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QUESTIONING AUTHORITY: EXPLORATIONS OF AN ATTORNEY'S POWER TO SETTLE IN OKLAHOMA

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"I have as much authority as the Pope, I just don't have as many people who believe it."

–George Carlin[1]

Every litigator understands the procedures behind forming a settlement agreement, particularly when an opponent is a represented party. First, one attorney, acting on behalf of his or her client, communicates a settlement offer to opposing counsel. Opposing counsel discusses the issue with his or her client and then makes a counteroffer. Of course, pursuant to the Oklahoma Rules of Professional Conduct, each offer must fall within the authority granted to the attorney by the client.[2] After a few volleys, and much parrying and jousting, the parties, through their attorneys, reach an agreement that they find acceptable, though probably not ideal. Then the plaintiff executes a settlement agreement. If there is a pending lawsuit, the plaintiff will dismiss with prejudice. Lastly, the defendant, or the defendant's insurer, issues payment, and the parties go about their business. With any luck, they will eventually forget the foul aftertaste left by the dispute and compromise. But what happens when the process does not go so smoothly? What if an attorney misunderstands a client's grant of settlement authority and exceeds the actual settlement authority? What if a party denies authorizing settlement? What if a rogue attorney claims to have more settlement authority than a client actually granted?

If a settlement dispute occurs, evidence supporting either side's argument could be sparse at best. Attorneys and their clients often communicate verbally, particularly when they discuss settlement issues as they frequently require prompt attention. Thus, very little evidence could demonstrate whether a client gave an attorney actual authority to settle. Similarly, settlement discussions between attorneys frequently take place either in person or on the telephone, particularly after they have exchanged their initial "posturing" letters.[3] Experienced attorneys often send written confirmation of a verbal settlement agreement.

1. GEORGE CARLIN, THE BEST OF BRAIN DROPPINGS 47 (2007).
2. OKLA. RULES OF PROF'L CONDUCT RR. 1.2(a), 1.4 cmt. 2 (2008).
3. *See* Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 GEO. J. LEGAL ETHICS 543, 589 (1999) ("A typical settlement scenario has attorneys reaching agreement on the eve of trial. Often the attorneys reach an agreement by phone, and then one or both call the judge's clerk to notify the judge that the matter is settled and that no trial will be needed.").

Nevertheless, confirmation letters rarely request reciprocal confirmation. Rather, these letters tend to request only that the opposing attorney advise of any misunderstanding. Thus, a fact finder would generally view any tangible evidence of such a settlement to be self-serving. Even less evidence is likely to support a claim that the opposing party gave its counsel actual settlement authority because the party denying actual authority would retain control of any evidence tending to prove actual authority. This one-sided possession of evidence would likely thwart the opposing party's attempt to prove actual authority. Lastly, such evidence would constitute attorney–client privilege, and although courts often consider the privilege waived in cases when the client disputes the attorney's settlement authority,[4] district courts hesitate to compel a party to produce or disclose what would otherwise be privileged.

Although courts across the country recognize that a lawyer may settle the client's claim if the client conveys authority to do so,[5] the Oklahoma Supreme Court has not given an easy-to-follow rule to govern an attorney's authority to settle a lawsuit on behalf of his or her client.[6] In fact, the Court has not addressed this issue in 50 years. In 2008, the Oklahoma Court of Civil Appeals, division IV, relied upon an antiquated case and held that the attorney–client relationship does not, by itself, give rise to actual settlement authority.[7] Thus, the most recent opinion from the Oklahoma Court of Civil Appeals, division IV, could nullify a settlement agreement entered by an attorney who lacks actual authority

4. *E.g.*, Rubel v. Lowe's Home Ctrs., Inc., 580 F. Supp. 2d 626, 628–29 (N.D. Ohio 2008) (noting that the party who asserted that his attorney lacked settlement authority could not "use the [attorney–client] privilege to bar questions . . . about those communications"); Thorton v. Syracuse Sav. Bank, 961 F.2d 1042, 1046 (2d Cir. 1992) (stating that attorney–client privilege is waived when the client brings the attorney's authority into question with regard to a settlement agreement).

5. *See* Eunice A. Eichelberger, Annotation, *Authority of Attorney to Compromise Action—Modern Cases*, 90 A.L.R.4TH 326, 333 (1991) ("A client is bound by the acts of the client's attorney within the scope of the attorney's authority.").

6. *See* Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority*, 78 OR. L. REV. 1061, 1098 (1999) ("Our review of the prevailing lawyer civil settlement guidelines suggest the need for certain new initiatives. First, the guidelines [setting forth an attorney's authority to settle] should predominantly originate in state supreme courts. At the very least, their general parameters should usually appear in written rules on the professional conduct of lawyers."). This Article does not discuss any potential changes to the Oklahoma Rules of Professional Conduct, but instead focuses solely on judicial action.

7. Hays v. Monticello Ret. Estates, L.L.C., 2008 OK CIV APP 74, ¶ 8, 192 P.3d 1279, 1281 (relying on Scott v. Moore, 1915 OK 850, 152 P. 823).

from the client.[8] Considering the likely shortage of evidence to the contrary, a party that wants to get out of a settlement agreement will always have an easy exit: "I never gave my attorney settlement authority."

After the attorneys reach an agreement, if one of the clients denies that he or she gave settlement authority, the entire playing field shifts. The dissenting party—who may no longer be bound by the settlement terms—would have an unfair advantage because that party would know how much the other party might pay or accept in full settlement. This Article demonstrates that the Oklahoma Supreme Court should recognize an attorney's apparent authority to settle a claim, regardless of actual authority, as well as a rebuttable presumption of actual authority. If an attorney exceeds actual authority, resolution of the disagreement should be handled between an attorney and his or her client, and the unauthorized attorney should face liability for malpractice.[9] Such a finding would protect an innocent third party and place liability where it belongs—on the errant party. In other words, an innocent third party should not bear the unavoidable prejudice that would come from a failed settlement agreement.

I. OKLAHOMA LAW ADDRESSING AN ATTORNEY'S AUTHORITY TO SETTLE

Much of the disagreement regarding an attorney's ability to settle a claim stems from language in the Oklahoma Rules of Professional Conduct. Rule 1.2 provides: "A lawyer shall abide by a client's decision

8. *See id.* ¶ 15, 192 P.3d at 1282.

9. Nelson v. Consumers Power Co., 497 N.W.2d 205, 208–09 (Mich. Ct. App. 1993) ("[A] third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice." (quoting Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 530–31 (6th Cir. 1986)) (internal quotation marks omitted)). However, should a client bring such a suit against an attorney, that client should be certain of the ability to meet the requisite burden of proof. *See, e.g.*, Harris v. Ark. State Highway & Transp. Dep't, 437 F.3d 749, 752 (8th Cir. 2006) (recognizing that for a litigant to only complain "that the settlement agreement was not explained to her with sufficient care [was irrelevant] . . . to the determination of whether a party gave her attorney express authority to enter into a settlement agreement"); Senate Realty Corp. v. Comm'r, 511 F.2d 929, 932 (2d Cir. 1975) ("[A]lthough [the attorney] was unauthorized to settle, we cannot agree . . . that [his actions] constituted a fraud upon the court.").

whether to settle a matter."[10] Furthermore, a comment to Rule 1.4 provides:

> [A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.[11]

These rules require that an attorney consult with his or her client regarding settlement negotiations and abide by that client's decisions. They do not require opposing counsel to obtain written confirmation of a party's agreement to settle. Thus, Rules 1.2 and 1.4 govern the attorney–client relationship; they do not govern the relationship of a represented party and opposing attorney.

A. Oklahoma Supreme Court Cases

Oklahoma courts have engaged in limited discussion over an attorney's power to settle. Based on *Moran v. Loeffler–Greene Supply Co.*, one could easily argue that the Oklahoma Supreme Court has long recognized an attorney's ability to enter into a settlement agreement on behalf of a client.[12] In *Moran*, a creditor intervened in a suit between two debtors and a company that had purchased the debtors' assets.[13] Through their respective attorneys, the creditor and the debtors agreed to a tentative settlement agreement that included the creditor withdrawing the application to intervene.[14] The creditor would be paid the amount owed once the debtors prevailed on the claim against the company in the initial lawsuit.[15]

The case between the debtors and the other company subsequently settled,[16] and the debtors' attorney, Moran, forwarded a cashier's check

10. OKLA. RULES OF PROF'L CONDUCT R. 1.2(a) (2008).
11. *Id.* R. 1.4 cmt. 2.
12. *See* Moran v. Loeffler–Greene Supply Co., 1957 OK 149, ¶ 13, 316 P.2d 132, 137–38.
13. *Id.* ¶ 3, 316 P.2d at 133.
14. *Id.* ¶ 3, 316 P.2d at 133–34.
15. *Id.* ¶ 3, 316 P.2d at 134.
16. *Id.* ¶ 4, 316 P.2d at 134.

to one of his clients with a request that the client endorse and return it so as to satisfy the creditor's claims.[17] Contrary to his attorney's request, the debtor had cashed the check, satisfied the attorney's fees out of the third-party settlement amount, and refused to satisfy the amount owed to the creditor.[18] The creditor sued Moran for satisfaction of the settlement agreement.[19] At trial, the creditor's attorney testified that he did not believe "that Mr. Moran made himself personally liable for the payment of [the] money."[20]

In addressing the issues presented, the Oklahoma Supreme Court recognized the tentative nature of the settlement agreement and stated that, to the extent the agreement existed, it "would have of necessity been a contract between [the creditor], on the one side and [the debtor] on the other, and not one between their respective attorneys, who were merely agents representing their respective principals."[21]

> It is the well established general rule that if a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone. This general rule of agency is, generally speaking, applicable to contracts executed by attorneys on behalf of their clients.[22]

Importantly, the Oklahoma Supreme Court recognized this point of law within the context of a settlement agreement.[23] Although the *Moran* Court did not discuss whether the debtor had given his attorney actual authority to enter into the settlement agreement, it did apply "a general

17. *Id.* ¶ 4, 316 P.2d at 135.
18. *Id.* ¶ 5, 316 P.2d at 135.
19. *Id.* ¶ 6, 316 P.2d at 135.
20. *Id.* ¶ 9, 316 P.2d at 136.
21. *Id.* ¶ 12, 316 P.2d at 137.
22. *Id.* ¶ 13, 316 P.2d at 137–38 (citations omitted).
23. "A settlement is an agreement ending a dispute or lawsuit." BLACK'S LAW DICTIONARY 1496 (9th ed. 2009). The agreement reached between the attorneys for the creditor and the debtors was that the creditor would drop the claim in exchange for a letter from Moran that stated the creditor's claim was protected in the event there was a settlement of, or a judgment rendered for, the pending case between the debtors and the other company. *Moran*, 1957 OK 149, ¶ 3, 316 P.2d at 134.

rule of agency" to resolve a settlement dispute and thus recognized that the attorney could act as agent for settlement purposes.[24] In other words, the Oklahoma Supreme Court recognized that a settlement agreement imposes contractual liability on the principal when entered into by an attorney "acting within the scope of his authority for a disclosed principal"—the client.[25] While *Moran* solely addressed the issue of whether the attorney must satisfy the settlement agreement when the client fails to do so, it established that the general rules of agency apply to determine the extent of an attorney's settlement authority.

