in the course of dealings over many years the lawyer handled and settled many cases for client without any complaint and on his own authority, some of those cases being settled for less than the full amount without specific authority and by consulting the bookkeeper when the client was out of town, the client was bound by the lawyer's negotiation and settlement of a case which was turned over to his lawyer without any specific instruction other than to handle the claim).

132. Yanchor v. Kagan, 22 Cal. App. 3d 544, 99 Cal. Rptr. 367 (1971). In Yanchor, when a client encouraged a third party to cooperate with his attorney by bringing him to his attorney's office and by urging him to be a witness in client's favor in exchange for an agreement that the client would not sue him, the third party could justifiably believe that the client had authorized a written agreement, sent to him by the lawyer, that the client would not enforce any judgment against him. Id. at 550, 99 Cal. Rptr. at 371. Accord Clark Equip. Co. v. Wheat, 92 Cal. App. 3d, 154 Cal. Rptr. 874 (1979)(client was held responsible for abuse of process when its lawyer, acting with apparent authority, represented to a defendant that the client was not seeking a judgment of replevin against him and the lawyer then proceeded to obtain a default judgment and contempt order against the defendant.
terms for payment of the judgment and then reject the settlement, abandon the appeal, and enforce the judgment in such a manner as to penalize the judgment debtor.\textsuperscript{33}

Courts may bind the client because he acquiesced in the lawyer's exercise of settling authority. For instance, in one case the client was present when a settlement was read into the record in open court and failed to object to it.\textsuperscript{1} Even if the client was not present at the time the settlement was finally read into the record, the client may have created apparent authority by allowing his lawyer to conclude negotiations which were started when the client was present.\textsuperscript{135}

The longer a client waits to challenge a settlement agreement, the more likely a court is to find that he acquiesced to it. Waiting five years,\textsuperscript{136} three years,\textsuperscript{137} two years,\textsuperscript{138} one and one-half years,\textsuperscript{139} one year,\textsuperscript{140} ten months,\textsuperscript{141} eight months,\textsuperscript{142} three months,\textsuperscript{143} or even two even though he knew that the defendant did not have possession of the item in question).\textsuperscript{133}


135. Lynch v. Lynch, 122 A.D.2d 572, 574, 505 N.Y.S.2d 739, 741 (1986). There, a client instructed his lawyer, who had represented him throughout the litigation, to "let's get it on paper this afternoon." The lawyer had negotiated on the client's behalf all morning at the courthouse on the day of the trial and then the client left without revealing any limits on his lawyer's authority. The court upheld the stipulation read into the record that afternoon. \textit{Accord} Bella Vista Dev. Corp. v. Estate of Birnbaum, 85 A.D.2d 891, 891-92, 446 N.Y.S.2d 753, 753 (1981) (upholding an oral stipulation made in open court by the estate's lawyers who failed to state that it was subject to the client's approval and made in the presence of the nephew of the executor who was authorized to bind the estate).

136. Miller v. Commonwealth, Dep't of Highways, 52 Pa. Commw. 127, 128, 415 A.2d 709, 711 (1980). \textit{But cf.} Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 530 (6th Cir. 1986), in which a four year delay was not fatal to the client's challenge if the client did not know that the settlement released all of its claims.


138. Webb v. First Nat'l Bank, 711 F.2d 1352 (Mont. 1983). In Webb, the client accepted the benefits of the settlement of the first lawsuit (dismissal of the claim against the client in exchange for a discounted payment of the obligation) before bringing a second lawsuit for tortious interference with a contract arising out of the same facts and alleging that the first settlement did not cover this claim. \textit{Id.} at 1354.


months\textsuperscript{144} to move to vacate a settlement may constitute proof of a client's acceptance of a stipulation. A client's absence from court when the stipulation was entered is often not a sufficient basis for challenging the lawyer's authority where the client has delayed in attacking the settlement.\textsuperscript{145}

Additionally, estoppel principles may bind a client to a settlement.\textsuperscript{146} A client will be estopped from denying that a settlement has been reached if: (1) the client had knowledge of the settlement reached by his lawyer; (2) acted in such a way that the other party reasonably believed that he intended to be bound by it; (3) the other party was unaware that the client did not want to be bound by it; and (4) the other party relied on the client's conduct to its detriment.\textsuperscript{147}

For the purpose of estoppel, discontinuing discovery and investigation\textsuperscript{148} or allowing a trial date to pass in reliance on a settlement\textsuperscript{149} often constitutes the opposing party's change of position to its detriment.

Closely related to the concepts of estoppel and acquiescence, ratifi-


\textsuperscript{145} Brown v. Brown, 245 Ga. 511, 265 S.E.2d 809 (1980)(husband waited at least a year to question divorce decree and partially complied with its terms). Accord Bauer v. Lygren, 113 A.D.2d 915, 493 N.Y.S.2d 815 (1985)(personal injury plaintiff waited three years from first consulting new attorney to challenge settlement entered when she was out of town); Brumberg v. Chinghai Chan, 25 Misc. 2d 312, 204 N.Y.S.2d 315 (1960)(tenant waited seven months after settlement was entered, four months after first learning about it, and one month after returning to the country before filing motion to vacate).

\textsuperscript{146} E.g., Szymkowski v. Szymkowski, 104 Ill. App. 3d 630, 633, 432 N.E.2d 1209, 1211 (1982)(client who silently stood by, allowed her attorney to negotiate on her behalf, and heard the terms of the settlement read into the record, is estopped from denying her lawyer's apparent authority); J.E.D. Assocs., Inc. v. Town of Danville, 122 N.H. 234, 236-37, 444 A.2d 493, 494 (1982)("Absent manifest hardship to a town, a good-faith settlement by town counsel in a zoning or subdivision case will estop the town from later attempting to abrogate its terms." The town counsel represented both the planning board and the board of selectmen in negotiating the settlement. The court ruled that the settlement was within the counsel's authority, and the town could not move to modify it.).

\textsuperscript{147} In re Gerry, 670 F. Supp. 276, 280-83 (N.D. Cal. 1987). Accord Arizona Title Ins. & Trust Co. v. Pace, 8 Ariz. App. 269, 272, 445 P.2d 471, 474 (1968)(An insurance company was estopped to deny that it was bound by the actions of the attorney which it retained to act on behalf of its insureds and was therefore obligated to reimburse the insureds for the settlement they paid. While the attorney nominally represented the insured, he was hired by the insurer, kept insurer informed of the litigation's progress, and the insureds were aware that he was protecting insurer's interests. Thus, insureds were justified in assuming that he had apparent authority to settle when he volunteered to negotiate on their behalf.).

\textsuperscript{148} In re Gerry, 670 F. Supp. 276, 282 (N.D. Cal. 1987).

cation is an additional ground for upholding settlements.\textsuperscript{150} Even if the court finds that the lawyer acted beyond his actual or implied authority by giving up a substantial right of the client, a client who acts on the stipulation and accepts its benefits may be barred from later challenging the settlement.\textsuperscript{151} In a similar context, a client who ratifies an agreement by accepting payment pursuant to its terms cannot then argue that she did not give her lawyer the authority to enter into other terms of the agreement, such as waiving appeal.\textsuperscript{152} making a claim for fees\textsuperscript{153}, or demanding that the defendant furnish a declaration that the settlement was for the policy limits.\textsuperscript{154}

Ratification likewise prevents a client from first following a settlement agreement and then denying his lawyer’s authority when the agreement later proves unsatisfactory. By adhering to its terms, the client ratifies the agreement, even if it works to his detriment. For example, if by stipulation a labor lawsuit is referred to arbitration and the client loses the arbitration, he can not then disavow the settlement.\textsuperscript{155} Similarly, if the client agreed to pay a stipulated amount by a certain date, the client cannot latter claim that the lawyer had authority as to the amount, but not as to the payment due date.\textsuperscript{156} In another case, a client ratified a stipulation to settle a quiet title action by holding conferences with his lawyer about purchasing the disputed land from the other owners, by following the lawyer’s advice regarding purchase, by having the lawyer make offers to the other owners, and by not objecting to the stipulated judgment until after the attempts to

\textsuperscript{150} Edwards v. Born, 22 V.I. 426 (1986)(clients orally ratified a settlement reached by their lawyer after the lawyer compared the settlement figure with their potential recovery at trial and the lawyer thereafter wrote a letter to the clients memorializing their understanding).

\textsuperscript{151} Smedley v. Temple Drilling Co., 782 F.2d 1357, 1361-62 (5th Cir. 1986)(defendant accepted the benefit of the settlement by terminating its own payments to the plaintiff until it learned that its insurer was insolvent); In re Paolino, 85 Bankr. 24, 31 (E.D. Pa. 1988)(debtor/wife waited one month to repudiate an agreement entered in her husband’s presence); City of Fresno v. Baboian, 52 Cal. App. 3d 752, 758-59, 125 Cal. Rptr. 322, 335 (1975); Webb v. First Nat’l Bank, 711 P.2d 1352, 1355 (Mont. 1985)(client accepted the following benefits: dismissal of action against him and paying plaintiff a discounted amount on the claim); Rolfstad v. Hanson, 221 N.W.2d 734, 736 (N.D. 1974)(client acquiesced over an extended period of time with full knowledge of his lawyer’s actions including: hiring another lawyer to represent the client in a particular matter and the second lawyer stipulating to the facts in the matter to avoid a prolonged trial).

\textsuperscript{152} In re Hatfield, 231 Kan. 427, 429, 646 P.2d 481, 483 (1982).


\textsuperscript{155} Williams v. International Assoc. of Machinists, 484 F. Supp. 917, 922 (S.D. Fla. 1978).