The Oklahoma Supreme Court addressed a similar issue in *Yahola Sand & Gravel Co. v. Marx*.[26] In *Yahola*, a dispute arose about retirement benefits owed to the plaintiff, Marx.[27] Prior to suit, the parties' attorneys engaged in settlement negotiations.[28] Ultimately, Marx personally executed a release, dismissal, and settlement contract in the defendant's attorney's office.[29] That same day, the defendant's attorney "wrote, signed and delivered to Marx a letter explaining in detail the benefits Marx would receive from the proposed contract."[30] When the defendant refused to honor the agreement, its attorney sent a letter to advise Marx's attorney that his client had "decided to not go into the contract"; he then made a substitute offer.[31]

Marx sued the defendant for breach of contract.[32] The trial court found in favor of Marx.[33] On appeal, the defendant's attorney contended:

> [T]here was no contract entered into between the parties; A, that [defendant's attorney's] acts were mere negotiations looking

24. *See Moran*, 1957 OK 149, ¶¶ 13–16, 316 P.2d at 137–38 ("Plaintiff's principle contention seems to be, however, that [the attorney] was a party to the alleged contract personally, rather than in his representative capacity. . . . Of course, it is possible for an agent to bind himself personally, under certain circumstances, but the presumption is that the agent is intended to bind the principal only, and to incur no personal liability. . . . The evidence here not only does not overcome such presumption, but affirmatively indicates an intention not to substitute or superadd defendant's personal liability for that of his client's.").

25. *Id.*

26. Yahola Sand & Gravel Co. v. Marx, 1960 OK 206, 358 P.2d 366.

27. *See id.* ¶¶ 2–3, 358 P.2d at 366.

28. *Id.* ¶¶ 5–7, 358 P.2d at 367.

29. *Id.* ¶ 9, 358 P.2d at 367.

30. *Id.* ¶ 10, 358 P.2d at 367.

31. *Id.* ¶ 11, 358 P.2d at 367.

32. *Id.* ¶ 14, 358 P.2d at 367.

33. *Id.*

> toward a settlement; that he had no specific or presumed authority to bind defendant; B, that [defendant's attorney] did not assume to effect a compromise; that he only drew up a proposed contract not intended to become effective until signed and acknowledged by both the parties; and, C, Marx did not change his position relying upon any apparent authority in [defendant's attorney] and therefore no estoppel arises in favor of Marx.[34]

The Oklahoma Supreme Court found that while an attorney has no authority to settle without a client's express consent, "a client ratifies his attorney's act if he does not repudiate it promptly upon receiving knowledge that the attorney has exceeded his authority."[35] Ultimately, the *Yahola* Court found in favor of settlement because the client had ratified the attorney's conduct.[36] Since the client had ratified the attorney's conduct, the *Yahola* Court did not address whether the client had given the attorney authority to settle. Interestingly, the Court did not discuss the *Moran* opinion, nor did it discuss whether agency law applied. The Oklahoma Supreme Court has still not addressed the issue of whether a client may be bound by the attorney's settlement agreement since it decided *Yahola* in 1960.

B. Oklahoma Court of Civil Appeals Cases

Although the Oklahoma Supreme Court has not discussed an attorney's authority to settle in over 50 years, the Court of Civil Appeals has addressed this issue more recently.[37] In *Hays v. Monticello Retirement Estates, L.L.C.*, the Court of Civil Appeals, division IV, distinguished a previous decision of the Court of Civil Appeals, division II, *Crisp, Courtemanche, Meador & Associates v. Medler*.[38] Importantly, the *Crisp* court relied upon *Moran* for the proposition that "the attorney[–]client relationship is one of agency," and ultimately found that

34. *Id.* ¶ 15, 358 P.2d at 367–68.

35. *Id.* ¶ 43, 358 P.2d at 372 (quoting Yarnall v. Yorkshire Worsted Mills, 87 A.2d 192, 193 (Pa. 1952)) (internal quotation marks omitted).

36. *Id.* ¶¶ 45, 50–51, 358 P.2d at 372–73.

37. *See* Hays v. Monticello Ret. Estates, L.L.C., 2008 OK CIV APP 74, 192 P.3d 1279.

38. *Id.* ¶¶ 11–13, 192 P.3d at 1281–82 (citing Crisp, Courtemanche, Meador & Assocs. v. Medler, 1983 OK CIV APP 11, 663 P.2d 388).

an attorney could bind his or her client to a contract for litigation-related services.[39] "An undisclosed limitation privately agreed upon between an attorney and client is binding only as between them, but not against someone innocently relying on what is apparently within the agent's scope of authority."[40] The *Crisp* court held that the client may have a claim "against Attorney for having exceeded his actual authority; however, [the client could not] use that claim as a defense against Reporter who was without actual knowledge of the limitation" in the attorney's authority.[41] In summary, the court recognized that an attorney can bind the client to a contract, in the context of litigation, and the client's recourse is against the attorney if the attorney exceeds the actual grant of authority.[42]

In *Hays*, the Court of Civil Appeals, division IV, reversed the district court's enforcement of a settlement agreement in which the parties had stipulated to the following testimony:

> *Defendants' [A]ttorney:* Plaintiff's Attorney never indicated to Defendants that he was limited in any way in negotiating a settlement; Defendant's [A]ttorney offered $50,000 to settle the case, and Plaintiff's Attorney stated Plaintiff had agreed to settle for that amount plus certain property; the two lawyers finalized the terms of the settlement; and Plaintiff's Attorney later said that Plaintiff was refusing to settle.
>
> *Plaintiff's Attorney:* Plaintiff's Attorney told Defendants' [A]ttorney that he believed unequivocally he had authority to settle the case; Plaintiff authorized him to settle for $50,000 with a guarantee and a retention of the agreed property; he informed her that attorney fees and costs would be taken out of the settlement amount; and when they met to review the agreement, she was not agreeable to it.
>
> *Plaintiff:* Plaintiff did not authorize her attorney to negotiate a settlement without her being present; she instructed him to solicit settlement proposals but expected him to discuss those with her;

39. *Crisp*, 1983 OK CIV APP 11, ¶¶ 7–8, 663 P.2d at 390 (citations omitted).
40. *Id.* ¶ 8, 663 P.2d at 390 (citations omitted).
41. *Id.* ¶ 10, 663 P.2d at 390.
42. *Id.* ¶¶ 8–10, 663 P.2d at 390 (citations omitted).

> and he was not authorized to enter into a settlement without her approval.[43]

Interestingly, the *Hays* court also recognized that actual authority is not necessary for an attorney to settle on behalf of a client in certain circumstances, namely when the attorney has apparent authority:

> To show apparent authority to settle a case, Defendants . . . . must show: 1) conduct of the principal . . . which would reasonably lead the third party . . . to believe that the agent . . . was authorized to act on the principal's behalf; 2) reliance thereon by the third party; and 3) change of position by the third party to his detriment.[44]

Hays did not articulate what manifestation would be sufficient to find that an attorney has apparent authority. However, the opinion does state that where actual authority is not proven, "apparent authority usually 'results from a manifestation by the principal to a third person that another is his agent.'"[45]

In *Hays*, the court distinguished *Crisp* on the ground that it stood only for the proposition that the attorney–client relationship necessarily includes the ability to incur litigation-related expenses, but "the power to settle or compromise lawsuits is not usually contained within the scope of an attorney's employment."[46] Yet *Hays* ignored the Oklahoma Supreme Court's decision in *Moran* despite *Crisp*'s reliance on it. Instead, the *Hays* court relied upon *Scott v. Moore*, a less recent case in which the Oklahoma Supreme Court had held contractual liability will fall on an attorney who exceeded settlement authority.[47] Furthermore,

43. *Hays*, 2008 OK CIV APP 74, ¶ 4, 192 P.3d at 1280–81.

44. *Id.* ¶ 14, 192 P.3d at 1282 (citations omitted). One commentator notes that courts tend to disfavor apparent authority solely based on a belief that it gives an attorney too much power and could cause outcomes that are unfair to a client. Giesel, *supra* note 3, at 586 ("The wariness [in finding apparent authority] expressed by some courts is based on the desire to protect a client within the attorney–client relationship but the result ignores fairness to the third party.").

45. *Hays*, 2008 OK CIV APP 74, ¶ 14, 192 P.3d at 1282 (quoting Stephens v. Yamaha Motor Co., 1981 OK 42, ¶ 8, 627 P.2d 439, 441).

46. *Id.*

47. *Id.* ¶¶ 8–10, 192 P.3d at 1281 (citing Scott v. Moore, 1915 OK 850, ¶ 1, 152 P. 823, 824). *Scott* arose out of a dispute over recovering a fee; the Thresher claimed he was entitled to a portion of the alfalfa seed that he had thrashed. *Scott*, 1915 OK 850, ¶ 1, 152 P. at 823. The party with whom he had contracted died before the Thresher could perform

Hays ignored the fact that *Moran* was not only more recent, but it too involved an actual settlement agreement,[48] as opposed to incurring litigation-related expenses, as was the case in *Crisp*. In other words, *Hays* ignored applicable, more recent law from the Oklahoma Supreme Court that had held an attorney could bind his or her client to a settlement agreement.[49] At the same time, *Hays* distinguished the *Crisp* opinion—which had relied upon *Moran*—and ultimately held—contrary to prior rulings of both *Moran* and *Crisp*—that an attorney lacks the capacity to settle a claim on behalf of the client.[50]

However, the Oklahoma Supreme Court has not addressed this issue since *Moran*—over 50 years ago. Nevertheless, its most recent caselaw suggests that an attorney, per agency law, can bind his or her client to a contract,[51] and courts should treat a settlement agreement the same as any other contract. The Court of Civil Appeals has addressed this issue much more recently than the Oklahoma Supreme Court, but Division IV neglected to address the most recent Oklahoma Supreme Court precedent. The Oklahoma Supreme Court should unequivocally rule that an attorney possesses apparent authority to negotiate and settle on behalf of a client and recognize that settlement by an attorney creates a rebuttable presumption of settlement authority. Also, it should affirm that a party challenging settlement must overcome a heavy burden in demonstrating lack of authority.

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under the contract, and the estate's administrator refused to allow the Thresher to take his portion of the seed following performance. *Id.* ¶ 1, 152 P. at 823–24. The trial court directed a verdict for the defendant. *Id.* ¶ 1, 152 P. at 824. During the pendency of the appeal, the Attorney for the Thresher settled the claim. *Id.* The Thresher asserted that he had discharged the Attorney prior to the purported settlement. *Id.* The appellate court found that the trial court had erred in directing the verdict and remanded for a determination of whether the Attorney had authority to settle, setting forth the law on the issue as follows:

> An attorney has no authority to compromise a matter in his hands as attorney, without the specific authority of his client. Any settlement so made is without authority of law and void; and, where the client denies that the attorney was given authority to compromise such claim, the burden is upon the attorney to show by a preponderance of the evidence that he was given such authority; or that the client, after the making of such compromise, with full knowledge of the compromise, approved it, or received the benefits thereof.

Id. (citations omitted).

48. *See supra* note 23 and accompanying text.
49. *See supra* Part I.A.
50. *Hays*, 2008 OK CIV APP 74, ¶¶ 13, 15, 192 P.3d at 1282.
51. *See supra* Part I.A.

II. SPECIFIC OKLAHOMA LAWS REGARDING AUTHORITY TO SETTLE

Oklahoma law recognizes that an attorney is the agent of a client, an agent may bind a principal to a contract,[52] and "[a] settlement agreement is a contract."[53] These and other tenets of Oklahoma law clearly support a rule that, under normal circumstances, an attorney has apparent authority to bind a client to a settlement agreement solely by virtue of the attorney–client relationship.

A. Oklahoma Contract Law

A discussion of basic contract law, as it relates to settlements, will help give a full understanding of how Oklahoma courts should view an attorney's authority to settle on behalf of a client. First and foremost, "[a] settlement agreement is a contract."[54] "Oklahoma law recognizes that an agreement to settle a claim constitutes a contract between the parties which should not be set aside absent fraud, duress, undue influence, or mistake."[55] A proper breach of contract claim will demonstrate: "1) formation of a contract; 2) breach of the contract; and 3) damages as a direct result of the breach."[56] In the context of a settlement agreement entered into by an attorney, a court should focus on whether the first element is met. An attorney must have some source of authority to bind a client to a contract or a claim will fail for lack of formation.[57]

52. *See infra* Part II.B.

53. Whitehorse v. Johnson, 2007 OK 11, ¶ 9, 156 P.3d 41, 46 (citations omitted); *see also* Thompson v. Peters, 1994 OK CIV APP 97, ¶ 4, 885 P.2d 686, 688.

54. *Whitehorse*, 2007 OK 11, ¶ 9, 156 P.3d at 46 (citations omitted); *see also Thompson*, 1994 OK CIV APP 97, ¶ 4, 885 P.2d at 688.

55. Vela v. Hope Lumber & Supply Co., 1998 OK CIV APP 162, ¶ 6, 966 P.2d 1196, 1198 (citations omitted).

56. Digital Design Grp., Inc. v. Info. Builders, Inc., 2001 OK 21, ¶ 33, 24 P.3d 834, 843.

> Every contract results from an offer and acceptance. An offer becomes a binding promise and results in a contract only when it is accepted. To constitute acceptance, there must be an expression of the intent to accept the offer, by word, sign, writing or act, communicated or delivered to the person making the *offer or the offeror's agent*.

Garrison v. Bechtel Corp., 1995 OK 2, ¶ 18, 889 P.2d 273, 281 (emphasis added) (footnotes omitted).

57. *See* Am. Sur. Co. v. Morton, 1912 OK 284, ¶ 5, 122 P. 1103, 1104 ("If a man contracts as agent, but without authority, for a principal whom he names, he cannot bind

Additionally, "[s]ettlement agreements may be oral."[58] Thus, the fact that attorneys communicate offer and acceptance verbally will not render a subject agreement unenforceable. Furthermore, public policy supports upholding settlement agreements, even when made verbally.[59]

B. Oklahoma Agency Law

The basics of agency law are clearly established in Oklahoma: "Generally, an agent is one who is authorized to act for another."[60] "Under the common law, a relationship of agency is established when two parties agree that one, the agent, shall act on behalf and subject to the control of the other, the principal."[61] The United States Supreme Court set forth the general distinction between a general agent and a special agent as far back as 1869: "The distinction between the two kinds of agencies is that the [general agent] is created by power given to do acts of a class, and the [special agent] by power given to do individual acts only."[62] The Oklahoma Supreme Court further clarified this distinction in the context of third parties who deal with agents: "Parties dealing with a known agent have a right to presume that the agency is general, and not special, and the presumption is that one known to be an

his alleged principal [or himself] by the contract; but the party whom he induce[s] to contract with him has one of two remedies[:] (a) If the alleged agent honestly believed that he had an authority which he did not possess[,] he may be sued upon a *warranty of authority*. . . . (b) If the professed agent knew that he had not the authority which he assume[s] to possess, he may be sued by the injured [party] in the action of deceit." (quoting WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT § 442 (Ernest W. Huffcut ed., Banks Law Publ'g Co., 2d ed. 1907) (1895) (internal quotation marks omitted)).

58. Russell v. Bd. of Cnty. Comm'rs, 2000 OK CIV APP 21, ¶ 3, 1 P.3d 442, 443 ("The law and public policy favor settlements and compromises, entered into fairly and in good faith between competent persons, as a discouragement to litigation."); s*ee also In re* De-Annexation of Certain Real Prop., 2009 OK 18, ¶ 8, 204 P.3d 87, 89 ("A settlement agreement is an oral or written contract between the parties." (citing *Russell*, 2000 OK CIV APP 21, ¶ 3, 1 P.3d at 443)).

59. Whitehead v. Whitehead, 1999 OK 91, ¶ 9, 995 P.2d 1098, 1101 (citations omitted).

60. Traders Ins. Co. v. Johnson, 2010 OK CIV APP 37, ¶ 13, 231 P.3d 790, 793 (citing BLACK'S LAW DICTIONARY, *supra* note 23, at 72).

61. Sur. Bail Bondsmen v. Ins. Comm'r, 2010 OK 73, ¶ 23, 243 P.3d 1177, 1185 (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)); *see also* McGee v. Alexander, 2001 OK 78, ¶ 29, 37 P.3d 800, 807 ("An agency relationship generally exists if two parties agree one is to act for the other." (citations omitted)).

62. Butler v. Maples, 76 U.S. 766, 774 (1869).

agent is acting within the scope of his authority."[63] This language clearly supports a presumption that an attorney is a general agent and thus possesses the authority to settle a claim.

In some circumstances, an agent may bind a principal to a contract. The Restatement (Second) of Agency provides:

> The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that:
>
> (a) the agent was authorized;
>
> (b) the agent was apparently authorized; or
>
> (c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority.[64]

In *Hurt v. Garrison*, the Oklahoma Supreme Court held that whether a principal will be bound by an agent's acts depends on three things: whether there had been a manifestation by the principal to the party who dealt with the agent, whether the agent purported to act on behalf of the principal by word or deed, and whether the agent acted within the scope of authority known to have been previously granted.[65] The Court specifically noted that usually "the declarations of an agent to a third party in the absence of the principal are inadmissible to establish agency"; if the agency relationship has already been established through course of dealing, "the declarations of an agent to a third party in the absence of the principal" are admissible to prove the agent's inherent agency power and thus bind the principal.[66] Agency and Oklahoma law clearly mandate that a disclosed principal will be liable for contracts entered into on a principal's behalf by a principal's general agent acting

63. Cont'l Supply Co. v. Sinclair Oil & Gas Co., 1924 OK 1166, ¶ 8, 235 P. 471, 475 (quoting Midland Sav. & Loan Co. v. Sutton, 1911 OK 510, ¶ 10, 120 P. 1007, 1011) (internal quotation marks omitted). *But see* Shuler v. Viger, 1926 OK 890, ¶ 4, 252 P. 18, 20 ("It is incumbent upon a person dealing with an alleged agent to discover, at his peril, whether the assumed agency be general or special, that such pretended agent had authority, and that such authority is in its nature and extent sufficient to permit him to do the proposed act." (citations omitted)).

64. RESTATEMENT (SECOND) OF AGENCY § 140 (1958).

65. *See* Hurt v. Garrison, 1942 OK 239, ¶¶ 5–6, 133 P.2d 547, 549.

66. *See id.* ¶ 5, 133 P.2d at 549.

within the scope of authority, even if a particular action was not authorized.[67] This is true unless the third party had reason to believe, or knew, the agent lacked authority to bind the principal.[68] In 1916, the Oklahoma Supreme Court set forth the elements of apparent authority, and recognized that an agent who has apparent authority may bind the principal to a contract:

> [A]n agent's authority is the sum total of the powers which his principal has caused him . . . to seem to possess. It is not limited to the powers actually conferred . . . but includes, as well, the apparent powers which the principal by reason of his acts or conduct is estopped to deny. The instructions of the agent include, not only terms of the power which are intended to be made known to those who deal with the agent, and the deviations from which will render ineffectual his act, but also private instructions . . . . Between these there is a material distinction. The former are part of the agent's authority; the latter . . . can have no effect to qualify the liability of the principal to third persons to whom they are not, and are not intended to be, communicated. . . . [A]s between the principal and third persons, the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny.[69]

Thus, an agent may bind the principal to a contract even in the absence of actual authority. Regarding contracts entered into by an agent on behalf of the principal, the United States District Court for the Eastern District of Pennsylvania recognized responsibility should reside with a principal and not with an innocent third party because it is a principal

67. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.03, 6.01 cmt. b (2006); Nat'l Sur. Co. v. Miozrany, 1916 OK 349, ¶ 5, 156 P. 651, 652.

68. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c ("Apparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal. . . . The relevant appearance is that the principal has conferred authority on an agent. . . . A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage.").

69. *Miozrany*, 1916 OK 349, ¶ 5, 156 P. at 652 (citations omitted).

who is best able to control an agent:

> Where both the principal and the third party are equally innocent, and there has been a complete breakdown of communication between the principal and the third party, the liability is best placed on the party with the most control over the agent, *i.e.* the principal. Moreover, because the principal enjoys the benefits of employing an agent, it is only fair that the principal bear the burden of supervision.[70]

In short, outside of the attorney–client relationship, agency law clearly mandates that a principal will be liable for contracts entered into on the principal's behalf by the agent, unless the third party to the contract has reason to believe the agent lacks authority to bind the principal.

A principal's liability for a contract entered into by an agent with apparent authority is particularly applicable in the context of the attorney–client relationship because the Oklahoma Rules of Professional Conduct forbid an attorney's direct contact with a represented opposing party.[71] Thus, it is very difficult to confirm that an opposing attorney does, in fact, possess the authority to settle. In this regard, the "complete breakdown" in communication that could occur between principal and a third party, which was anticipated by the Eastern District of Pennsylvania,[72] is actually *mandated* by Oklahoma's Rules of Professional Conduct when both parties are represented by attorneys.[73]

One commentator has recognized the "faulty logic" of courts that focus on the notion "that the rules of ethics clearly place the control of the settlement decision with the client."[74]

> Because of this ethics role division, courts say, a client cannot be held to have delegated this control to an agent attorney by the

70. Ortiz v. Duff–Norton Co., 975 F. Supp. 713, 720 (E.D. Pa. 1997) (citations omitted).

71. OKLA. RULES OF PROF'L CONDUCT R. 4.2 (2008) ("[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.").

72. *Ortiz*, 975 F. Supp. at 720.

73. OKLA. RULES OF PROF'L CONDUCT R. 4.2 (2008); *see also* Parness & Bartlett, *supra* note 6, at 1098 ("[L]awyers should not reveal the nature of their delegated authority to the adversaries of their clients even when these adversaries have good reason to know.").

74. Giesel, *supra* note 3, at 544.

> sole act of retaining the attorney. While such a stance is not wrong, the ethics principle to which courts link it does not demand it. In addition, some courts have refused to apply traditional agency doctrines such as that of apparent authority, relying again on the ethics principle that a client controls settlement and concluding that the apparent authority doctrine too easily allows that control to reside with the attorney. Yet, no ethics or fiduciary standard demands that the settlement decision always remains with the client even if the client chooses to delegate it or acts in a way that reasonably indicates delegation. Further, agency law clearly allows a principal to revoke previously delegated authority. Thus, the client can recover the authority to settle even if the client delegates it. In an attempt to protect the client in the context of the attorney–client relationship, some courts have trod inappropriately upon the rights and expectations of the other party to the contract. The third party's rights and expectations of sanctity of contract deserve no less protection than that afforded by traditional agency law to third parties in general contexts.[75]

The notion that the settlement decision rests with the client should not adversely affect the third party who, due to application of other ethical standards, has no direct access to the client. A third party should not face adverse consequences for believing that an opposing attorney—the agent and only means of contact for the third party—has followed the ethical rules requiring adherence to a client's express authority[76] and honesty to an opponent regarding that authority.[77]

In *Sparks Brothers Drilling Co. v. Texas Moran Exploration Co.*, the Oklahoma Supreme Court set forth the elements of apparent authority and recognized that an agent with apparent authority may bind the principal:

> Apparent authority of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. Three elements must exist

75. *Id.* at 544–45 (footnote omitted).

76. OKLA. RULES OF PROF'L CONDUCT R. 1.2 (2008).

77. *Id.* R. 4.1 ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .").