\textsuperscript{156} Zim Isr. Navigation Co. v. Special Carriers, Inc., 800 F.2d 1392, 1394 (5th Cir. 1986).
purchase the land were unsuccessful and partition was ordered.157

2. Abandonment of the Agency Model

In some instances, when it is clear that a lawyer had no express or apparent authority to settle, an attorney has been found to have implied authority to bind a client to a settlement. Some jurisdictions have abandoned the agency model and found the authority in the lawyer-client relationship itself. In Georgia, for example, "[in] the absence of express restrictions upon the attorney's authority it may be termed as plenary insofar as the court and the opposing parties are concerned."158 A Georgia court upheld a settlement agreement despite the client's assertion that he had no memory of authorizing his attorney to accept a settlement because he was taking medication which affected his mental capabilities.159 The same kind of wide-ranging authority exists in South Carolina where the mere hiring of an attorney gives the attorney implied authority to confess judgment in the other party's favor.160

While no such implied plenary power exists in California, some cases have held that there is a rebuttable presumption that the attorney had authority to dismiss the client's action with prejudice.161

158. Shepherd v. Carlton's Nice Cars, Inc., 149 Ga. App. 749, 750, 256 S.E.2d 113, 115 (1979). Accord Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985)(Plaintiff's lawyer entered into an oral agreement with defendant's lawyer that included a general release. However, the lawyers could not later agree on language to preserve plaintiff's rights against another potential defendant. Therefore, since the agreement was governed by Georgia law the plaintiff was bound to the general release because her lawyer had not raised this issue during the settlement negotiations.); Bridges v. Bridges, 256 Ga. 348, 349-50, 349 S.E.2d 172, 174 (1986)(court cited the principle, but held that the oral agreement was not enforceable because the lawyers knew that the client had not agreed to one essential term of the settlement); Brumbelow v. Northern Propane Gas Co., 251 Ga. 674, 676, 308 S.E.2d 544, 547 (1983)(since Georgia lawyers have apparent authority to bind their clients to settlements, this authority is plenary unless limited by the client and this limitation must be communicated to the opposing side. Absent this communication, an opposing lawyer can deal with the lawyer as if dealing with client. Where there is no challenge to the existence of the agreement or its terms, but only to the lawyer's authority to enter into it, the client is bound even in absence of writing.). See also Georgia Superior Court Rule 4.12, "an attorney of record has apparent authority to enter into agreements on behalf of his client(s) in civil actions." GA. CODE ANN. § 24-3304 (Harrison 1986).
Some jurisdictions presume that the attorney has the authority, and require the client or moving party to overcome that presumption. In New York, a court rule which requires a lawyer attending a pretrial conferences to have full settlement authority creates implied authority for a lawyer to bind the client if the lawyer does not reveal any limits on his authority. In Alabama, an attorney is vested with authority to bind his client in all matters that relate to the cause, including the right to settle all questions involved in the case.

B. Relief from the Lawyer's Procedural Choices

Other examples of overt abandonment of the agency model are cases in which clients are granted relief from the effects of lawyers' procedural errors. Even though the lawyer has authority over the procedural aspects of litigation and, as the client's agent, a lawyer's neglect is generally imputed to the client, the client or his lawyer


164. Hallock v. State, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984)(upholding a settlement in an eminent domain proceeding). Accord Continental Cas. Co. v. Chrysler Constr. Co., 80 Misc. 2d 532, 554, 363 N.Y.S.2d 258, 261 (1975)(upholding a settlement in a construction bond dispute over the client's objection because of prejudice to the other party and the court's need to control congestion and its own procedures); DiRusso v. Grant, 28 A.D.2d 847, 881 3011.2d 513 (1967)(plaintiffs' motion to restore a negligence action to the calendar based on their refusal to accept a settlement that their lawyer negotiated at a pretrial conference was denied because the clients did not appear for conference, implyingly acknowledging their lawyer's authority to bind them, and the lawyer never made known that his authority was at all limited).

165. Daley v. County of Butte, 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693, 700 (1964)(the client must seek redress against the lawyer rather than have the ne-
may be relieved of a default "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." 166 A court may also grant relief to a client if the lawyer's procedural errors are so extreme as to deprive the client of representation 167 or impair the client's cause of action. 168 Granting relief from these errors protects the

glect reversed); Buckert v. Briggs, 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61, 63 (1971)(the inexcusable neglect of an attorney is usually not a proper basis for granting the client's motion for relief of a default under the relevant California statute, CAL. CIV. PROC. CODE § 473 (West Supp. 1990)).

166. CAL. CIV. PROC. CODE § 473 (West Supp. 1990). E.g., in Robinson v. Varela, 67 Cal. App. 3d 611, 136 Cal. Rptr. 783 (1977), the court pointed to the following factors in granting defendant relief from default: plaintiff's lawyer refused to grant an extension to answer an unlawful detainer summons within the five day period and quietly filed the request to enter default on the first possible day without notifying defendant's lawyer; the illness of the chief trial deputy at defense counsel's office; the limited hours during Christmas week; and defense counsel's preoccupation with other litigated matters. Id. at 616, 136 Cal. Rptr. at 785. In Manning v. Wymer, 273 Cal. App. 2d 519, 78 Cal. Rptr. 600 (1969), a lawyer was unaware that his associate had settled another related lawsuit on the condition that it would not prejudice the lawsuit that was the subject of a summary judgment motion. At the argument on the motion the lawyer failed to advise the court of the agreement and the court granted the motion. The court of appeals granted relief from the summary judgment based on excusable mistake. Id. at 528, 78 Cal. Rptr. at 605. In Miller v. Fortune Ins. Co., 484 So. 2d 1221 (Fla. 1986) plaintiff was entitled to a hearing to determine whether a secretarial error which caused a voluntary dismissal to be entered with prejudice constituted mistake, inadvertence or excusable neglect. Id. at 1224. Accord FED. R. CIV. P. 60 (b). See also Note, The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors, 1988 DUKE L.J. 733 (criticizing the agency theory as a basis for sanctioning clients for their attorneys' procedural errors); Note, Inryco, Inc. v. Metropolitan Engineering Co.: Inexcusable Neglect by Whom?, 45 U. PITZ. L. REV 695 (1984)(analyzing cases in which the client sought relief pursuant to a claim of gross attorney neglect).

167. In re Marriage of Park, 27 Cal. 3d 337, 342, 612 P.2d 882, 887-88, 165 Cal. Rptr. 792, 796 (1980)(Attorney of record was appointed a commissioner, and the client never agreed to a substitution or association of new counsel because she was involuntarily deported. Client never received notice of the new attorney's actions, nor did the attorney know she was deported, consult with her, investigate her case, or present any evidence on her behalf, thus denying her an adversary hearing.); Orange Empire Nat'l Bank v. Kirk, 259 Cal. App. 2d 347, 533-54, 66 Cal. Rptr. 240, 244-45 (1968)(defendant's lawyer failed to file an appearance, even though he received the complaint five days after service was made; failed to take any action to set aside the default; failed to appear at the trial; and did nothing to protect his client from the effects of the judgment); Daley v. County of Butte, 227 Cal. App. 2d 380, 391-92, 38 Cal. Rptr. 693, 699-700 (1964)(plaintiff's lawyer failed to serve process, failed to appear at successive pretrial conferences, failed to communicate with the court, client and other counsel, and held on to the substitution of attorney for more than five months until the successful motion to dismiss for lack of prosecution was filed).

168. Central Distribs., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5th Cir. 1968)(lawyer should be allowed to amend pre-trial stipulation to permit introduction of evi-
client's control over the ultimate resolution of his case. But in those situations where the lawyer's conduct is dilatory, rather than inadvertent, and the conduct was not extremely prejudicial, the client remains bound by the lawyer's action and must seek relief against the attorney.

In deciding whether to relieve a client of a lawyer's procedural error where serious prejudice might ensue, courts consider several factors. The client should seek relief promptly, and the opposing party should not suffer prejudice if relief is granted. In addition, the court must also consider the evidence of damages to prevent injustice). Daley v. County of Butte, 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693, 699 (1964).


170. Carroll v. Abbott Laboratories, Inc., 32 Cal. 3d 892, 895-96, 654 P.2d 775, 776, 187 Cal. Rptr. 592, 593 (1982)(The lawyer received four extensions of time to produce documents, but still failed to produce them after two court orders compelling production. He also failed to appear at two court appearances, and the second resulted in the dismissal of the action. There the lawyer-client relationship was not severed, and the lawyer was guilty of gross negligence.). But see Shea v. Donohoe Constr. Co., 785 F.2d 1071, 1079 (D.C. Cir. 1986)(plaintiff's complaint was reinstated where only counsel was negligent, plaintiff was unaware of the negligence and dismissal was unnecessary to remedy the prejudice to the defendant or to the judicial system caused by the failure of plaintiff's attorney to attend three separate status calls within a three week period); Dunbar v. Triangle Lumber and Supply Co., 816 F.2d 126, 128 (3d Cir. 1987)(dismissal for failure to prosecute is warranted only if the following factors are considered: the party's personal responsibility, prejudice to the adversary, history of dilatoriness, bad faith of party or lawyer, consideration of alternative sanctions, and meritourousness of the party's claim or defense).

171. E.g., Giles v. Giles, 404 So. 2d 649, 651 (Ala. 1981)(Defendants are entitled to a hearing on their motion for relief from a judgment to determine why defendants' lawyer failed to introduce a deed into evidence which would have been a partial defense to the lawsuit); Elston v. City of Turlock, 38 Cal. 3d 227, 233, 695 P.2d 713, 717, 211 Cal. Rptr. 418, 423 (1985)(The lawyer failed to respond to requests for admissions which went to the heart of the case. Because two attorneys had recently left the firm and the office was shorthanded, the requests were misplaced, and the lawyer was unaware of them until the answers were overdue. The California Supreme Court granted plaintiff's request for relief.); Campbell v. Archer, 555 S.W.2d 110, 112-13 (Tenn. 1977)(Defendants entitled to a new trial because their attorney failed to take note of a notice of trial date and they did not arrive at the court until after the trial had begun. Plaintiffs suffered no particular prejudice, but defendants must bear the costs they incur for a retrial.).

172. Elston v. City of Turlock 38 Cal. 3d 227, 233, 695 P.2d 713, 716, 211 Cal. Rptr. 416, 419 (1985)(Whether the client's delay in filing the motion for relief is reasonable depends upon the circumstances. Thus if the trial judge wrote the clients that they had six months in which to file a motion, and if the client's new lawyer would not accept employment until a retainer was paid and if the clients had difficulty in raising the money, a five month delay was not unreasonable.); In re Marriage of Park, 27 Cal. 3d 337, 342, 612 P.2d 882, 888, 165 Cal. Rptr. 792, 796 (1980) (client's four year delay in filing her motion to vacate a judgment of disso-
considers whether the client has a meritorious claim or defense.\footnote{173} In cases in which there is a total breakdown of the lawyer-client relationship, other significant factors include whether the client is free from personal neglect\footnote{174} and whether the attorney's action amounts to positive misconduct.\footnote{175}

In some instances courts recognize that a lawyer's procedural mistakes may obliterate the client's substantive claim and that a client may not be aware of the serious implications of these errors.\footnote{176} In resolution was not unreasonable in light of the facts that she was deported before the interlocutory hearing; her husband was present when she was arrested; their common immigration lawyer did nothing; her husband concealed the fact that she was deported; she was unaware that her lawyer had been named a court commissioner; she attempted to contact her lawyer from Korea; she immediately applied for re-entry and re-entered as soon as it was granted; she filed her motion to vacate within one month of learning of the judgment; Buckert v. Briggs, 15 Cal. App. 3d 296, 302, 93 Cal. Rptr. 61, 64-65 (1971)(merely having to try the issues that were determined by default is not sufficient prejudice to the opposing party for the court to deny the motion); Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 192-95, 486 A.2d 920, 921-23, (App. Div. 1985)(Motion to set aside default entered because the plaintiffs' attorney failed to file answers to interrogatories was remanded to the trial court to determine whether defendant had been prejudiced by three year delay. The long delay was understandable because plaintiffs' lawyer repeatedly told them that the trial was imminent.).

\footnote{173} In re Marriage of Park, 27 Cal. 3d 337, 342, 612 P.2d 882, 888-89, 165 Cal. Rptr. 792, 796 (1980).

\footnote{174} Orange Empire Nat'l Bank v. Kirk, 259 Cal. App. 2d 347, 353, 66 Cal. Rptr. 240, 244 (1968)(fact that the client knew other lawyers to consult or was experienced in politics does not create an inference that she was neglectful). In another case the court stated,

Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel. Daley v. County of Butte, 227 Cal. App. 2d 380, 392, 38 Cal. Rptr. 693, 700-01 (1964).

\footnote{175} Buckert v. Briggs, 15 Cal. App. 3d 296, 301-02, 93 Cal. Rptr. 61, 64-65 (1971)(Lawyer failed to appear at trial or notify the clients of the date, when he knew of the trial date. His reason was that he thought the clients had lost interest in the case, when the clients had never communicated their lack of interest. He then failed to do anything to set aside the judgment, despite his promise to do so. The court held that the lawyer had obliterated the lawyer-client relationship and his failure to advise his clients of the trial date was positive misconduct.).

\footnote{176} Other authors have argued that the application of agency theory in other contexts results in similar harsh or inconsistent outcomes. \textit{See}, \textit{e.g.}, \textit{Note, Dismissal with}
these cases the client may be entitled to relief other than against the lawyer, despite the lawyer's purported authority in procedural matters.

As has been illustrated, courts make exceptions to the lawyer's procedural authority. Additionally, courts are increasingly willing to either bend or reject the client's authority and bind him to a settlement which he asserts he did not authorize. Some commentators have begun to recognize that the traditional agency model does not adequately describe the distribution of authority within the lawyer-client relationship. In response, other theories have been offered to better account for the allocation of authority and proposals have been made to reform the court's approach.

IV. SUGGESTED ALTERNATIVES TO THE TRADITIONAL AGENCY DOCTRINE

A. Modified Agency Theories

1. Reciprocal Agency

Some writers have attempted to interpret agency law to conform to the reality of the allocation of authority within the lawyer-client relationship as defined by the codes of ethics and case decisions. Acknowledging that a simple agency concept is inaccurate because the lawyer often has too much authority, Professor Patterson described the lawyer-client relationship historically as one of "reciprocal agency" in which the lawyer is the principal in some areas and the client in others.

The problems with the reciprocal agency theory as a basis for analyzing the lawyer-client relationship are twofold. First, while this model creates a rationale for the traditional substance/procedure standard found in the cases, it no longer describes a true agency relationship with one principal controlling one agent. Second, this grant of


177. Patterson, supra note 2, at 914.
178. Id. at 926. To determine in which matters the lawyer is the principal and therefore has the authority to make decisions, Patterson referred to the three different duties which the rules of ethics impose on lawyers: duty of loyalty to the client, the duty of candor to the tribunal, and the duty of fairness to others. The lawyer has authority to make decisions that involve the last two areas, and the client makes decisions over all substantial legal rights as they affect him provided they do not involve the lawyer's other duties and are within the limits of the law. Id. at 927. Thus, the lawyer determines what the client's rights and duties are and acts lawfully in accordance with this determination. Id. at 964-65. Since the lawyer has these other duties, the lawyer may not act criminally or fraudulently or violate the rules of the legal system.
authority could leave the client completely out of procedural decisions that may be important to him. If the lawyer is designated the principal in procedural matters, he may override or ignore the client in making those decisions.

2. Joint Venture Model

Building on this reciprocal agency concept, another author characterized the decisionmaking framework of the Model Rules of Professional Conduct as a collaborative “joint venture” model, emphasizing that communication and allocation are the critical components of this structure. The client decides objectives. The lawyer, after consultation with the client, has final authority to decide the means by which these objectives are to be pursued. The lawyer must override the client's decision to follow a questionable course of conduct. If the client will not forego that course, the lawyer must decline or withdraw.

This “means/objectives” allocation forms the basis for a scheme for predicting how courts will decide authority disputes. The representational context and the nature of decisions define the presumptive sphere of authority. In civil litigation, for example, courts allocate decisions of substance or outcome-related decisions to the client; procedural and tactical decisions are allocated to the lawyer.

Under this scheme, three additional factors may rebut this substance/procedure presumption. First, the attributes of a specific client-lawyer relationship may affect whether a third party may justifiably assume that a lawyer has authority greater than that which

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180. Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct, 17 U.C. Davis L. Rev. 1049, 1080 (1984). The author described the joint venture relationship as "personal and terminable at will." Id. at 1067. "Each is respected as an individual with legitimate claims to autonomy, dignity, and responsibility." Id. "Mutual expectations are initially defined and are revised as the relationship develops. Each participant contributes valued resources to the common end." Id. To resolve disputes within the joint venture model, individuality, economic interests, and societal interests in the legal system should be balanced. Id. at 1070.
181. Id. at 1061.
183. Maute, supra note 180, at 1064.
184. Id. at 1065; Model Rules of Professional Conduct Rules 1.2(e), 1.16(a)(1)(1983).
185. Maute, supra note 180 at 1081.
186. Id. at 1082. The client usually bears the consequences of decisions involving legal, moral, or financial risk and has authority over those choices. The lawyer bears moral and legal risk and has principal authority for issues relating to the legitimacy of the legal system, such as creation and use of documents, spurious or inflammatory claims, and perjured or deceptive testimony. Id. at 1082-83.
is normal for the particular subject matter of the representation. Second, the identity of the client may affect how much explanation a client requires to make an informed decision. Finally, whether the lawyer acted in an emergency or whether the client objected quickly to a decision may affect whether that decision should be upheld. By applying the presumptions and the rebuttable factors, Maute attempts to make some sense out of often inconsistent decisions regarding questions of authority.

The joint venture model involves a complicated topology with various presumptive spheres and rebuttable factors to explain authority decisions. However, even its creator recognizes its limitations when she notes that the cases reach inconsistent dispositions on similar facts because of "judicial ambivalence about authority questions." Additionally, while the model espouses a collaborative approach to lawyering, the topology reinforces the results found in the cases. The means-

187. Id. at 1083. A long-term or extensive representation may justify an assumption of greater authority than a first-time or single relationship.
188. Id. An unsophisticated client may require increased explanation.
189. Id. at 1084. First, if there is a true emergency, the lawyer may act without consulting the client. Second, if the client objects to the decision promptly, rather than waiting to learn of an ultimate outcome and thereby reducing judicial economy and upsetting stable judgments, the court may be more willing to protect the client's interests.

190. Generally, in the civil litigation context, the client has exclusive control over the cause of action and the subject matter of the litigation: who to sue, for how much, and when to settle, unless the lawyer has ostensible authority to act otherwise. Id. at 1087. Settlement authority, not inherently belonging to lawyer, may be inferred from a course of conduct or upheld by ratification. Id. at 1089.

The lawyer, on the other hand, has control in areas of tactics and procedures with authority to bind the client even if the actions are detrimental. Id. at 1090. This broad authority is justified to maintain the effective operation of the adversary system: courts and litigants must rely and act upon the decisions made by a lawyer during litigation. Id. at 1091. Finality of judgments and certainty mean that clients have little relief after the end of litigation. However, clients can object to decisions and remove attorneys with whose tactical choices they disagree. Id.

Stipulations and concessions during litigation fall within an overlapping area. Id. at 1093. Counsel has authority to make binding concessions of fact or law: simplifying issues, eliminating weak claims and defenses, and stipulating on evidentiary, factual or legal questions. Id. at 1094. But if a procedural stipulation harms the client's substantive rights it may be set aside if it involves a lawyer's breach of loyalty or a court's abuse of administrative power. Id. at 1093. The lawyer also has implied authority to make spontaneous tactical decisions. Id.

Finally, the litigator can override a small group of unethical or illegal client choices when they conflict with her responsibilities to the system, profession, or herself. For example the lawyer can pay necessary litigation expenses, reject frivolous claims, and false evidence. Also the lawyer can protect his own legitimate economic interests. Id. at 1094-95.

191. Id. at 1081. Furthermore, Maute notes, the law in this area is "fact-specific" and that prediction of results is risky because "each client-lawyer relationship is unique." Id.
objectives framework is maintained, but it is balanced by requiring increased communication and consultation between lawyer and client on the one hand and by enhanced lawyer prerogatives in procedural matters on the other. Ultimately, agency principles remain the basis for determining authority questions within this framework.

B. Informed Consent

In response to the problems inherent in the agency model of the lawyer-client relationship, several authors have called for the introduction of the medical concept of "informed consent" into the practice of law. The purposes of this innovation are to broaden the client's decision-making authority and to require that lawyers provide their clients with the information necessary to make decisions. In addition, proponents argue that an informed consent rule would eliminate the confusion created by the "subject-matter/procedure or tactics" line of cases.

It has been suggested that informed consent could be instituted through three means. First, the client could enforce the doctrine of

192. Id. at 1106-07.
193. Id. at 1087.
194. "The doctrine of informed consent, then combines the patient's right to make a decision with a requirement that the physician provide sufficient information to make the exercise of that right meaningful." Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 U. Pa. L. Rev. 41, 48-49 (1979). In the legal field, Spiegel argued that the presumption should be that the client has control over all aspects of his case. Id. at 73.