> before a third party can hold a principal liable for the acts of another on an apparent-agency principal: (a) conduct of the principal [which would reasonably lead the third party to believe that the agent was authorized to act on behalf of the principal], (b) reliance thereon by [the] third person, and (c) change of position by the third party to his detriment.[78]

The Court also recognized, in *Stephens v. Yamaha Motor Co.*, that an agent can bind the principal, regardless of actual authority, when the principal's actions or words reach a third party and cause that party to reasonably believe that the agent is authorized to act on behalf of the principal.[79] Thus, pursuant to extant Oklahoma law, an agent may bind the principal to a contract even in the absence of actual authority.

Importantly, clients that are bound to settlement agreements because of their attorneys could pursue recovery from their attorneys under a theory of malpractice.[80] Should the Oklahoma Supreme Court clarify that an attorney has apparent authority to settle a claim on behalf of a client, Oklahoma law suggests that a client would have a viable malpractice claim against an errant attorney.[81] Courts of other jurisdictions have

78. Sparks Bros. Drilling Co. v. Tex. Moran Exploration Co., 1991 OK 129, ¶ 17, 829 P.2d 951, 954 (alterations in original) (citations omitted) (internal quotation marks omitted).

79. Stephens v. Yamaha Motor Co., 1981 OK 42, ¶ 8, 627 P.2d 439, 441; *see also* Traders Ins. Co. v. Johnson, 2010 OK CIV APP 37, ¶ 13, 231 P.3d 790, 793 ("The existence of actual authority between principal and agent is not a prerequisite to establishing apparent authority. However, when it is absent, apparent authority usually results from a manifestation by the principal to a third person that another is his agent. In other words, the apparent power of an agent must be determined by the acts of the principal, and not by the acts of the agent." (quoting *Stephens*, 1981 OK 42, ¶ 8, 627 P.2d at 441) (internal quotation marks omitted)).

80. *See, e.g.*, Crisp, Courtemanche, Meador & Assocs. v. Medler, 1983 OK CIV APP 11, ¶ 11, 663 P.2d 388, 390; *see also* Parker v. Bd. of Trs. of S. Ill. Univ., 220 N.E.2d 258, 260 (Ill. App. Ct. 1966) ("While it is true that an attorney is not authorized to consent to the entry of a judgment against his client without the client's consent, a court is not deprived of jurisdiction when he so acts. The remedy of the client is against his attorney."); Bergstrom v. Sears, Roebuck & Co., 532 F. Supp. 923, 933 (D. Minn. 1982) ("[W]here one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who, by his or her conduct, created the circumstances which enabled the third party to perpetrate the wrong and cause the loss." (quoting 3 AM. JUR. 2D *Agency* § 79 (2002)) (internal quotation marks omitted)); Edwards v. Born, Inc., 608 F. Supp. 580, 583 (D.V.I. 1985), *vacated*, 792 F.2d 387 (3d Cir. 1986) ("[A]lthough the settlement should not be set aside, the client would have a remedy against his or her attorney.").

81. *See* Manley v. Brown, 1999 OK 79, ¶ 8, 989 P.2d 448, 452 ("The plaintiff in a

recognized the availability of a legal-malpractice claim against an attorney who has exceeded settlement authority.[82] Thus, should the Oklahoma Supreme Court adopt the position set forth herein, a client would not be left to suffer the consequences of an attorney's rogue activities, and the opposing party would not be put in the unenviable position of arguing that an opponent's attorney had actual authority to settle the claim.

III. OTHER JURISDICTIONS' VIEWS

As discussed below, courts from a number of other jurisdictions have addressed the issue of an attorney's authority to settle claims on behalf of a client. The majority of these courts recognize, at the very least, a presumption, which is generally quite difficult to rebut, that an attorney may settle a client's claim. Others find that an attorney has apparent or implied authority to settle a claim on behalf of the client.

A. United States Supreme Court

The United States Supreme Court has long recognized that a court should not disturb a settlement reached and communicated between attorneys even if one attorney lacks actual authority to settle a client's claims. As the Court stated in *Holker v. Parker*:

> Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet *a Court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all*, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made,

legal negligence action must prove (1) the existence of an attorney–client relationship, (2) breach of a lawyer's duty to the client, (3) facts constituting the alleged negligence, (4) a causal nexus between the lawyer's negligence and the resulting injury (or damage) and (5) but for the lawyer's conduct, the client would have succeeded in the action." (footnotes omitted)); *see also* Wathor v. Mut. Assur. Adm'rs, Inc., 2004 OK 2, ¶ 4 n.6, 87 P.3d 559, 566 n.6 (citing Hopkins v. Clemson Agric. Coll. of S.C., 221 U.S. 636, 643 (1911), and RESTATEMENT (SECOND) OF AGENCY § 343 (1958)).

82. *See, e.g.*, Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239, 244 (La. 1972).

> there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party.[83]

Holker arose out of a three-way partnership in which the acting partner, Parker, had caused the partnership to take on significant debt before he absconded; as a result, his partner, Holker, became personally liable for the partnership debts.[84] After paying many such debts,[85] Holker instituted a suit against Parker to recover some of his personal funds expended.[86] The matter was ordered to arbitration, but Holker was afforded the liberty of objecting within 30 days of the award.[87] The arbitration date was subsequently continued after Holker submitted an affidavit testifying to the importance that he appear personally because of his complicated relationship with Parker.[88] Subsequently, Holker, a Virginia resident, was arrested in Baltimore and taken to jail in Philadelphia where he was allowed bail under the sole condition that he not return to Boston.[89] Upon learning of this development, Holker's attorney wrote to Holker to inform him that Parker's attorneys would probably confess judgment for the full value of the property attached.[90] The attorney implored Holker to advise how Holker would like to proceed so that the attorney could "avoid all responsibility and every hazard of future blame."[91] Holker

83. Holker v. Parker, 11 U.S. 436, 452–53 (1813) (emphasis added); *see also* United States v. Beebe, 180 U.S. 343, 352 (1901) ("Prima facie, the act of the attorney in making such compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with special authority, but when it is proved he had none, the judgment will be vacated on that ground.").

84. *Holker*, 11 U.S. at 436 ("After receiving large sums of money, and contracting debts to a great amount, Parker absconded from the United States without making any settlement of his accounts.").

85. Holker sued, obtained judgment, and satisfied a portion of that judgment "by attaching the effects of Parker in the hands of" a third party. *Id.* Next, Holker joined with a number of other creditors in the execution of an indenture that created a trust to convey Parker's interest in another venture to Parker's creditors. *Id.* at 436–37. As a party to that agreement, Parker agreed that, within eight months, he would "repair to Philadelphia personally, or by attorney, and then settle all the accounts of the company." *Id.* at 437. However, he failed to comply with this provision. *Id.* at 437–38.

86. *Id.* at 438.

87. *Id.*

88. *Id.* at 439.

89. *Id.*

90. *Id.* at 440 ("They appear[ed] to be heartily sick of defending Parker as they [knew] him to be immersed beyond hope of recovery, and [were] doubtful whether they [would] be compensated for their trouble.").

91. *Id.*

failed to respond to the letter.[92] The arbitration proceeded, and the parties appeared by their attorneys.[93] The referees awarded Holker $5,000.00 in full satisfaction, "with the consent of Parker's attorney, and without objection on the part of Holker's attorney."[94] Holker sought to have the arbitration award set aside after unsuccessfully suing Parker in France, where it had been determined that the suit was barred because of the award in the United States.[95]

The United States Supreme Court recognized the award was not an award, but was rather a compromise entered into by Holker's attorney without authority from Holker.[96] Importantly, the Court held that a compromise should not necessarily be vacated if it is "fairly made" even if an attorney acted beyond the bounds of actual authority.[97] Further still, the Court held that, if "the injured party . . . has been perfectly blameless, [he] ought to be relieved against" the judgment or award pursuant to the agreement, even if the agreement exceeded the attorney's authority.[98] Therefore, according to the Court's reasoning, a client should be bound by the compromise of his or her attorney except in extreme circumstances, such as when the error is apparent to the opposing party.[99]

Applying these principles to the facts presented, the Court found Holker's attorney had acted under a mistaken belief when he had entered into the agreement and that it had been a mistake shared by all.[100]

92. *Id.* at 440–41.
93. *Id.* at 441.
94. *Id.* at 442.
95. *Id.* at 444.
96. *Id.* at 452–53.
97. *Id.* ("Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a Court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party."); *see also* United States v. Beebe, 180 U.S. 343, 352 (1901) ("[T]he utter want of power of an attorney, by virtue of his general retainer only, to compromise his client's claim, cannot, we think, be successfully disputed.").
98. *Holker*, 11 U.S. at 453.
99. *See id.* at 453 ("[I]t is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining.").
100. *Id.* ("He believed Parker to be irretrievably ruined. He thought him totally and absolutely insolvent. This impression was communicated to the referees. They too were of [the] opinion that to drudge through the trunks of papers arrayed before them for the purpose of ascertaining how much one insolvent owed another, would be a useless waste of time.").

Ultimately, even though the Court held that Holker was not bound by the agreement entered into by his attorney,[101] the opinion provides very helpful insight into how the Court has historically viewed settlements entered into by attorneys. The convoluted facts of *Holker* demonstrate the exceptional nature of this case. Specifically, the party who cried foul was precluded from attending the proceeding that gave rise to the agreement,[102] and his attorney acted upon misinformation—his belief that Parker was utterly insolvent—that had potentially come from opposing counsel.[103] In other words, because the Court decided *Holker* in light of the difficulties facing an incarcerated litigant in the early 19th century, the holding should not bind a typical 21st-century litigant. The general rules of law discussed in *Holker*, however, still apply.

In this regard, *Holker* demonstrates the reluctance courts should display when disturbing an agreement reached by attorneys on behalf of their clients. The Court focused upon the nature of the agreement—whether it was "so unreasonable in itself as to be exclaimed against by all"—to determine whether to set aside the agreement.[104] The Court also discussed the necessity of considering the totality of the circumstances, arguably even circumstances unknown to the parties at the time of the agreement.[105] The holding, in this regard, seems contrary to modern Oklahoma law, wherein appellate courts generally will not consider any issues or evidence not presented to the district court.[106] Regardless, the *Holker* opinion should serve as a starting point, recognizing that a settlement entered into between parties' attorneys should be set aside

101. The Court found that the award should not bind Holker "unless his own gross negligence may have deprived him of that equity which would otherwise belong to his case." *Id.* Therefore, the Court examined Holker's behavior in the events giving rise to settlement. *See id.* at 454. The Court recognized the necessity that Holker attend the proceeding to testify, and also that "[h]is attendance was impossible." *Id.* While the Court was somewhat critical of Holker for his failure to transmit important papers to his attorney, it considered Holker's inability in conjunction with his attempt to attend his arbitration, as well as his belief that the referees would consider the prior judgments in finding that they should grant Holker some relief. *See id.* Based on all of these extenuating circumstances, the Court found that Holker had not been grossly negligent and the circuit court erred in dismissing the case without further consideration. *Id.*

102. *Id.* at 454.

103. *Id.* at 453.

104. *Id.* at 452.

105. *Id.* at 452–53.