196. Spiegel, supra note 194, at 72.
197. Id. at 104.
198. Id. at 52. The malpractice cases tend to protect the client's authority to settle a matter, but they do not identify which procedures or tactics are controlled by the lawyers. Spiegel analyzes another set of cases, referred to as the "third party benefit" cases. If a lawyer-agent acts without the authority of his client-principal and a third party benefits, must the third party give up the benefit or is the client bound? The cases do not deal directly with whether the allocation of authority is a separate issue from withdrawal of this third party benefit. While the cases analyze the problem from an "express-implied" authority perspective, they are in effect more consistent with a theory based on considerations of fairness and efficiency to the third parties. Id. at 54-55. A similar "fairness and efficiency" analysis is applied in attorney default cases where the attorney completely drops the ball and the client loses his right to pursue a claim. Id. at 61-62.

Spiegel comments further that while the Model Code of Professional Responsibility uses broader language (decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client" in Model Code of Professional Responsibility EC 7-7 (1980)) than the cases, it does not clearly define which decisions are meant to fall within those general categories. Id. at 65-67. See Martyn, supra note 195, at 331-32; Strauss, supra note 195, at 324-26.
informed consent through malpractice lawsuits. However, doctrinal or statutory changes in the malpractice area are unlikely to bring about a shift in the decision making authority within the lawyer-client relationship because of the difficult causation and damages requirements of malpractice cases. Clients (and their contingency fee paid lawyers) are unlikely to undergo the stresses of another lawsuit in order to vindicate the “dignitary right” to informed consent unless they can prove substantial damages.

A second means of enforcing this reallocation of authority is through changes in legal ethics. While the Model Rules of Professional Conduct may be an improvement over the Model Code of Professional Responsibility in this regard, clients must rely on an already overburdened (and lawyer-controlled) disciplinary system to see that such rules are enforced. Moreover, since clients do not directly benefit from the results of a disciplinary process, they have little incentive to use it.

Finally, proponents argue that changes in legal education could bring about reallocation of authority in lawyer-client decision making. Changes in the malpractice doctrine and ethical standards would then reinforce this idea. If an attitude of encouraging increased client decisionmaking was reflected in classes on professional responsibility, then a new generation of lawyers might show deference for their clients’ authority.

However, the limits on the ability of law schools to change the standards of practice may be evident from recent experiences with “zealous advocacy.” It seems ironic that the strengthening of Federal Rule of Civil Procedure 11 in 1983 to encourage courts to sanction

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201. Spiegel, supra note 194, at 139.
202. See Maute, supra note 180, at 1055-57, 1060-63, comparing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, EC 7-8 and DR 7-101 (1980) with MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.4 (1983)(The latter more clearly deals with issues of decisionmaking authority and require the lawyer to give the client sufficient information so he can participate in making decisions. However, the Rules do not mention informed consent.).
204. Under the new version of the rule, sanctions must be assessed against the lawyer and/or client for filing a pleading, motion, or paper that, after reasonable inquiry, is not well grounded in fact, is not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or is imposed for any improper purpose, such as harassment or delay. FED. R. CIV. P. 11. See, e.g., Balfour Guthrie, Inc. v. Hunter Marine Transp., Inc., 118 F.R.D. 66, 73 (M.D. Tenn. 1987). Former Rule 11 only required that lawyers act with “good faith,” a subjective standard, in representing their clients. Whittington v. Ohio River Co., 115 F.R.D. 201, 204 (E.D. Ky. 1987).

litigation abuses\textsuperscript{205} came after almost a decade of emphasis on teaching of ethics in law schools\textsuperscript{206} and the growth of clinical and skills courses.\textsuperscript{207} Apparently these changes in the law school curriculum were unsuccessful in teaching future lawyers more about their role in the lawyer-client relationship and the justice system. It is equally dubious that changes in legal education alone would be more successful in affecting the distribution of authority in the lawyer-client relationship.

None of the three alternative models of authority within the lawyer-client relationship effectively deals with the problems inherent in the agency model and the substance/procedure distinction. Reformulating agency into reciprocal agency or a joint venture in essence only offers a new rationale for the current approach. As important as the principle of informed consent could be for enhancing client autonomy and guiding lawyers' behavior, it does not offer the courts a basis for deciding disputes about decision making authority other than in malpractice actions.

V. A PROPOSAL FOR CHANGE

It is apparent that agency principles are increasingly inappropriate for understanding the distribution of authority within the lawyer-client relationship in a civil litigation context. Applying either the reciprocal agency or the joint venture model leads ultimately to the same substance/procedure division of authority\textsuperscript{208} with all of the in-
herent difficulties that have led courts to abandon or distort the agency theory. Yet, if courts are to discard the agency theory, they will have to find a new vehicle for determining when an attorney's decisions will bind his client.

One might propose that clients should be entitled to relief in all cases. If courts were to adopt an informed consent theory, a client could conceivably overturn any step taken by his lawyer. While this would protect the interests of the client in controlling his cause of action, it might do so at great expense to judicial efficiency and to the interests of opposing parties. In addition, such an approach would have a detrimental impact on the legal profession's ability to function. Lawyers would face the unhappy prospect of having their clients continually second guessing their work, or even worse, of being reduced to mere instruments of their client's bidding without any deference paid to their professional expertise.

Instead, it is proposed here that we approach the problem by candidly recognizing that resolution of decision making disputes requires a balancing of the competing interests at stake. The basic question to be resolved in such cases then becomes whether the goal of protecting the individual client is such that it outweighs the countervailing inte-

209. Other authors have likewise recognized that the application of agency theory results in harsh or inconsistent outcomes. See, e.g., Dismissal with Prejudice, supra note 176; Negligent Litigation, supra note 176.

210. See supra notes 194-205 and accompanying text.

211. While the authority cases do not often present questions of wrongful conduct, one critic has noted that the agency model, which largely ignores the lawyer's duties of candor to the justice system and fairness to third parties, has the potential of pushing lawyers towards illegal or wrongful conduct. The undivided client loyalty and confidentiality which the agency model fosters are thus questionable for they may lead to a lawyer's lying and deception. Burke, "Truth in Lawyering": An Essay on Lying and Deceit in the Practice of Law, 38 ARK. L. REV. 1, 3-4 (1984). "The autonomous client model really becomes a convenient excuse for lawyers to justify doing things for their clients that they presumably would not do for themselves. Whatever rights an autonomous client may have, he has no right to legal assistance in illegal or wrongful conduct." Id. at 5-6.
ABANDONING THE AGENCY MODEL

ests of other parties to the litigation and the public's interest in judicial efficiency. In weighing the client's interests, the court should consider the nature of the specific lawyer-client relationship, the sophistication of the individual client, the extent of the client's involvement in the challenged action, and the degree of prejudice to the client if he loses this dispute. In assessing the interests of other parties, the court should evaluate any prejudice they would suffer should the client overturn the decision, and determine whether that prejudice can be alleviated through cost-shifting or other devices. The interests to be considered under judicial efficiency include the ability of the court to sanction delinquent lawyers, and whether any harm has occurred to other litigants whose interests might be delayed.212

A. The Client's Interests

1. The Nature of the Lawyer-Client Relationship

Analyzing the actual lawyer-client relationship would replace agency theory's focus on presumptive areas of client and lawyer authority.213 Courts would examine the understanding of this lawyer and this client about the distribution of authority in their specific relationship. That relationship might reflect a traditional division of authority, where the lawyer assumes control of all procedural decisions,214 or one in which the client delegates even wider authority

212. Several courts have identified a series of factors to be considered when a complaint is dismissed for failure to prosecute. Dunbar v. Triangle Lumber and Supply Co., 816 F.2d 126, 128 (3d Cir. 1987)(dismissal for failure to prosecute is warranted only if the following factors are considered: the party's personal responsibility; prejudice to the adversary; history of dilatoriness; bad faith of party or lawyer; consideration of alternative sanctions; and meritoriousness of the party's claim or defense).

213. Abandoning this presumption might ameliorate the problem of "procedural fetishism" in which substantive issues are turned into procedural ones. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. REV. 29, 113. Once clients turn their problems over to lawyers, they lose control of the problem, and the lawyer's view of the problem predominates. A client's individual choices of ends and means to resolve the dispute are submerged in the justice system, denying them responsibility for what occurs. Id. at 115. Moreover since it is the lawyer who controls the access to the courts, he has great power over the unsophisticated client. Id. at 116.

214. What does a client want from a lawyer when he hires one to represent him in a lawsuit? One suggested answer is to do what the client cannot do for himself: to be rational and make wise decisions in a controversy; to comply with various procedural rules and understand substantive rules; and to communicate effectively in a courtroom setting. Saltzburg, Lawyers, Clients, and the Adversary System, 37 MERCER L. REV. 647, 661 (1986). A lawyer can be a zealous advocate within the bounds of law, but the client should be no better nor worse off than had s/he proceeded pro se. Id. at 662.

A lawyer can make moral choices to do what he wants. The system allows a lawyer to reject certain cases and clients, or to stop being a lawyer. Moreover, the
to the lawyer. If the lawyer-client relationship is actually denoted by broad client delegation to the lawyer, the less likely the client will be able to avoid a settlement agreement or avoid responsibility for his lawyer's procedural errors, since the client can then be deemed to have approved his lawyer's conduct.

On the other hand, the client and his attorney may have provided for something approaching informed consent either in their retainer agreement or through their evolving mutual dealings. If courts uphold a client's objections to his lawyer's actions when the latter has violated their mutual understanding, including matters of procedure, this would respect the ideal of informed consent and client consultation, stimulating greater client involvement. Moreover,

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215. See Smedley v. Temple Drilling Co., 782 F.2d 1357 (5th Cir. 1986) (client gave express authority to his claims adjustor and the lawyer the adjustor hired to settle cases without consulting with the client).

The agency model has been criticized for reinforcing paternalism in the lawyer-client relationship. Because lawyers have such wide authority over tactical matters, they are encouraged to think that they know best. Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 458. The author gives three practices that demonstrate that lawyers should make important decisions:

1. Chambers conferences customarily involve lawyers only.
2. Judges are notoriously hostile to pro se litigants.
3. Lawyers will not speak to another party if he is represented by counsel.

However, the author points out, this means/ends dichotomy (in which the lawyer is supposed to be paternalistic about means) misses the point because it assumes a dichotomy the client does not necessarily share. How the client gets to a certain result may be equally important to a client as the result itself. If the lawyer need not consult the client about the means, the lawyer will never know the significance of means to the client. Furthermore, professionals, by their training, tend to view all of their client's problems as technical and professional.

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216. See supra notes 193-205 and accompanying text.

217. One court, at least, noted that a client need not passively accept his lawyer's every recommendation by denying the lawyer's motion to withdraw over the client's objections because the client disagreed with his strategy decision to move for a continuance; the court also found that the lawyer-client relationship had not so deteriorated that they could not work together. Mekdeci ex rel Mekdeci v. Merrill Nat'l Laboratories, 711 F.2d 1510, 1521 (11th Cir. 1983).

218. Note that under the agency model, courts sometimes uphold lawyer's procedural decisions even where it violates the explicit agreement with the client; i.e., the presumptive areas of authority are sometimes conclusive. See supra notes 72-87 and accompanying text. This would not happen under the proposed model.

219. This altered lawyer-client relationship is similar to that proposed by critical legal scholars. Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1983). These authors argue that a lawyer should create a client who is capable of holding the lawyer accountable for what she does by endeavoring to create a relationship
lawyers would be encouraged to do the kind of counseling necessary to make informed consent functional and thereby reduce client dissatisfaction.

If the overall lawyer-client relationship is characterized by extensive client interaction, this fact would be significant should the client seek to escape an agreement or avoid the effects of his lawyer's procedural mishaps. The greater the client's general involvement in the decision making process, the more difficult it should be to void a settlement agreement or avoid responsibility for a lawyer's procedural errors. A client who maintains close involvement can be deemed to have approved of his lawyer's conduct.

2. The Sophistication of the Client

The courts should also take into account the sophistication of the client, and particularly his knowledge of and experience with the litigation process. A large institutional client is more likely than an individual client to be actively involved in legal actions and decisions. An institutional client is often aware of the nature of the legal system and has the resources to monitor the performance of counsel. An institution's attorney is consequently motivated to inform the client of developments in order to keep the client satisfied and to further the of respect and equality with his client; he should endeavor to demystify the symbolic authority of the state and reshape legal conflicts to show the political and economic foundations of these legal disputes. Id. at 376. The lawyer must be more closely involved with the client's case, having together set a strategic and political agenda. Id. at 379. This affects small cases as well as traditionally political ones. In the former the lawyer can see the common thread in what are otherwise small cases to make them political statements. Id. at 397-98.

See also Simon, Visions of Practice in Legal Thought, 36 Stan. L. Rev. 469 (1984). The author rejects the fiction that the lawyer is always accountable to the client. Rather the client's goals are indeterminate and those goals are affected by the system in which his interests are played out. This notion of lawyering involves both personal responsibility by the lawyer and political commitment to change the system and the actors in it. Id. at 488-89.

220. How lawyers and clients interact may depend greatly on who is the client. Those who represent individuals rather than corporate or large organizational clients are likely to have greater authority and freedom of action within the lawyer-client relationship. J. Heinz & E. Laumann, Chicago Lawyers: The Social Structure of the Bar 323 (1982). Organizational clients, in contrast to individuals, have the resources to supervise attorneys and thereby to control the positions that attorneys take. Id. at 322. Moreover, firms that represent large clients with substantial market power may be financially dependent on, and therefore deferential to, one client. Id. at 338.

221. Some courts have already considered the sophistication of the client as a factor in deciding whether to enforce settlement agreements. In Mathewson Corp. v. Allied Marine Indus. Inc., 827 F.2d 850, 854 (1st Cir. 1987), the court stated, "[w]e think it highly significant in this respect that these negotiations transpired between sophisticated business entities represented by seasoned counsel."
lawyer's own interest in a continuing relationship.\textsuperscript{222} Moreover, because the lawyer and the institutional client are more likely to share common values, conflict is less frequent, and the lawyer is more inclined to carefully respect the client's wishes.\textsuperscript{223}

Expressed in traditional agency terms, when a lawyer representing an institutional client takes action, he is likely to have express authority from the client.\textsuperscript{224} Since it is probable that the institutional client carefully selects its lawyer, it is fair to bind it to the decisions the attorney later makes. Moreover this type of client is virtually certain to understand that its instructions to its lawyer imply that counsel has authority to act on his behalf.

In contrast, an individual client without a continuing relationship with a particular lawyer and who lacks detailed knowledge of the legal system is far less likely to consciously delegate authority to his lawyer.\textsuperscript{225} Communication between them is probably minimal, is not al-

\textsuperscript{222} For example, one analysis of large firm corporate practice rejected the theory that diversification of law firm client bases freed individual lawyers from dependence on particular clients. In truth, which lawyer controlled a client was important to an individual lawyer's prestige and authority within the firm. Nelson, Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm, 37 STAN. L. REV. 503, 528 (1985). Thus, lawyers spent a substantial proportion of their time on the client for whom they worked the most, averaging more than one-third in the sample as a whole. \textit{Id.} at 529.

Large firms today are dependent on in-house lawyers throwing work their way, diminishing the close relationship between a corporation and one firm. J. HEINZ & E. LAUMANN, supra note 220, at 367. Since corporations also tend to spread out the work among many firms, this makes each firm insecure. \textit{Id.} at 369. To accommodate their clients, firms have opened branches to be near clients, \textit{Id.} at 369-70, or avoided taking cases or clients that offend major clients. \textit{Id.} at 371.

\textsuperscript{223} Litigators in large firms were less likely to question their client's demands or refuse work because it was contrary to their personal values. Nelson, \textit{supra} note 222, at 534. These lawyers saw most of their tasks as technical; their values were similar to their clients' and they transformed moral issues into procedural ones. \textit{Id.} at 537-38. Given the limited scope of the lawyer's discretion, it is unlikely that disputes about authority will arise in this kind of representation.

While corporate lawyers may be in the position to influence clients' decisions, the question remains whether they are willing to confront their clients over differing values, or whether they have different values at all. Heinz, The Power of Lawyers, 17 GA. L. REV. 891, 900-01 (1983). \textit{See also} Macaulay, Lawyers and Consumer Protection Laws, 14 LAW & SOC'Y REV. 115 (1979), in which the author makes a similar point that the lawyers who represent businesses tend to share values with their clients and have greater respect for their clients than do the lawyers who represent "deadbeat" consumers.

\textsuperscript{224} The institutional client is the one described by the court in \textit{Link v. Wabash R.R.}, 370 U.S. 626, 633-34 (1962). \textit{See supra} notes 93-94 and accompanying text.

\textsuperscript{225} The little that is known about the lawyer-client relationship from empirical studies undermines the assumption implicit in \textit{Link v. Wabash}, 370 U.S. 626 (1952), that the attorney/agent is controlled by the client/principal and consults with and respects the client's wishes in the representation, at least in terms of lawyers who represent individuals in such matters as personal injury, divorce, and consumer affairs. One study of personal injury clients and their attorneys summa-
rized its findings as follows: "[c]lients are forced to delegate decision making responsibility to attorneys who then refuse to accept this responsibility when performance breaks down." D. ROSENTHAL, LAWYERS AND CLIENTS: WHO'S IN CHARGE 144 (1974).

This study also noted that lay clients were handicapped in getting and evaluating information about their claims by their inexperience and by their dependence upon their lawyer's candor and directness. Id. at 50. The Link Court rationalized holding clients responsible for their lawyers' misdeeds because clients exercised free choice in choosing their lawyers. The Rosenthal study indicated that the inexperience of personal injury plaintiffs was reflected in the rather haphazard system they used to choose a lawyer. Most were chosen through a single referral from a lawyer, friend or relative. Id. at 129.

226. In reality, mistrust is an ever-present aspect of the client-lawyer relationship. Burt, Conflict and Trust Between Attorney and Client, 69 GEO. L.J. 1015 (1981). First, the lawyer might tell the client that he is unlikely to prevail and the lawyer is even sympathetic to the law as it is written (client loses). Id. at 1019. Moreover both lawyer and client might not want to acknowledge this mistrust because client will fear that the lawyer will abandon him and lawyers only want to see happy clients. Id. at 1020. Even when the lawyer gives the most favorable prognosis, some clients will still find conflict intolerable. They want only to win, and to win at every turn. If this aggressive attitude is not revealed to the lawyer, they may resent anyone, including their attorney, who fails to satisfy their wishes at once. Id.

Moreover, legal problems in criminal or domestic relations areas involve great emotional distress for the clients. Even in financial controversies, the lawyers make money off their clients' troubles, leading to increased suspicion. The more difficult the case (i.e., it is not clear that the client will prevail) the greater the fees are likely to be in relation to the good results achieved for the client. The client may feel that the lawyer is the one making the most money from his problems. Id. at 1021.

Clients are suspicious of lawyers because the adversary is a person not a disease as in medicine. Thus, if the lawyer does not easily vanquish his opponent, the client may suspect that the lawyer has hidden sympathies for the adversary. Id. at 1021. "Conflict and potential conflict pervade attorney-client relations, and prompt an unspoken wariness that inevitably interferes with the profession's canonical aspirations toward a relationship of undiluted client trust and attorney loyalty." Id. at 1022.

227. In handling settlement negotiations the personal injury lawyers "cooled the client out" or prepared the client to accept less than he anticipated and persuaded him that it was in his best interest to do so. D. ROSENTHAL, supra note 225, at 110. This was accomplished by inaccurately reporting settlement negotiations to prepare the client to take less. That is, the lawyer, having received an offer of $5,000, told the client that it was $3,500. Then the lawyer stated that he would try to get $4,500. When he thereafter reported the $5,000 offer, the client was thrilled and accepted. Id. at 111. Another way that lawyers manipulated clients into settlements was to make the case seem worse than it was. Id. Finally, few of these lawyers discussed the details of the suit with the client, even though they recognized that they had a duty to explain the details of a case to the client. Id. at 113.

A similar kind of lawyer-client relationship was reported in a study of lawyers who represent consumers in consumer claims. Rather than knowing the particular law, lawyers applied their own concepts of fairness. Macaulay, supra note 223, at 117. Lawyers often mediated the situation by adjusting the client's perception of the problem based on what the merchant said and convinced the client to take
individual is often unable to select his lawyer with the same degree of care as the institutional client.\(^2\) Possibly the client does not understand the import of his communication with counsel or is ignorant of his responsibility to control his lawyer.\(^2\) When determining whether to hold a client responsible for a lawyer's procedural errors, the court should thus consider it plausible that the individual client did not know of the lawyer's actions. If the lawyer in fact presents the client with his options in a clear manner, and thereafter gains the client's approval to enter into a settlement, then the lawyer's actions normally should be upheld. Similarly, before a court concludes that the client ratified an agreement entered into by his lawyer, it should ascertain that the client was aware of all his options, including that of refusing to accept the agreement. Where the evidence is questionable, ratification should not be presumed.