106. Dolese Bros. v. State *ex rel.* Okla. Tax Comm'n, 2003 OK 4, ¶ 38, 64 P.3d 1093, 1107 ("A deficient record may not be supplemented by material physically attached to a party's appellate brief." (citing Frey v. Independence Fire & Cas. Co., 1985 OK 25, ¶ 17, 698 P.2d 17, 20)).

only in rare circumstances.[107]

B. Tenth Circuit

Similarly, in *Thomas v. Colorado Trust Deed Funds, Inc.*, the Tenth Circuit recognized, "that an attorney of record is presumed to have authority to compromise and settle litigation of his client."[108] In *Thomas*, two brothers purchased a mortgage insurance company and its two subsidiaries to utilize in their joint endeavor to develop real estate in California.[109] One brother became president and the other vice-president of these companies.[110] As a result of securities sold to the public after the brothers had acquired the corporations, the Securities and Exchange Commission (SEC) brought an action against both brothers and both subsidiaries.[111] An attorney, hired to represent the defendants in the matter, arranged for a conference with SEC representatives to discuss the suit.[112] The attorney and the president appeared in district court and "stipulated to the entry of an injunction" and how best to avoid appointment of a receiver.[113] After the meeting, the attorney prepared an offer and attempted to communicate with the president, but the attorney received no response.[114] Around this time, another attorney took over the defense.[115] The new attorney submitted a settlement proposal to the SEC representatives, and it mirrored the one that had been suggested in settlement negotiations by the president and the first attorney; the SEC promptly accepted it.[116] The new attorney stated that he had spoken with

107. While the *Holker* Court did not discuss agency law, nor did it give an in-depth analysis of an attorney–client relationship, it subsequently discussed these issues in greater detail. *See* United States v. Beebe, 180 U.S. 343, 351–53 (1901).

108. Thomas v. Colo. Trust Deed Funds, Inc., 366 F.2d 136, 139 (10th Cir. 1966); *see also* Hot Springs Coal Co. v. Miller, 107 F.2d 677, 680 (10th Cir. 1939) ("In the absence of an affirmative showing to the contrary, it is presumed that an attorney has authority to compromise and settle a case."); Feldman Inv. Co. v. Conn. Gen. Life Ins. Co., 78 F.2d 838, 840 (10th Cir. 1935) (recognizing, in the context of written stipulation and confession of the plaintiff's allegations, that "[a]n appearance by a practicing attorney creates a presumption that he has authority to act and the law casts the burden of proving the contrary upon the one asserting it").

109. *Thomas*, 366 F.2d at 137.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 137–38.

116. *Id.* at 138.

the president, who gave the "go ahead," and the district court adopted and approved the stipulation "declaring it to be in full force and effect."[117]

The Tenth Circuit held that the president was bound by the stipulation in his individual capacity, but the vice president was not bound since "the record show[ed] that he did not participate in the transactions and negotiations with the [SEC] and did not consent to the execution of the stipulation or the entry of judgment."[118] The court recognized that "an attorney of record may not compromise, settle, or consent to a final disposition of his client's case without express authority."[119] The court further noted, however, that

> this general principle must be considered in connection with the rule that *an attorney of record is presumed to have authority to compromise and settle litigation of his client*, and a judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof by the party seeking to vacate the judgment that the attorney had no right to consent to its entry.[120]

Thus, Tenth Circuit precedent supports finding a rebuttable presumption of an attorney's authority to settle.

C. Second Circuit

In the context of a bankruptcy proceeding, the Second Circuit Court of Appeals held the burden of proof falls on the party that alleges an attorney lacks settlement authority:

> [B]ecause of the unique nature of the attorney–client relationship, and consistent with the public policy favoring settlements, we presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so. In accordance with that presumption, any party challenging an attorney's authority to settle the case under

117. *Id.*
118. *Id.* at 139–40.
119. *Id.* at 139 (citations omitted).
120. *Id.* (emphasis added) (citing United States v. Beebe, 180 U.S. 343, 351–52 (1901)).

> such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority.[121]

In that case, the bankruptcy trustee entered into a settlement agreement for several debtors.[122] The attorney, not the debtors, executed the settlement agreement.[123] The bankruptcy court held the debtors were bound by the agreement, and the district court affirmed.[124]

The Second Circuit Court of Appeals concluded that the appellants had "failed . . . to deny that they gave [the attorney] the authority. Instead, appellants argue[d] that the parties understood that there would be no final agreement until the parties themselves signed the agreement."[125] The court also denied the appellants' request for an evidentiary hearing because they had not successfully alleged that the attorney had been without authority.[126] In light of these numerous failures, the court affirmed.[127]

D. First Circuit

In *Michaud v. Michaud*, the First Circuit Court of Appeals recognized "that an attorney, merely by virtue of his employment, lacks authority to compromise, because the decision to settle is the client's to make, not the attorney's."[128] However, despite the lack of implied authority, the court further recognized that "[w]hile there is a presumption that a settlement entered into by an attorney has been

121. Pereira v. Sonia Holdings, Ltd. (*In re* Artha Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir. 1996) (citations omitted). Other courts have similarly held that there is a presumption in favor of an attorney of record possessing settlement authority on behalf of a client. *See, e.g.*, Waits v. Weller, 653 F.2d 1288, 1290 n.2 (9th Cir. 1981) ("[U]nder Nevada law an attorney is presumed to have authority to settle his client's claim." (citations omitted)); Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1222 (8th Cir. 2006) (recognizing that, under Missouri law, courts "will presume that an attorney has the necessary authority if the attorney's statements or conduct imply the authority to settle" and that the client will bear "the burden of proving that the attorney acted without authority" (citations omitted)).

122. *In re Artha*, 91 F.3d at 328.

123. *Id.*

124. *Id.*

125. *Id.* at 329 (internal quotation marks omitted).

126. *Id.* at 330 ("A hearing is not necessary in light of appellants' failure ever to allege that they did not give their attorney authority to sign the settlement agreement for them.").

127. *Id.* at 331.

128. Michaud v. Michaud, 932 F.2d 77, 80 (1st Cir. 1991) (citations omitted).

authorized by the attorney's client, rebuttal of the presumption renders any purported settlement ineffective."[129] In this case, the plaintiff's attorney "confirmed that plaintiff had agreed to accept defendants' long-standing settlement offer."[130] This acceptance was communicated to the trial court by telephone the day after the hearing on the defendants' motion to dismiss for failure to prosecute but before the trial court could rule on the motion to dismiss.[131] "The same day, the court entered an order dismissing the action without costs and without prejudice to the right, upon good cause shown within sixty (60) days, to reopen the action if settlement is not consummated."[132] Shortly thereafter, the defendants mailed a settlement check and "cancelled all their trial plans and preparations and released all their witnesses."[133]

Strikingly similar to the facts of *Holker*, the plaintiff in *Michaud* was in jail at the time of the settlement[134] and communications between the plaintiff and his lawyer had essentially broken down because of "[p]rofound distrust and dissatisfaction [that] clearly reigned on both sides."[135] About six weeks after the dismissal, "the court received a lengthy, somewhat incoherent, handwritten letter from plaintiff himself, reporting that his attorney no longer wishe[d] to represent [his] interests if indeed he ever did."[136] The plaintiff also asserted that he had been denied a right to trial and denied a fair settlement.[137] The district court treated the letter as a motion to reopen.[138] The plaintiff's attorney claimed he had communicated the settlement offer to his client, who had agreed to the figure.[139] Following a hearing—where the plaintiff was not present—the district court found the plaintiff had agreed to settle, and it ordered finalization of the settlement within two weeks of the order.[140] When the plaintiff failed to comply, the court dismissed the action with prejudice.[141]

129. *Id.*
130. *Id.* at 79.
131. *Id.* at 78.
132. *Id.* (internal quotation marks omitted).
133. *Id.* at 79 (internal quotation marks omitted).
134. *Id.*
135. *Id.* at 81.
136. *Id.* at 78 (internal quotation marks omitted).
137. *Id.* at 78–79.
138. *Id.* at 79.
139. *Id.*
140. *Id.* at 80.
141. *Id.*

Although the court recognized a presumption that an attorney has authority to settle,[142] it remanded to afford the plaintiff an opportunity to be heard on whether he had actually given his attorney authority.[143] However, the court candidly admitted that "[i]t is tempting on these facts to affirm the district court's actions. Given . . . his former attorney's express representations that he had been given authority to settle, one can understand the impatience of the court."[144] Though sympathetic to the district court's plight, the First Circuit found an insufficient record to affirm and believed the plaintiff's testimony was necessary to resolve the issue.[145]

If Oklahoma courts adopt a presumption that the attorney has authority to settle, they should follow the First Circuit's lead regarding the procedure for determining whether the presumption will stand. Specifically, whenever a dispute arises, the trial court should hold an evidentiary hearing to determine whether the disputing party can present sufficient information to rebut the presumption of settlement authority.[146] Of course, the Oklahoma Supreme Court could easily create a scheme

142. *Id.*

143. *Id.* at 81–82 ("We hold, therefore, that the court acted prematurely in deciding the issue of authorization on the basis solely of counsel's remarks, without more.").

144. *Id.* at 80–81.

145. *Id.*

146. *See* Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1222–23 (8th Cir. 2006) ("As a general rule, an evidentiary hearing should be held when there is a substantial factual dispute over the existence or terms of a settlement. A court, however, need only hear so much evidence as is necessary for it to resolve the essential issues of fact concerning the settlement. When deciding whether to hold a hearing, a court may also consider the need to conserve judicial resources and the unseemliness of holding, in effect, a mini-trial to resolve a dispute between attorneys arising from their oral settlement talks. Accordingly, when the parties' counsel [are] the sole witnesses to their own conversations, the court may properly determine whether a settlement exists by relying exclusively on the representations of counsel." (alteration in original) (citations omitted) (internal quotation marks omitted)); *see also* Mid–S. Towing Co. v. Har–Win, Inc., 733 F.2d 386, 390 (5th Cir. 1984) (recognizing that "[a]lthough a district court has inherent power to enforce an agreement to settle a case pending before it summarily, when opposition to enforcement of the settlement is based not on the merits of the claim but on a challenge to the validity of the agreement itself, the parties must be allowed an evidentiary hearing on disputed issues of the validity and scope of the agreement"; it then remanded "for the narrow purpose of providing [the party disputing settlement] with an evidentiary hearing in which [it] will have the burden of proof on the factual question of whether [its attorney] did not actually have authority to settle the case" (citations omitted)); Garabedian v. Allstates Eng'g Co., 811 F.2d 802, 803 (3rd Cir. 1987) (recognizing the "presumption that a settlement entered into by an attorney has been authorized by the client" but requiring an evidentiary hearing on the issue (citations omitted)).

providing both a rebuttable presumption of actual settlement authority and implied or apparent authority by virtue of the attorney–client relationship. In order to avoid a settlement under this scheme, a disputing party would need affirmative evidence showing that his or her attorney had no actual authority (to rebut the presumption) and that the opposing party knew, or should have known of this lack of authority (to overcome the apparent authority).

E. Eighth Circuit

In *Greater Kansas City Laborers Pension Fund v. Paramount Industries, Inc.*, the Eighth Circuit held that a heavy burden of proof rests with the party that challenges the attorney's authority to settle.[147] Importantly, the court recognized that the determination of whether a client granted an attorney authority is governed by the same rules used to determine the authority given by a principal to an agent.[148] Thus, according to the Eighth Circuit, agency law applies, rather than some special set of rules, based upon the unique nature of the attorney–client relationship.

F. Rhode Island

In Whipple v. Whitman the Supreme Court of Rhode Island discussed this issue in some detail more recently than the Supreme Court had in *Holker*:

> The decisions on the power of an attorney to compromise are contradictory. In England, however, the doctrine established by the later cases, after some vacillation, is, that the attorney has power, by virtue of his retainer, to compromise the action in which he is retained, provided he acts *bonâ fide* and reasonably,

147. Greater Kan. City Laborers Pension Fund v. Paramount Indus., Inc., 829 F.2d 644, 646 (8th Cir. 1987) ("Once it is shown . . . that an attorney has entered into an agreement to settle a case, the party who denies that the attorney was authorized to enter into the settlement has the burden to prove that authorization was not given. *This is a heavy burden*." (emphasis added) (citations omitted)); *see also* United States v. Int'l Bhd. of Teamsters, 986 F.2d 15, 20 (2d Cir. 1993) ("The burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial.").