Allowing the unsophisticated individual a greater opportunity to overturn his lawyer's decisions will enhance the client's power by en-

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\(^2\) Courts have considered that some individual clients may not be able to make a wise choice of counsel. In refusing to heap on the client the financial penalties caused by his lawyer's misconduct or incompetence, the court in Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 194, 486 A.2d 920, 922 (1985), noted that not all individuals are able to separate the good lawyers from the bad.

\(^2\) In the divorce context, a study of how lawyers and clients reached decisions also indicated that clients were not in charge of the process. Sarat & Festiner, Law and Strategy in the Divorce Lawyer's Office, 20 LAW & SOC'Y REV. 93, 128 (1986). The lawyer managed the client towards negotiation, rather than protecting the client's views or furthering the client's interests. Lawyers gave a personal view of the law in response to client's questions rather than explaining the law. This gave the client a view of the system which emphasized personalities and uncertainty. Thus, the client's perception of the process changed; she became increasingly dependent on her lawyer; the client had less control over her life or the system; and finally, the rational (economic) issues were emphasized over emotional (the client's sense of fairness or justice) ones. \(\text{id.}\) at 131-32.

The lawyer described the negotiation process as one where the lawyer has primacy: the client's role was limited to giving initial instructions and ratifying the agreement after it was done. If the lawyers were unable to sell their deal to their clients, then the clients' only alternative was trial. Moreover, if the lawyer was satisfied with the agreement and the client rejected it, then the lawyer suggested that the client should seek therapy. \(\text{id.}\) at 110.

In fixing the goals of a negotiation, the lawyer attempted to focus the client's attention on the financial issues he thought were important rather than vindicate the client's sense of injustice. \(\text{id.}\) at 112. Surprisingly, the lawyer did not encourage the client to be contentious and fight, rather he endorsed settlement and negotiation, even if the client was ambivalent towards negotiation and in part interpreted negotiation as capitulation. \(\text{id.}\) at 113-15. Ultimately the client gave the lawyer authority to settle and agreed to the goals. However, the process was distorted in favor of the lawyer's view of negotiation, in terms of process, issues, and goals, instead of the client's.
ABANDONING THE AGENCY MODEL

Courting lawyers to treat him with the same respect that more sophisticated litigants typically receive. Accepting the differences that exist among clients reflects the reality that the lawyer-client relationship, especially in "personal plight" matters, is not one of undiluted trust and loyalty. Courts should be understandably hesitant to fix the penalty of a lawyer's unauthorized actions on clients who were in no sense the responsible party.

Recognizing that individual clients are less likely to be aware of their lawyers' actions will make it easier to hold lawyers accountable. Paternalistic lawyers and those who are overly concerned with their own personal interests will be reminded that they owe a legal and ethical duty to listen to this kind of client. Lawyers may be forced to mend their ways to avoid the embarrassment of clients repeatedly challenging their actions.

3. The Client's Involvement in the Challenged Action

Under the agency model, apparent authority may bind a client to a settlement agreement if the client's behavior gives third parties a good faith belief that the lawyer has authority to act. Courts should continue to consider whether a client's conduct may have led his opponent to believe that his lawyer acted with the client's approval. For

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230. This term was used to refer to lawyers who typically handle personal injury or criminal matters in a study of the structure of the Chicago Bar. J. HEINZ & E. LAUMANN, supra note 220, at 378. These lawyers were a subgroup of the personal sector lawyers, those who represent individuals or small businesses. Id.

231. A study showed that the sources of a lawyer's business also influences how deferential a lawyer will be to the client. Kritzer, The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and a Field Study, 1984 AM. B. FOUND. RES. J. 409, 423-24. On-going professional and personal relationships with corporate clients may limit the lawyer's autonomy.

Personal plight sector lawyers, in contrast, are answerable to people other than clients: court clerks and bailiffs, insurance claims adjustors, and brokers among others. These individuals are important sources of referrals and also affect the lawyer's ability to practice efficiently. Since the practice depends on volume, the lawyer may be more willing to cultivate and accommodate relationships with these people rather than a client whom he may never see again. J. HEINZ & E. LAUMANN, supra note 220, at 364. He may be in a stronger position to define the client's needs, modify his goals, and determine how those needs will be met. Personal plight clients may have less clout because the lawyer is working on a contingency fee or the fee is being paid by a third party (insurance). Kritzer, supra, at 413.

232. Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 195, 486 A.2d 920, 923 (1985)(clients repeatedly inquired about the status of the case and they had no reason to know or suspect that their attorney was not performing his duties).

233. This would provide the client with recourse other than malpractice or discipline. The plaintiff's burden in malpractice actions is severe. See R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 650, at 796-99, § 656, at 810-11 (2d ed. 1981). Discipline may correct errant lawyer behavior, but does nothing for the client's substantive case.
instance, a client may create a situation where it appears that the lawyer is negotiating with authority and then seek to renege on the agreement because the client has second thoughts or thinks he might be able to achieve a better result.

Under the agency model, a client is usually deemed bound by his lawyer's procedural acts and thus bears the brunt of an attorney's mistakes. Under the proposed model, instead of presuming that clients are bound, courts should consider to what extent the client in fact participated in, or is responsible for, the challenged decision or action. If, for example, the lawyer engaged in dilatory or negligent behavior over an extended period of time and the client was aware of this behavior but took no steps to correct it, then the client should not be permitted to set aside a default or other penalty imposed against him. Similarly, if the client was a contributory cause for his lawyer's misconduct, for example, failure to comply with discovery brought about by a lack of cooperation with counsel, the client should not escape the consequences of his errors.

The extent to which a client may have contributed to the challenged action is a factor similar to the equitable doctrine of "unclean hands." It would allow the courts to deny relief to a client whose own behavior contributed to the problem for which he now asks the court's assistance. In addition, a court could deny relief to a client who repeatedly brings motions to be relieved of his lawyer's acts if the client made no efforts to correct his lawyer's behavior.

4. The Degree of Prejudice to the Client

The extent to which the lawyer's conduct will harm the client is another factor which courts should consider in determining whether or not to relieve a client of his attorney's actions. A client should not be totally deprived of his day in court or robbed of a vital defense, simply because strict application of agency theory would uphold the action of an unscrupulous or incompetent lawyer. Rather than punish an innocent client, the court should be willing to set aside the challenged action, especially if this can be done with minimal harm to the interests of other parties.

The court must thus evaluate the significance of the lawyer's action. The degree of prejudice to the client may vary from a total loss of a claim or defense, to merely being unable to call a particular witness at trial. A client need not have the power to challenge every tactical decision that his lawyer makes in the course of representation.

Between these extremes are a variety of lawyer mistakes which have different effects on the client. For example, the failure to make discovery may lead to certain critical issues being deemed resolved against the client or to the denial of certain defenses which may be fatal to the client's case. The court may deem that it has personal ju-
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risdiction over a defendant if his lawyer failed to file a motion to quash service of process before filing an answer. This may force the defendant to litigate in an unfavorable jurisdiction, but it does not equate with being denied a defense in toto. If the court upholds a settlement agreement over the client's protests, the result may not be as satisfactory as the client had expected, but, again, it will not ordinarily represent a complete loss. The more compelling the case for the client, the more compelling the case for granting relief.

B. The Effect on the Other Parties to the Litigation

The foregoing factors seek to determine the strength of the client's interest in being relieved of the consequences of his lawyer's conduct. Once the court has assessed these, it should next consider whether granting the client's request will adversely affect other parties and whether means exist for alleviating any such prejudice. Under the agency model some courts have attempted to take these concerns into account through the application of estoppel principles. These considerations would now assume significance in all cases where a client urges that he should not be bound by the actions of counsel.

If the matter has not already been tried, then merely requiring a third party to submit to an initial adjudication on the merits is not unfairly burdensome. That party's economic cost or psychological stress is the same as would have been experienced had the opposing counsel not acted improperly. The third party has no legitimate right to benefit from his opponent's mistake, absent a greater showing of prejudice.

On the other hand, if the third party must retry a matter already litigated and which he legitimately thought was disposed of, then his prejudice is more weighty. There comes a time when he should know that a matter is over. Litigation is stressful, expensive, and inefficient and should not be unnecessarily prolonged or duplicated. Moreover, if the third party suffers some additional prejudice, such as lost tactical surprise or the loss of witnesses or evidence, then his interests have an even stronger claim to being accommodated.

Where relieving a client of his attorney's mistake could cause serious harm to third parties, courts should explore means of reducing that prejudice before concluding that the client is bound by his lawyer's conduct. This is especially true where the prejudice to a client would be severe, as in the case of dismissal. Perhaps, due to the client's delay, certain issues or claims could be excluded if the opponent's evidence is lost or his witnesses have become unavailable.


235. See Negligent Litigation, supra note 176, at 1243.
possibility is that sanctions could be imposed against the lawyer and/or the client for improper behavior. The extra attorney's fees and costs that the third party will incur if a dismissed action is revived might be shifted to the opposing lawyer or his client if they subsequently lose on the merits. Likewise, if the client is permitted to reopen a settled matter and recovers less than the settlement value at trial, then he could be required to bear the other side's added fees and costs. It is important to note that fee shifting practices must also be tempered. Clients should not be unduly penalized for pursuing cases or for having unknowingly chosen an incompetent lawyer.

C. Effect on the Judicial Process

Along with prejudice to other parties, courts should consider the extent to which relieving a client of his lawyer's actions might adversely affect the judicial system. This inquiry involves several distinct concerns including the danger of encouraging aberrant behavior by both lawyers and clients and fairness to other litigants whose actions may be delayed if this client's case is allowed to proceed.

The first concern is that if courts too readily relieve lawyers and clients of the effects of improper actions, shoddy practice may be encouraged. Yet, using the agency theory to simply impose liability on the client does not discourage lawyers' delinquent behavior because the wrong person is forced to bear the cost. Clients often may not be aware of or responsible for their lawyers' behavior. Therefore courts should attempt to locate and sanction the person responsible for the abuse or delay through devices such as Federal Rule of Civil Procedure 11, rather than terminate the action or otherwise penalize the client.

The second concern is that reopening actions will clog the courts and deny other litigants their opportunity to compete for scarce judicial resources. However, if clients are denied relief at the trial level, they will often be forced to pursue a malpractice remedy or appeal to a higher court to reinstate the action. These remedies do not effect any reduction in civil litigation, but instead merely shift cases to a higher court or a different arena. Moreover, the difficulties a client faces in prevailing in a malpractice action may allow the lawyer to escape with impunity.

In summary, resolving decisionmaking disputes should involve the weighing of the client's interests versus those of other parties to the litigation and the public's interest in an efficient judicial system. This will mean abandoning the litmus test of agency theory in favor of a

236. Id. at 1241.
more flexible approach which will produce less tortured decisions and in many cases more equitable results.

VI. APPLICATION OF THE SUGGESTED MODEL

In the following discussion the proposed balancing model is applied to five cases in which clients attempted to set aside settlement agreements. In one, the result is the same as that reached under the agency model, but the reasoning is more straightforward. In two, the outcomes are different, but the model justifies the results. And in the final two, the model indicates the kinds of inquiries courts should make to resolve disputes.

A. Terrain Enterprises, Inc. v. Western Casualty and Surety Co. 238

In Terrain, a settlement agreement was reached when the plaintiff's lawyer's $65,000 offer was accepted by the defendant's lawyer. The plaintiff then disavowed the settlement on the grounds that the offer was unauthorized. When the case was tried, the plaintiff recovered over $1,000,000 in compensatory and punitive damages.239 The court of appeals overruled the verdict, concluding that the plaintiff was bound by the settlement agreement. It applied the agency model and found that the plaintiff's lawyer had apparent authority to make the offer based on the fact that the plaintiff hired the lawyer and the lawyer attended and took depositions, engaged in other discovery, corresponded with counsel for the defendant, and participated in all pre-trial conferences and hearings.240

If this case were analyzed under the suggested model, the court would have expressly considered facts other than those which it interpreted to prove apparent authority. First, it should have examined the nature of the relationship between the plaintiff and its lawyer. The court of appeals disregarded the trial court's finding that the plaintiff and its lawyer had a misunderstanding regarding the lawyer's authority to settle. If the court knew more about their interaction, the court could have assessed its significance. For example, if the settlement were enforced, would that defeat the client's legitimate expectation that it would retain authority over the handling of this case.

In addition, the court could have considered the sophistication of the client, a factor which it did not even mention. The plaintiff was a corporate land developer involved in major litigation about a subdivision. The court should have inquired as to whether it was likely that such a plaintiff would have been unaware of an offer to settle put forth by its lawyer.

238. 774 F.2d 1320 (5th Cir. 1985), cert. denied, 475 U.S. 1121 (1985).
239. Id. at 1321.
240. Id. at 1322.
The court of appeals found that the plaintiff was involved in the disputed settlement because it had hired a lawyer who then represented it in various stages of the litigation. Yet the facts indicate that the plaintiff did nothing more than have its lawyer perform ordinary tasks in the course of civil litigation.\textsuperscript{241} No facts demonstrate that the client played an unusual role in the settlement process.

The possible prejudice to plaintiff if the settlement were upheld was also unaddressed by the court. The plaintiff lost the opportunity to collect $283,000 in compensatory damages, even if the punitive damages were disallowed on appeal. On the other hand, it would still recover $65,000 under the settlement, and therefore would not be denied all recovery.

In assessing the countervailing interests, the court should have considered that the defendant would suffer serious prejudice if the $1,000,000 trial judgment were upheld. Even if the court eliminated what it thought were the improper punitive damages,\textsuperscript{242} the compensatory damages were still several times the plaintiff's $50,000 actual damages under the contract.\textsuperscript{243}

On balance, the decisive factors here would appear to be the presumably sophisticated plaintiff and the severe prejudice that the defendant would otherwise suffer were the settlement agreement set aside. The result in Terrain was thus a correct one. However, had the court analyzed the case in terms of the proposed model, rather than relying on rather flimsy evidence of apparent authority, its decision would have been less tortured and more easily understood.

B. \textit{Worthy v. McKesson Corp.}\textsuperscript{244}

In \textit{Worthy}, the plaintiff agreed to a $15,000 settlement of his employment discrimination claim negotiated and explained to him by his lawyers. A few days later, the plaintiff spoke to another lawyer who advised him not to settle the case. Over the client's objection that he

\textsuperscript{241} But cf. Fennell v. TLB Kent Co., 865 F.2d 498, 502 (2d Cir. 1989)(the court rejected a settlement even though the plaintiff in this wrongful discharge action knew that a settlement was being discussed; he did not tell his lawyer to stop discussing settlement; he would have taken more money ($50,000) than the $10,000 his lawyer settled for; and he did not tell opposing counsel that his lawyer's authority was limited); Edwards v. Born, Inc., 792 F.2d 387, 390 (3d Cir. 1986)(the following four factors were insufficient to prove that the plaintiff's lawyer had apparent authority to settle at a pre-trial conference: 1) the same lawyer had represented plaintiffs throughout the suit; 2) the lawyer had transmitted all communications between the defendants and the plaintiffs; 3) the pretrial order required the lawyer to appear with the client or have authority to settle; and 4) the client had allowed the lawyer to select the examining physician).

\textsuperscript{242} Terrain Enterprises, Inc. v. Western Casualty & Surety Co., 774 F.2d 1320, 1322 n.1 (5th Cir. 1985).

\textsuperscript{243} Id. at 1321.

\textsuperscript{244} 756 F.2d 1370 (8th Cir. 1985).
had not intended to relinquish his wrongful termination claims, the court enforced the agreement, ruling that the plaintiff could not change his mind simply because he was dissatisfied with the agreement, and that his lawyer, who had represented him throughout the litigation and who consulted with him about the settlement, had full authority to settle.\textsuperscript{245}

In traditional agency terms, the result in \textit{Worthy} is readily explained: the plaintiff expressly authorized his lawyer to accept the defendant's offer. However, under the suggested model, the result might have been different. The nature of this particular lawyer-client relationship is unclear. While it did entail discussions between the lawyer and the client about both the settlement offer and the effect of a settlement, the plaintiff still felt an immediate need to consult another attorney for a "second opinion."\textsuperscript{246} The court did not delve any further into their actual understanding and instead accepted the lawyer's statements that the client understood the effect of the settlement agreement.

The sophistication of the client was another unexplored factor. The plaintiff was a field sales manager who brought an employment discrimination claim against his employer. From this brief information, we do not know whether the plaintiff was experienced with the legal system, or a novice who did not understand the binding nature of settlement agreements. Some courts have treated employment discrimination plaintiffs with special deference because they serve an important role as a "private attorney general" in enforcing the policies of Title VII.\textsuperscript{247} The plaintiff in \textit{Worthy} received no such consideration.

Another factor relevant under the proposed model is that the client was involved in bringing about the action he later challenged. He was present at his deposition when settlement was first discussed; he authorized his lawyer to make a demand of $26,000; and, at least according to his lawyers, he accepted the defendant's $15,000 counteroffer.\textsuperscript{248}

The degree of prejudice to the plaintiff from upholding the settlement is unclear. On the one hand, he would forfeit his right to a trial on the merits. The facts do not indicate what the second lawyer's opinion of the case was. The plaintiff's first lawyer may have settled too cheaply. On the other hand, the $15,000 settlement compares fa-

\textsuperscript{245} Id. at 1372-73.
\textsuperscript{246} Id. at 1372.
\textsuperscript{247} Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981). After the plaintiff's lawyer negotiated an agreement for $750 and both attorneys signed a proposed consent order, the court upheld the plaintiff's right to reject the settlement and return the check. The court also noted that such plaintiffs are treated as "sort of wards of the court" and that waivers of their cause of action should be carefully examined. Id. at 252-53.
\textsuperscript{248} Worthy v. McKesson Corp., 756 F.2d 1370, 1372 (8th Cir. 1985).
favorably with the $26,000 the plaintiff was willing to accept. Thus, his recovery under the settlement at least approximated his own valuation of his case.

In terms of countervailing interests, the court never identified the prejudice to the defendant if the plaintiff were allowed to reopen the matter. The plaintiff waited only six days to reject the purported settlement. Obviously in that short period of time, the defendant could suffer little harm to its case. Nor would relieving the plaintiff of his lawyer's action harm judicial efficiency. The matter had never been tried. Thus, the court would not have been forced to rehear a matter it had already decided, and other litigants would not therefore suffer undue delay.

In sum, if the court had followed the analysis proposed here, it is entirely possible that the plaintiff would have been granted relief. Neither the defendant nor the courts would suffer any harm strong enough to outweigh the plaintiff's interests in having his case heard on the merits and in protecting his right to make a fully informed decision about the disposition of his claim. If the court believed that the client had in fact contributed to the challenged action, it could temper relief with a fee shifting provision. For example, the plaintiff might be required to pay the defendant's cost in fighting the settlement motion, or, if the plaintiff did not achieve a more favorable result at trial, he could be compelled to bear all or part of the defendant's fees and costs for trial.

C. *Wong v. Bailey* 249

In *Wong*, a personal injury suit, the court enforced an oral settlement with the insurer of the driver and owner of the car which struck the auto in which the plaintiff was a passenger. Later, realizing that he had failed to specifically preserve the plaintiff's rights against the driver of the car in which she was riding, the plaintiff's lawyer refused to sign a written agreement which contained general release language. The court ruled, however, that under Georgia law the attorney's oral consent to the settlement without an objection to a general release was binding on the client. 250

The result in *Wong* is explained by the court's application of Georgia law under which a lawyer's assent binds his client to a settlement. 251 Moreover, the court pointed out that the lawyer had failed to realize the need for the special language until after he had orally agreed to the settlement; that this was a matter within the lawyer's domain of authority; and that if he had failed to protect his client's

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249. 752 F.2d 619 (11th Cir. 1985).
250. Id. at 621.
251. See supra notes 157-58 and accompanying text.
claim, then the plaintiff could sue him for malpractice.\textsuperscript{252}

Not only is this result inconsistent with the traditional agency model, it also would not stand under the model proposed here. The conclusive presumption that a lawyer's assent to an agreement is automatically binding on his client completely undermines the interest of the client — sophisticated or unsophisticated — in making informed decisions about the management of her case. In addition, in this case there was no evidence that the plaintiff had in any way contributed to the challenged action; the mistake was entirely the lawyer's. The prejudice to the plaintiff is obvious, for she is barred from pursuing any claim against the driver.

The countervailing harm to the defendant was minimal. The plaintiff's lawyer objected to the general release within two weeks of receiving it, too short a period for the defense to have been harmed.\textsuperscript{253} Moreover, nothing in the opinion explains why the defendant's insurance company refused to substitute a limited release in place of the general release. Possibly the same company was the insurer of the other potential defendant, and by insisting on a general release it would avoid paying under that policy. Yet, the court never addressed the prejudice that either the driver or his insurer would suffer if the plaintiff were granted relief.