148. *Paramount Indus., Inc.*, 829 F.2d at 646 ("The rules for determining whether an attorney has been given authority by a client to settle a case are the same as those which govern other principal–agent relationships." (citations omitted)).

> and does not violate the positive instructions of his client, and that the compromise will bind the client, even if he does violate instructions, unless the violation is known to the adverse party. The reason is, the attorney, within the scope of his retainer, is considered the general agent of the client. And it is strongly argued in support of the power, that it ought to be upheld both as a matter of public policy and for the good of the client, inasmuch as the attorney generally knows vastly better than the client whether it is better to risk the trial of the suit or to compromise it, and is often called upon to do the one or the other suddenly in the absence of the client.[149]

Citing *Holker*, the Supreme Court of Rhode Island recognized the general rule that an attorney lacks authority to bind the client to a settlement agreement, but also that "[t]he American courts . . . show a leaning in favor of such compromises, when fairly made, and readily uphold them if they can find grounds on which to do so."[150] Thus, Rhode Island precedent supports recognizing an attorney's inherent power to settle the client's claims.

G. Indiana

In *Koval v. Simon Telelect, Inc.*, the Supreme Court of Indiana answered the following certified question: "If an attorney settles a claim as to which the attorney has been retained, but does so without the client's consent, is the settlement binding between third parties and the client?"[151] In the events giving rise to suit, the plaintiff was injured in the course and scope of his employment and brought suit against the manufacturer and distributor of the harm-causing instrument.[152] The employer's insurer, Liberty Mutual, had compensated the plaintiff pursuant to Indiana workers' compensation law.[153] A single attorney

149. Whipple v. Whitman, 13 R.I. 512, 513–14 (1882) (citations omitted); *see also* Edwards v. Born, Inc., 608 F. Supp. 580, 584 (D.V.I. 1985) (recognizing "a distinct minority view, . . . which states that an attorney has no authority, to settle or compromise an action without express permission from his or her client" (citations omitted)), *vacated*, 792 F.2d 387 (3d Cir. 1986).

150. *Whipple*, 13 R.I. at 514 (citing Holker v. Parker, 11 U.S. 436, 452 (1813)).

151. Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1301 (Ind. 1998).

152. *Id.*

153. *Id.*

represented both the employer and Liberty Mutual in mediation.[154] The mediation agreement provided that the parties would not be bound until they executed a written settlement agreement.[155] Subsequently, the employer denied that he had given authority to the attorney.[156]

In answering the certified question, the Indiana Supreme Court recognized a general principle of settlement authority:

> It is well settled that an attorney, by virtue of the representation, becomes a powerful agent with a great deal of authority. Retention confers on an attorney the general implied authority to do on behalf of the client all acts in or out of court necessary or incidental to the prosecution or management of the suit or the accomplishment of the purpose for which the attorney was retained.[157]

In this context, the Court discussed various opinions from the Indiana Court of Appeals, and ultimately held that "the general rule in Indiana is that retention of an attorney does not without more carry implied authority to the attorney to settle."[158] The Court recognized that "[l]ike implied authority, apparent authority to settle is not conferred simply by the retention of an attorney."[159] The Court discussed the difference between a general agent who has general authority to act on behalf of the principal, and a special agent who acts on the principal's behalf for only limited purposes.[160] It stated that attorneys are usually special agents, but they

> present a unique circumstance where, although they are special agents, some inherent power is found. This stems from a line of Indiana cases that recognize the power of an attorney to bind the client to the attorney's actions in court. It is derived from the need for structural integrity of court procedures and the protection of third parties who rely on the finality of those procedures. Both considerations require that an attorney have the

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1302.
158. *Id.* at 1303.
159. *Id.* at 1304.
160. *See id.* at 1304–05.

> power to bind the client in court.[161]

The Court further discussed the ability an attorney's ability to compromise the client's case by allowing judgment to be taken, and the rule that, should the attorney exceed the authority granted by the client, then "the client must look to the attorney for redress."[162] It discussed the fact that this general rule—that an attorney may bind a client to a judgment or settlement agreement—applied only in open court.[163] The Court also found that the rule should apply in the context of alternative dispute resolution (ADR); however, it drew a poorly enunciated distinction between formal ADR and informal settlement negotiations:

> [Mediation is] a formal proceeding where the parties are assembled in a setting subject to the court's jurisdiction, before a court appointed or otherwise approved official, in a court sanctioned environment, for the express purpose of settling a claim, and with the set expectation that those attending have the authority to do so. These are unlike an unstructured negotiation, where it is reasonable to conclude that the client may not have authorized the settlement and there is no reasonable assumption that the attorney was empowered with the authority to settle.[164]

Although the Court did not give a full-fledged explanation for the distinction between ADR and informal settlement agreements, its analysis provides sound logic for expanding the idea that an attorney may compromise the client's case beyond the bounds of the courtroom or court-filed documents.

One commentator discussed the Court's reasoning and disagreed with its reliance on implied authority:

> While this court's approach is a way to protect settlement when the court is involved, and thus protects the judicial system and the general public policy in favor of settlement, the use of inherent power to do so is fraught with difficulty, not only because inherent power is not generally available to special

161. *Id.* at 1305.
162. *Id.* (quoting Thompson v. Pershing, 86 Ind. 303, 310 (1882)) (internal quotation marks omitted).
163. *Id.* at 1306–07.
164. *Id.* at 1307.

> agents, but also because of the lack of understanding and acceptance of the doctrine.[165]

Certainly, this commentator makes a valid point—particularly with respect to the distinction between a special and general agent. The reasoning may not apply so strictly in Oklahoma, however, where the concept of implied authority is somewhat well established, although only with regard to non-attorney agents.[166]

In short, numerous jurisdictions recognize an attorney's apparent authority to bind a client to a settlement agreement.[167] Further, the United States Supreme Court and other jurisdictions recognize that a settlement agreement should be enforced unless it is "so unreasonable in itself as to be exclaimed against by all," even if it exceeds the attorney's authority.[168] Further still, most jurisdictions place the burden on the party contesting the settlement agreement to demonstrate that the attorney exceeded settlement authority[169] and the settlement agreement was patently unreasonable.[170] Oklahoma courts should adopt a similar standard.

165. Giesel, *supra* note 3, at 565.

166. *See, e.g.*, Elam v. Town of Luther, 1990 OK CIV APP 7, ¶ 6, 787 P.2d 1294, 1296 ("In addition to express authority granted by a principal, an agent has authority to perform such acts as are incidental to, or reasonably necessary to accomplish the intended result." (citations omitted)). Thus, in Oklahoma, even a special agent may have a specific task, yet it will necessarily carry with it implied authority to do that which is reasonably necessary to accomplish the end result sought by the principal. *Id.*

167. *See, e.g.*, Marchese v. Sec'y, U.S. Dept. of Interior, 409 F. Supp. 2d 763, 772 (E.D. La. 2006); Brumbelow v. N. Propane Gas Co., 308 S.E.2d 544, 547 (Ga. 1983); Kenney v. Vansittert, 277 S.W.3d 713, 721 (Mo. Ct. App. 2008).

168. Holker v. Parker, 11 U.S. 436, 452 (1813); *see also* Senate Realty Corp. v. Comm'r, 511 F.2d 929, 932 (2d Cir. 1975) ("[A]lthough [the attorney] was unauthorized to settle, we cannot agree with appellant that his disregard of . . . advice constituted a fraud upon the court. Whatever liability, if any, [the attorney] may have as to [the client] or the estate is not the question before us. The point is that vis-a-vis the Tax Court there was no conduct on the part of [the attorney] which compromised the merits of the negotiated settlement or which precluded the court from adjudging the matter impartially."); Stearns Bank N.A. v. Palmer, 182 S.W.3d 624, 626 (Mo. Ct. App. 2005) ("The compromise of a pending suit by an attorney having apparent authority will be binding upon his client, unless it be so unfair as to put the other party upon inquiry as to the authority, or imply fraud." (quoting Promotional Consultants, Inc. v. Logsdon, 25 S.W.3d 501, 505 (Mo. Ct. App. 2000)) (internal quotation marks omitted)).

169. *See, e.g.*, Thomas v. Colo. Trust Deed Funds, Inc., 366 F.2d 136, 139 (10th Cir. 1966); United States v. Beebe, 180 U.S. 343, 352 (1901).

170. *See, e.g.*, *Holker*, 11 U.S. at 452–53; Whipple v. Whitman, 13 R.I. 512, 514 (1882).

H. Georgia

Other jurisdictions have addressed similar situations. For example, Georgia courts recognize the apparent authority of attorneys to settle claims on behalf of their clients.[171]

> Under Georgia law, "[a]n attorney has apparent authority to enter into a binding agreement on behalf of a client." "Where the very existence of the agreement is disputed, it may only be established by a writing." And while "[t]he writing which will satisfy this requirement ideally consists of a formal written agreement signed by the parties[,] . . . letters or documents prepared by attorneys which memorialize the terms of the agreement reached will suffice."[172]

Thus, Georgia recognizes that communications between attorneys are sufficient to establish a settlement agreement. In fact, under Georgia law, a settlement agreement reached between attorneys is unenforceable "[o]nly if the client had specifically limited his attorney's authority to settle and the opposing attorneys were aware of this limitation."[173] Professor Giesel discussed this area of Georgia law in some detail:

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

171. *Brumbelow*, 308 S.E.2d at 547. One commentator refers to this as "retention-based authority." Giesel, *supra* note 3, at 568.

172. Walter v. Mitchell, 669 S.E.2d 706, 708 (Ga. Ct. App. 2008) (alterations in original) (quoting *Brumbelow*, 308 S.E.2d at 546).

173. Glazer v. J.C. Bradford & Co., 616 F.2d 167, 169 (5th Cir. 1980) (citations omitted).

> appropriate recourse is against the client's attorney.[174]

In short, Georgia courts recognize that the issue of attorney malpractice should be handled between attorney and client rather than allowing the burden of a ill-intentioned or negligent attorney to fall upon a third party to the attorney–client contract.[175]

I. Missouri

Missouri courts also recognize a presumption of an attorney's authority to settle a client's claims.[176] In *Kenney v. Vansittert*, the defendant disputed the existence of a settlement agreement in a case, which had arisen out of a street fight.[177] The original plaintiffs had executed a release and received settlement checks from the defendant's insurer.[178] The defendant refused to sign the release because he claimed he had not given his attorney authority to dismiss his counterclaims.[179] The trial court held an evidentiary hearing and "found the parties through their respective attorneys of record, mutually agreed to voluntarily dismiss all pending claims and counterclaims."[180] The defendant

174. Giesel, *supra* note 3, at 569 (footnotes omitted).

175. *See* Green v. Lanford, 474 S.E.2d 681, 682 (Ga. Ct. App. 1996) ("The client's remedy, where there have been restrictions not communicated to the opposing party, is against the attorney who overstepped the bounds of his agency, not against the third party."); Dickey v. Harden, 414 S.E.2d 924, 926–27 (Ga. Ct. App. 1992) (holding that a principal is bound by an agent cloaked with authority, even if the agent acted adversely toward the principal's interests, and the principal may have recourse against the agent); Hynko v. Hilton, 401 S.E.2d 324, 326 (Ga. Ct. App. 1991) ("The principal, having selected his representative and vested him with apparent authority, should be the loser in [dealing with a contract entered into by a wayward agent], and not the innocent party who relied thereon.").