The only plausible interest to be served by enforcing this agreement is that of the public in an efficient judicial system. If a lawyer's assent to a settlement agreement is regularly upheld, the courts will be able to dispose of litigation more easily. However, in this case that interest is ephemeral because, as even the court acknowledges, the client no doubt will seek relief against her lawyer in a malpractice lawsuit. Thus, applying the suggested model in this case demonstrates that the Georgia presumption, while no doubt convenient for the courts, overrides other far more compelling interests.

D. \textit{Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.}\textsuperscript{254}

In \textit{Greater Kansas City}, the court held that two individual defendants were entitled to a hearing to determine whether their lawyer had authority to enter into a pre-trial agreement making them personal guarantors if the defendant corporations did not honor an agreement settling a labor pension fund dispute.\textsuperscript{255} The individuals asserted that their lawyer had not explained to them the significance of personal guarantees and had failed to obtain their express consent to the agree-

\begin{itemize}
  \item \textsuperscript{252.} Wong v. Bailey, 752 F.2d 619, 621 (11th Cir. 1985).
  \item \textsuperscript{253.} \textit{Id.} at 620.
  \item \textsuperscript{254.} 829 F.2d 644 (8th Cir. 1987).
  \item \textsuperscript{255.} \textit{Id.} at 645-46.
\end{itemize}
The lawyer agreed that he had not fully explained the legal significance of the personal guarantee. If, in the hearing on remand, the court followed the proposed model, it would consider whether the lawyer failed to live up to his responsibilities within the lawyer-client relationship by not explaining the agreement to his clients. If that was the case, then the client's consent was tainted. However, these clients were sophisticated businessmen and a personal guarantee is a common business transaction. Therefore, it seems rather unlikely that they did not understand its significance or that their lawyer would have settled a matter exposing them to a $41,000 liability without consulting them.

The court on remand should also consider whether the clients contributed to the challenged action by not being present when the settlement was read into the record. The court should also evaluate the prejudice to the clients created by upholding the settlement. The harm will vary inversely with the financial condition of the defendant corporations. In addition the court should determine whether settlement would force the clients to forfeit defenses to the underlying claim as well.

After evaluating the clients' interests, the court should consider any countervailing interests of the plaintiffs. Here, because the matter was settled before there had been a trial on the merits, granting relief would not unduly prolong this litigation. However, the plaintiffs were four union trust funds seeking collection of unpaid fringe benefit contributions, and the prejudice to the union membership from unpaid contributions could be great depending on the liquidity of the funds. The court should consider whether or not the funds have sufficient money to pay current pensions or other benefits. In this case third parties may have important interests at stake.

Finally, the court should examine the effect on judicial efficiency if clients are allowed to avoid the effects of their lawyer's shoddy practices. Rather than completely deny the clients their defense, this may be an appropriate case for sanctions against both the lawyer and his clients: the lawyer for his admitted failure to adequately explain the agreement to his clients and the clients for not attending the hearing at which the stipulated judgment was read into the record.

Without further facts the result of this analysis is uncertain. However, the clients would have to overcome the indications that their own inattention to this matter was a contributing cause of their lawyer's conduct. If the court did decide to set aside the settlement

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256. Id. at 646.
257. Id. at 645 n.1.
258. The lawyer appeared before the court, read the settlement into the record, and represented that his clients were willing to settle the case on those terms. Id. at 645.
agreement, at a minimum the court should sanction the lawyer and his clients for forcing their opponents and the judicial system to deal with a problem that could have been avoided.

E. In re Marriage of Helsel

In Helsel, the appellate court in a dissolution modification action ruled that a husband’s attorney lacked the authority, in his client’s absence, to enter into a courthouse stipulation to the extent that it resolved certain contested issues that were “central to the controversy.” If, on remand, the trial court determined that these issues were not central, then the stipulation was to be enforced against the client even though it was unauthorized. In the latter case, the client’s only recourse would be to institute malpractice or disciplinary proceedings against his lawyer.

This decision added a new level of complexity to the substance/procedure analysis where courts are dealing with partial stipulations. Before ever reaching the issue of authority, the court must first determine the importance of the agreement; that is, whether it is purely procedural, purely substantive (e.g., involves a “substantial” right, or a total settlement of the case), or somewhere in the middle, (e.g., a substantial resolution of the dispute, or merely the “winnowing of the issues” in the context of settlement). To divide the middle group, the court suggested the application of two factors: first, how the stipulation compares to the result that the client urges is justified by the facts; and second, the economic value of the stipulation in both comparative and absolute terms. If it is determined that the stipulation was substantive, then the trial court must decide if the lawyer had express, apparent or implied authority to settle.

If a court were to decide this dispute under the model proposed here, it would proceed in a more straightforward fashion, although it would still take the client’s interests into consideration. First, the court would consider the nature of the lawyer-client relationship, rather than focus on the events of the one particular day when the client was absent from court. The court appearance might have been the culmination of a series of meetings and negotiations in which the parties and their lawyers had attempted to work out a modification of

260. Id. at 339, 243 Cal. Rptr. at 661.
261. Id. at 338, 243 Cal. Rptr. at 661.
262. In fact, on remand the trial judge did not follow the appellate court’s directions, ruling that the client had approved the stipulation but had subsequently changed his mind. Telephone interview with Richard D. Ring, attorney for petitioner/wife (June, 1989).
264. Id. at 339-40, 243 Cal. Rptr. at 661-62.
265. Id. at 340, 243 Cal. Rptr. at 662.
the judgment. If so, the lawyer and the client may have decided on the allocation of authority, either over their retainer agreement or in the course of the representation. This would shed some light on the client's expectations when his lawyer then negotiated in his absence.

The level of this client's sophistication would tend to indicate that he should be bound by the agreement. He was a doctor. Moreover, the modification proceeding took place some thirteen years after the original dissolution judgment was entered. Therefore, it is likely that this client was quite familiar with and understood the legal system. He is probably not the type of client who needs special protection from paternalistic lawyers.

In addition, the client may have contributed to the challenged action. As the trial judge noted, he voluntarily absented himself from court, though the reason for his absence is unclear. In addition his lawyer spoke with him on the telephone before the proceeding and the lawyer told the court that his client had agreed to the oral stipulation. The client may be able to show that his lawyer misunderstood him or violated their understanding about decision making authority. On the other hand, he may have indicated to his lawyer that he approved the agreement.

The prejudice to the client if the agreement were enforced can be determined from its terms. The stipulation increased the husband's child support obligation from $200 to $500 per month, determined the distribution of $15,000 held in trust under the dissolution, and ordered payment of $750 as the wife's attorney's fees. It left unresolved the amount of accrued child support he owed and other unspecified issues. The stipulated terms, while significant, are not tantamount to a termination of his entire claim. For instance, he may be able to seek a modification of the child support order. At the same time, an increase of $300 per month in support and the distribution of $15,000 in funds are not insignificant.

On the other side of the balance, the court never explicitly considered the interests of the wife. It noted that the client should pay the wife's attorneys's fees incurred in negotiating the stipulation and in opposing the husband's motion. However, it failed to consider whether the wife had the financial ability to continue to pursue post judgment relief thirteen years after the original dissolution decree. Nor does awarding her attorney's fees also compensate for the emotional strain of the continued litigation.

Finally, the trial court expressed grave concern about the effect on the judicial system, and in particular on the very busy dissolution

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266. Id. at 336 n.2, 243 Cal. Rptr. at 659 n.2.
267. Id.
268. Id. at 336, 243 Cal. Rptr. at 659.
269. Id. at 340 n.7, 243 Cal. Rptr. at 662 n.7.
courts, if clients could be relieved of a stipulation, entered during their voluntary absence, by simply asserting that their lawyer lacked authority. The court of appeals, on the other hand, argued that the use of fee shifting would deter clients from making frivolous motions. What is not in dispute is that the trial court would continue to be involved with this matter, whether the stipulation is set aside or not, since several issues remained unresolved. Thus, allowing the client to contest these additional issues may have only a minimal effect on the dissolution calendar while avoiding a malpractice action in the regular civil court.

If the Helsel court applied the proposed balancing model and determined that the husband was consulted by his lawyer, understood the operations of the legal system, contributed to the problem by his voluntary absence, and would not suffer undue prejudice if he were compelled to comply with the stipulation, then he should be denied relief. On the other hand, if the court found that his interest in informed decision making was substantial, that his absence was excusable despite his knowledge of the legal system, and that the terms of the stipulation were significant to him, then it should grant him relief. By ordering him to pay his wife's attorney's fees, the court could minimize the prejudice to her and deter frivolous motions.

VII. CONCLUSION

The law of lawyering is traditionally thought of as a specialized area of the common law of agency. It is therefore not surprising that the basic framework of the first Restatement of the Law of Lawyering, now in preparation, will be the law of agency. This Article has argued that the agency model has not proven effective for resolving disputes about the allocation of decision making authority between lawyers and clients. Typically courts have attempted to decide such cases by drawing a distinction between substance and procedure. Substantive matters, such as settlement, are regarded as within the client's area of control, while procedural matters, such as strategy and tactics, fall within the lawyer's domain. However the cases are inconsistent, frequently abandoning or finding exceptions to the these principles. As a result, courts often bind clients to settlement agreements to which they object, while relieving them of the prejudicial effects of their lawyers' procedural errors.

The factors which have caused the courts to make these exceptions can be discerned from an analysis of the relevant case law and scholarly literature. This Article has offered a proposal which directly ad-

270. Id. at 336 n.2, 243 Cal. Rptr. at 659 n.2.
271. Id. at 340 n.7, 243 Cal. Rptr. at 662 n.7.
addresses those factors. Under the model offered here, courts should inquire as to the nature of the lawyer-client relationship; the sophistication of the client; the extent to which the client may have contributed to the challenged action; and the prejudice to the client if he is deemed bound by his lawyer’s actions. Courts must then balance these interests against those of opponents who may be prejudiced if the action in question is overturned and of a judicial system concerned with efficiency and controlling lawyer and client misconduct.

This suggested approach is preferable to the pseudo-litmus test of the agency model. In addition to providing a more straightforward method of analysis, it is based upon a more realistic view of the lawyer-client relationship, and, in its application, will encourage better lawyer-client communication.