176. *See, e.g.*, Marchese v. Sec'y, U.S. Dep't of Interior, 409 F. Supp. 2d 763, 771 (E.D. La. 2006) ("[T]he attorney of record is presumed to have authority to settle his clients' case, and the burden to rebut this presumption falls on the clients who contend that their attorney had no such authority."); Hartman v. Hook–Superx Inc., 42 F. Supp. 2d 854, 855 (S.D. Ind. 1999) ("Because of the unique nature of the attorney–client relationship, and consistent with the public policy favoring settlements, federal law presumes that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, has authority to do so."); Kenney v. Vansittert, 277 S.W.3d 713, 720–21 (Mo. Ct. App. 2008).

177. *Kenney*, 277 S.W.3d at 717.

178. *Id.* at 717–18.

179. *Id.* at 718.

180. *Id.* (internal quotation marks omitted).

appealed.[181]

On appeal, the court recognized the presumption that an attorney has settlement authority over a client's case, and one who attempts to rebut the presumption faces a heavy burden.[182] The *Kenney* court stated: "[W]here such apparent authority is present, the compromise of a pending suit will be binding upon his client, unless it be so unfair as to put the other party upon inquiry as to the authority, or imply fraud."[183] The court found that the defendant's testimony regarding his attorney's "role and [the defendant's] own knowledge of the negotiations was contradictory and inconclusive."[184] The court recognized the trial court's freedom to accept or reject a party's testimony on the issue, and that the trial court had obviously rejected the defendant's testimony that his attorney lacked authority.[185] Therefore, the court found adequate support in the record to affirm the trial court's enforcement of the settlement agreement.[186]

Oklahoma courts should similarly recognize a heavy burden of proof on parties claiming their attorney lacked authority to enter into settlement. Generally speaking, the party claiming lack of authority will be in the best position to produce evidence relating to the actual authority conveyed. Thus, that party should bear the heavy burden of coming forward with potentially privileged evidence to demonstrate the lack of any such authority.

IV. OTHER OKLAHOMA DOCTRINES SUPPORTING THE AUTHORITY TO SETTLE

As shown above, Oklahoma caselaw is somewhat jumbled regarding an attorney's ability, if any, to enter into a settlement agreement on behalf of the client. The Oklahoma courts and legislature have, however, touched on related issues. Some authority supports a presumption that an attorney may enter into a settlement on behalf of a client[187] or that an

181. *Id*.

182. *Id*. at 720–21 ("In Missouri, a party contending that his attorney lacked authority to bind him carries a heavy burden. . . . However, authority is presumed to be present in the client's attorney of record and where the attorney undertakes negotiations with the opposing party." (citations omitted)).

183. *Id*. at 721 (citations omitted) (internal quotation marks omitted).

184. *Id.*

185. *Id.*

186. *Id.* at 722.

187. *See infra* Parts IV.B–C.

attorney, by virtue of representation, has apparent authority to do so.[188]

A. Magister Litis

Oklahoma recognizes the attorney as master of the litigation. "The lawyer, an officer of the court, is presumed to have authority to act for a client."[189] "A party to an action who is represented by counsel of record may not act independently as his own attorney in the case."[190] In fact, an attorney's control over litigation is so firmly established that, once delegated, a client must follow proper procedure to regain such control:

> The client who wants to take over a lawsuit from the lawyer must first (a) discharge the counsel of record by a document on file in court and then (b) proceed independently (*pro se*) as an unrepresented party. But while the lawyer continues to hold the status as counsel of record, it is the lawyer alone who holds the position of *magister litis*—the master of the client's litigation.[191]

Although this point of law does not necessarily overcome the ethical rule that the decision to compromise a case rests with the client, it demonstrates an attorney's profound power to dispose of a lawsuit. Interestingly, both the *magister litis* doctrine and the Oklahoma Rules of Professional Conduct, Rule 1.2,[192] govern the attorney–client relationship; they do not govern interaction with the opposing party. Thus, both perspectives enjoy some support in extant rules.

B. Offer of Judgment

As discussed below, Oklahoma courts have consistently held that an attorney can bind a client in disposing of a lawsuit. First, an attorney can file an offer of judgment—without his or her client's approval—and neither the party, nor the attorney, can withdraw that offer.[193] In *Hernandez v. United Supermarkets of Oklahoma, Inc.*, the Court of Civil

188. *See infra* Part IV.A.

189. N. Side State Bank v. Bd. of Cnty. Comm'rs, 1994 OK 34, ¶ 25, 894 P.2d 1046, 1055.

190. Watson v. Gibson Capital, L.L.C., 2008 OK 56, ¶ 13, 187 P.3d 735, 739.

191. *Id.* ¶ 8, 187 P.3d at 738 (footnote omitted).

192. *See* OKLA. RULES OF PROF'L CONDUCT R. 1.2 (2008).

193. *See* Hernandez v. United Supermarkets of Okla., Inc., 1994 OK CIV APP 122, ¶¶ 15–16, 882 P.2d 84, 88.

Appeals held that "an offer of judgment made pursuant to . . . § 1101 may not be revoked by the defendant, on grounds that revocation is not authorized by the statute."[194] In that case, the defendant, a supermarket, filed an offer of judgment after its attorney had filed and argued a motion for summary judgment.[195] After the district court granted summary judgment in favor of the defendant, the plaintiff accepted the offer of judgment.[196] The defendant attempted to withdraw the offer of judgment by filing an objection to the plaintiff's acceptance.[197] "The trial court held that its decision to grant summary judgment caused Defendant Supermarket's offer of judgment to be withdrawn," and the plaintiff appealed.[198]

The Court of Civil Appeals cited a case from the Colorado Supreme Court, which had held "that a statutory offer of judgment is 'not a simple private offer of settlement . . . [but is] a *special statutory process spelled out in clear and unambiguous language* which can and should be enforced without engrafting contract principles onto it.'"[199] The Court of Civil Appeals recognized that Oklahoma and Colorado *mandate* entry of judgment where the offer is timely accepted, and no discretion is left to the court in this regard.[200] Thus, the court held "that an intervening judgment has no effect on a plaintiff's right to accept an offer of

194. *Id.* ¶ 12, 882 P.2d at 88. The statute authorizing an offer of judgment provides:

> The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

OKLA. STAT. tit. 12, § 1101 (OSCN through 2013 Leg. Sess.).

195. *Hernandez*, 1994 OK CIV APP 122, ¶ 4, 882 P.2d at 86.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* ¶ 14, 882 P.2d at 88 (alterations in original) (quoting Centric–Jones Co. v. Hufnagel, 848 P.2d 942, 946 (Colo. 1993)).

200. *Id.* ¶¶ 15–16, 882 P.2d at 88.

judgment" when made pursuant to § 1101.[201] While the court agreed with the majority's holding in *Centric–Jones* and much of its reasoning, it adopted the concurring opinion.[202] The Court of Civil Appeals believed the concurring opinion in *Centric–Jones*

> treated the summary judgment that was entered during the statutory acceptance period as interlocutory until the end of the acceptance period and, as such, the summary judgment "remained open to modification, reconsideration or withdrawal." Stated another way, the acceptance of the offer of judgment, along with its attendant mandatory judgment, displaces an intervening summary judgment, which remains interlocutory for the length of the acceptance period.[203]

In short, the Court of Civil Appeals considers an acceptance of an offer of judgment binding even if the district court enters judgment between the time of the offer and the time of the acceptance.

In *Allison v. City of El Reno*, the Court of Civil Appeals addressed a dispute involving damaged private property as a result of sewage backup following heavy rains.[204] Shortly before trial, the City submitted an offer of judgment, and "[t]he plaintiffs were advised by their attorney that a § 1101 offer, if refused, would subject them to the risk of paying attorney's fees to the City in the event the plaintiffs' recovery at trial was less than the City's written offer."[205] The plaintiffs accepted the offer of judgment and subsequently moved to recover attorney's fees. The City argued that

> its offer was intended to include attorney's fees, and any other interpretation is based on a mistake of fact necessitating revocation; that the plaintiffs' request for attorney's fees constituted a counter offer, which negated the original offer; and finally, that the court entered an invalid consent decree because

201. *Id.* ¶ 18, 882 P.2d at 89.
202. *Id.*
203. *Id.* ¶ 19, 882 P.2d at 89 (Erickson, J., concurring) (citations omitted) (quoting *Centric–Jones*, 848 P.2d at 949).
204. Allison v. City of El Reno, 1994 OK CIV APP 170, ¶ 3, 894 P.2d 1133, 1134.
205. *Id.* ¶ 5, 894 P.2d at 1135.

the City did not consent to an attorney's fee award.[206]

The court rejected the City's arguments, recognizing that an offer to confess "terminates only upon two events: acceptance by the plaintiff, or expiration of five days."[207]

Under this analysis, a client would be bound by an offer of judgment filed by an attorney, even if that attorney did not have authority to file the offer or if it had been filed for the wrong amount. As stated by the dissenting judge in *Allison*: "The interpretation of section 1101 offered by the majority would preclude withdrawal of an offer containing a misplaced decimal point."[208] In other words, once an offer of judgment is filed, it cannot be withdrawn for five days. Prior to that expiration, the party filing the offer will be bound by its acceptance even if that party's attorney exceeded actual authority in filing the offer. Thus, this area of law also supports a holding that an attorney is imbued with apparent authority to settle and that there is a rebuttable presumption of actual authority.

C. Dismissal with Prejudice

Oklahoma courts have recognized that a plaintiff is bound by a dismissal with prejudice filed by the plaintiff's counsel, even if the dismissal was a mistake.[209] For instance, in *Ritter v. Ritter*, the Court of Civil Appeals addressed a scenario where the plaintiff's attorney inadvertently dismissed the plaintiff's lawsuit with prejudice when the attorney intended to dismiss without prejudice, which would have permitted the plaintiff to refile within one year.[210] "Over Defendants'

206. *Id.* ¶ 13, 894 P.2d at 1136.

207. *Id.* ¶ 14, 894 P.2d at 1136.

208. *Id.* ¶ 4, 894 P.2d at 1138 (Taylor, J., dissenting).

209. Part IV.C relies on cases that discussed and are premised on OKLA. STAT. tit. 12, § 684 for their holdings. Shortly before publication, the Oklahoma Supreme Court decided *Douglas v. Cox Retirement Properties, Inc.* in which it held that the Comprehensive Lawsuit Reform Act of 2009 (CLRA), or H.B. 1603, was "void in its entirety." Douglas v. Cox Ret. Props., Inc., 2013 OK 37, ¶ 12, 302 P.3d 789, 794. While the Court's decision in *Douglas* rendered Title 12, § 684 unconstitutional, the Court's decision was solely based on the unconstitutionality of CLRA and its "constitutional infirmity of logrolling." *Id.* ¶¶ 10, 12, 302 P.3d at 793–94. In fact, the Court explicitly invited the legislature to separately reenact the statutes affected by the *Douglas* decision, which would include Title 12, § 684. *Id.* ¶ 12 n.8, 302 P.3d at 794 n.8.

210. Ritter v. Ritter, 2008 OK CIV APP 9, ¶ 2, 177 P.3d 1110, 1111; OKLA. STAT. tit 12, § 100 (OSCN through 2013 Leg. Sess.) ("If any action is commenced within due

objections, the trial court entered an order allowing Plaintiff to file an amended dismissal without prejudice."[211] The Court of Civil Appeals reversed the trial court's decision to allow the plaintiff to file an amended dismissal, and held that "[t]he trial court's order allowing Plaintiff to file an amended dismissal an unauthorized use of judicial authority which this Court must prohibit."[212] Generally speaking, the voluntary filing of a dismissal divests the court of jurisdiction to further consider a particular case.[213]

The *Ritter* ruling comports with a prior ruling of the Oklahoma Supreme Court.[214] In *General Motors Acceptance Corp. v. Carpenter*, the Court assumed original jurisdiction and entered a writ of prohibition to preclude the trial court from reopening a case following dismissal and payment of costs.[215] The Court stated that "[o]nce an action has been dismissed, no jurisdiction remains in district court to go forward with the

time, and . . . if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.").

211. *Ritter*, 2008 OK CIV APP 9, ¶ 2, 177 P.3d at 1111 (internal quotation marks omitted).

212. *Id.* ¶ 6, 177 P.3d at 1111.

213. *See* Shinn v. Morris, 1951 OK 304, ¶ 9, 237 P.2d 455, 457 ("In the case at bar the dismissal was effective and complete. . . . The trial court was without jurisdiction to enter the order vacating the dismissal and is without jurisdiction to entertain the motion or application for an order requiring the defendant therein to pay attorney fees."). *But see* Berko v. Willow Creek I Neighborhood Ass'n, 1991 OK CIV APP 50, ¶ 9, 812 P.2d 817, 819 ("[A] voluntary dismissal does not act as a jurisdictional bar to further proceedings seeking the imposition of sanctions under section 2011.").

214. *See, e.g.*, Gen. Motors Acceptance Corp. v. Carpenter, 1978 OK 39, ¶ 8, 576 P.2d 1166, 1168; Firestone Tire & Rubber Co. v. Barnett, 1970 OK 93, ¶ 22, 475 P.2d 167, 171 ("We hold that the dismissal was effective and complete and that the jurisdiction of the court was thereupon terminated; that the trial court was without jurisdiction to vacate said dismissal and such action constituted an attempt to make unauthorized application of judicial force and should be prohibited by this court." (citations omitted)). On a side note, the Court's rulings regarding dismissal finality are interesting in light of the following:

> On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect. In such cases amendment shall be made by the party in default within a time specified by the court for filing an amended pleading. Within the time allowed by the court for filing an amended pleading, a plaintiff may voluntarily dismiss the action without prejudice.

OKLA. STAT. tit. 12, § 2012(G).

215. *Carpenter*, 1978 OK 39, ¶ 10, 576 P.2d at 1168.

action."[216] Thus, in this context as well, the Oklahoma Supreme Court's ruling recognized an attorney's ability to dispose of a lawsuit without the express authority of the client.

Simply put, Oklahoma law enables an attorney—either a plaintiff's or a defendant's attorney—to dispose a lawsuit and such disposal will be binding on the client.[217] A defendant's attorney may file an offer of judgment, and it will be binding on the client.[218] This is true even if it involves a "misplaced decimal point."[219] A plaintiff's attorney might accidentally dismiss a lawsuit with prejudice, rather than dismissing without prejudice, and the dismissal with prejudice will be binding on the client.[220] Therefore, there is a strong policy argument to be had that an attorney should have the apparent authority to bind a client to a settlement agreement. Any dispute regarding an attorney's actual authority should be worked out between attorney and client and have no adverse effect on the rights of an innocent opposing party.

Other courts have held contrary to this Article's thesis because of state law forbidding an attorney from compromising a client's claim except under very limited circumstances.[221] For instance, the Supreme Court of Illinois held in *Brewer v. National Railroad Passenger Corp.* that a client will not be bound by an out-of-court settlement without proof the attorney had actual authority to settle.[222]

> The authority of an attorney to represent a client in litigation is separate from and does not involve the authority to compromise or settle the lawsuit. An attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so.[223]

However, Oklahoma courts have repeatedly recognized an attorney's

216. *Id.* ¶ 8, 576 P.2d at 1168 (citations omitted).
217. *See, e.g.*, *Ritter*, 2008 OK CIV APP 9, ¶ 6, 177 P.3d at 1111; Allison v. City of El Reno, 1994 OK CIV APP 170, ¶ 12, 894 P.2d 1133, 1136.
218. *See Allison*, 1994 OK CIV APP 170, ¶ 12, 894 P.2d at 1136; Hernandez v. United Supermarkets of Okla., Inc., 1994 OK CIV APP 122, ¶¶ 15–16, 882 P.2d 84, 88.
219. *Allison*, 1994 OK CIV APP 170, ¶ 4, 894 P.2d at 1138 (Taylor, J., dissenting).
220. *See Ritter*, 2008 OK CIV APP 9, ¶ 6, 177 P.3d at 1111.
221. *See, e.g.*, Giesel, *supra* note 3, at 574–75 and cases cited therein.
222. Brewer v. Nat'l R.R. Passenger Corp., 649 N.E.2d 1331, 1334 (Ill. 1995).
223. *Id.* at 1333–34 (citations omitted).

power to compromise a client's lawsuit in a number of ways merely by virtue of an attorney–client relationship. Thus, the distinction between Illinois and Oklahoma law sheds light on how Oklahoma courts should handle this issue. Specifically, Illinois does not allow an attorney "to compromise, consent to a judgment against the client, or give up or waive any right of the client,"[224] but Oklahoma does;[225] therefore, Oklahoma should recognize the foundation of its legal precedent and explicitly hold that an attorney has apparent authority to settle a claim on behalf of the client.

V. OKLAHOMA COURTS SHOULD ENFORCE SETTLEMENT AGREEMENTS COMMUNICATED BY COUNSEL

As previously discussed, the *Moran* Court recognized an attorney's power to bind a client to a contract—even a settlement contract.[226] Furthermore, the Oklahoma Supreme Court recently recognized that a settlement agreement is a valid contract, regardless of whether the parties made the agreement orally or in writing.[227] The fact that a settlement agreement may arise out of litigation should not negate these established points of law. In fact, an attorney's primary duty is to represent a client in litigation, particularly when the representation would likely culminate in a settlement agreement. Thus, an attorney should possess the authority to bind the client to a settlement agreement, just like any other contract, in order to carry out this duty. Courts should treat a settlement agreement like any other contract. This area of the law has developed greatly in other jurisdictions since the Oklahoma Supreme Court last addressed the issue, and now a number of jurisdictions recognize an attorney's authority to settle or a rebuttable presumption thereof.[228] Oklahoma

224. *Id.*

225. *See supra* Parts IV.B–C. Interestingly, the Oklahoma Supreme Court has also recognized that dismissal power rests solely with the attorney, not the client. *See* Watson v. Gibson Capital, L.L.C., 2008 OK 56, ¶ 9, 187 P.3d 735, 739 (holding that a dismissal "was facially flawed and hence utterly ineffective . . . because it was filed solely by a client represented by counsel of record without having the lawyer join him in the document").

226. *See supra* Part I.A.

227. *See In re* De-Annexation of Certain Real Prop., 2009 OK 18, ¶¶ 6, 8, 204 P.3d 87, 89.

228. *See, e.g.*, Hartman v. Hook–Superx Inc., 42 F. Supp. 2d 854, 855 (S.D. Ind. 1999) ("Because of the unique nature of the attorney–client relationship, and consistent with the public policy favoring settlements, federal law presumes that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, has authority to do

should likewise recognize an attorney's apparent authority to settle on behalf of a client and establish a presumption that an attorney has actual authority to settle.[229] Such a ruling would comport with extant law in Oklahoma regarding disposition of a lawsuit. If an attorney, as the client's agent, can bind the client in filing an offer of judgment or in filing a dismissal with prejudice, then a client should likewise be bound by an attorney's settlement agreement.

In Oklahoma, "[c]ompromises and settlements are favored by the law."[230] The Court of Civil Appeals's holding in *Hays*, which rejected an attorney's authority to settle a suit on behalf of a client, flies in the face of this longstanding rule, as well as the daily practice of litigators. As Professor Giesel noted, this position, which is also followed in Kentucky and Florida,

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

so." (citations omitted)); Brumbelow v. N. Propane Gas Co., 308 S.E.2d 544, 547 (Ga. 1983) ("An attorney has apparent authority to enter into a binding agreement on behalf of a client. Therefore, where there is no challenge to the existence or the terms of an agreement but only to an attorney's authority to enter into it, the client is bound by its terms even in the absence of a writing or detrimental reliance on the part of the opposite party." (citations omitted)); Kenney v. Vansittert, 277 S.W.3d 713, 720–21 (Mo. Ct. App. 2008) ("In Missouri, a party contending that his attorney lacked authority to bind him carries a heavy burden. . . . [A]uthority is presumed to be present in the client's attorney of record and where the attorney undertakes negotiations with the opposing party.").

229. *See* Giesel, *supra* note 3, at 586 ("While a client might claim that he or she intended no bestowal of authority, if a client's actions would lead a reasonable attorney to believe that the client had bestowed authority, the client ought to be held to the reasonable interpretation of those actions.").

230. Shoenfelt v. Donna Belle Loan & Inv. Co., 1935 OK 579, ¶ 6, 45 P.2d 507, 509.

attorney care.[231]

At best, the *Hays* ruling leads to increased carelessness in settlement negotiations. At worst, it encourages attorneys to purposely exceed the scope of their settlement authority in order to feel out the opposing party and determine that party's stance on settlement. In short, attorneys can and should expect that opposing counsel will have authority to settle. Thus, public policy and the Oklahoma Rules of Professional Conduct support a holding that attorneys have apparent authority to bind the client to a settlement agreement and there is a presumption that an attorney in such a situation acts with actual authority.

VI. CONCLUSION

The issue of an attorney's authority to settle arises out of a conflict between two Rules in the Oklahoma Rules of Professional Conduct. On one hand, the ultimate decision of whether to settle a claim rests with the client, not the attorney.[232] On the other hand, an attorney cannot directly contact an opposing party that is represented by counsel.[233] Thus, an attorney lacks the ability to fully explore the extent of actual authority conveyed to an opposing party's attorney. In this scenario, the party contesting the settlement should still be bound to the contract. If an attorney truly exceeded actual authority, then the dispute should be resolved between attorney and client rather than placing the burden on an innocent third party that reasonably relied upon an attorney's statements.

Because an attorney is master of the litigation, an opposing attorney must be able to reasonably assume that an attorney has the authority to enter into a settlement agreement on behalf of his or her client. Furthermore, where one attorney represents to another attorney that he or she possesses settlement authority, the opposing attorney should not face adverse consequences for believing the assertion. In dealing with one another, attorneys should be able to assume that an opposing attorney will behave honestly, as required by the Oklahoma Rules of Professional

231. Giesel, *supra* note 3, at 577.

232. OKLA. RULES OF PROF'L CONDUCT R. 1.2 (2008) ("A lawyer shall abide by a client's decision whether to settle a matter.").

233. *Id.* R. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

Conduct.[234]

Such a ruling comports with current Oklahoma caselaw in which an attorney has the power to dismiss a suit or file an offer of judgment and duly bind a client without any showing of actual authority. There is no basis for a distinction between in-court announcements and settlements reached privately. The Oklahoma Rules of Professional Conduct require that an attorney deal truthfully in all situations, not only at the courthouse.[235] Thus, the Oklahoma Supreme Court should adopt a similar rule, and recognize an attorney's apparent authority to enter into a settlement agreement on behalf of the client.[236] Additionally, the Court should adopt a presumption that an attorney, who enters into a settlement on behalf of a client, has actual authority to do so. Such a rule would eliminate confusion for practitioners, streamline the settlement process, and promote the public policy favoring settlement over litigation.

234. *Id.* R. 4.1 ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .").

235. *Id.*

236. *See* Giesel, *supra* note 3, at 586 ("There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs.").