An Attorney's Implied Authority To Bind His Client's Interests and Waive His Client's Rights

The attorney-client relationship may be characterized as an agent-principal relationship.[1] But because this is more than an ordinary agency relationship, many special problems may arise during the course of the attorney's service on behalf of his client.[2] Typically the broadest expanse of authority as agent of the client is his implied authority.[3] The classic statement of an attorney's implied authority is found in *Moulton v. Bowker*[4] where Chief Justice Gray stated:

> An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action . . . .[5]

Courts have not been consistent, however, in defining the limits of this authority.

An attorney will have no authority whatsoever to bind interests or waive rights of a person as his client until that person retains or

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1. E. HUFFCUT, THE LAW OF AGENCY §114 (2d ed. rev. 1901); W. SEAVEY, HANDBOOK ON THE LAW OF AGENCY §31 (1964); F. TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT §33 (2d ed. R. Powell 1924).

2. *E.g.*, Miller v. Mueller, 28 Md. App. 141, 343 A.2d 922 (1975) (question concerning authority to make a contract for the sale of his client's property); Fonesca v. County of Hidalgo, 527 S.W.2d 474 (Tex. Civ. App. 1975) (question on authority to settle the condemnation of an easement).

3. Implied authority is a type of actual authority derived by implication from the principal's words or deeds. It is in effect actual authority circumstantially proved. An agent, either general or special, will have implied authority to do those acts usual and incidental to the authorized transaction and those reasonably necessary to accomplish his principal's purposes. W. SELL, AGENCY §40 (1975).

4. 115 Mass. 36 (1874). In *Moulton v. Bowker*, plaintiffs were suing to recover possession of property they purchased at a judgement sale. Plaintiffs had caused the real property of a Mr. Whitman to be attached pursuant to an earlier action they had begun against him in court. Judgement was rendered for plaintiffs in that action and was executed by a sale of the attached property at public auction to them. Prior to the entry of judgement for plaintiffs, their attorney had executed a discharge of the attachment. Defendant received and occupied the property through a chain of conveyances from Whitman and through this case plaintiffs were endeavoring to recover possession of the property by arguing that the attorney was not authorized to discharge the attachment.

5. *Id.* at 40.

employs him or until he is assigned by the court to be that person's counsel.[6] In most instances it is said that employment or retainer of a lawyer for one purpose gives that attorney no authority regarding matters separate and collateral to the employment or the accomplishment of its objective. Because the attorney serves as a special agent,[7] the scope of his authority is confined to only those actions necessary to accomplish the specific purpose for which he is employed.[8]

As a result of his employment, retainer, or assignment to the case, the attorney will have implied authority in regard to the general conduct of litigation to do or take all steps or actions which are necessary or incidental to the orderly prosecution, defense, or conduct of litigation or court proceedings.[9] This implied authority includes the power to bind the client's interests in some areas[10] and waive certain of the client's rights.[11] These implied powers, however, are limited only to matters of procedure or remedies and may not

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6. 7 C.J.S. *Attorney and Client* §62 (1937).

An attorney may not even appear in a cause of action without some form of authority from the party in whose behalf he appears. Loftberg v. Aetna Cas. & Sur. Co., 264 Cal. App. 2d 306, 308, 70 Cal. Rptr. 269, 270 (1968).

The court can appoint counsel in civil proceedings for a person absent or legally incompetent and the attorney's actions will be binding on those parties if due process requirements are met. In a criminal case, however, an attorney appointed by the court without the defendant's knowledge or consent cannot act to bind the fugitive defendant. United States v. Weinstein, 511 F.2d 622, 628 (2d Cir. 1975).

7. "An attorney at law . . . is a special agent limited in duty and authority to the vigilant prosecution or defense of the rights of his client." State *ex rel.* Montgomery v. Goldstein, 109 Or. 497, 220 P. 565, 567 (1923).

For a discussion of the distinctions between special and general agents see F. MECHEM, OUTLINES ON THE LAW OF AGENCY §17 (4th ed. 1952) and W. SELL, AGENCY §70 (1975).

8. 7 C.J.S. *Attorney and Client* §67 (1937).

9. Mungin v. Florida E. Coast Ry., 318 F. Supp. 720, 732 (M.D. Fla. 1970); Herfurth v. Horine, 266 Ky. 19, 98 S.W.2d 21 (1936); 1 E. THORNTON, A TREATISE ON ATTORNEYS AT LAW §199 at 351-52 (1914).

10. *E.g.*, Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958) (proceed without a court reporter); American Rattan & Reed Mfg. Co. v. Handel-Maatschappij Moraux & Co., 194 App. Div. 90, 185 N.Y.S. 480 (1920) (release attachments); Mavoulas v. State Indus. Accident Comm'n, 117 Or. 406, 244 P. 317 (1926) (submit pending case for binding arbitration).

11. *E.g.*, State v. Baker, 276 So. 2d 470 (Fla. 1943) (waiver of right to be tried within a 180 day time limit); People v. Merriweather, 50 Mich. App. 751, 213 N.W.2d 756 (1973) (waiver of record of the final argument).

be used to impair a client's substantive rights or the cause of action.[12] Thus within the sphere of counsel's implied authority to bind his client are the choice of proceedings, manner of trial and the like.[13] If, however, the result of the exercise of the attorney's authority would clearly be a denial of due process to the client, the attorney's actions do not bind the client.[14]

Actions by counsel which violate penal laws of the state do not prejudice the rights of the client, as the client never impliedly authorizes his lawyer to violate state penal laws.[15] The court in *Herfurth v. Horine*[16] remarked that only if there was an absence of collusion, fraud or inequitable conduct between the attorney and opposing counsel would an attorney's acts based on implied authority bind his client.[17] It is said to be a universal rule that a client is not bound by acts of his attorney without ratification where the attorney has a personal interest in the subject matter involved or where there is a conflict of interest between the attorney and the client.[18]

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12. Mungin v. Florida E. Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970) (within scope of attorney's authority to amend complaint to state a class action); Linsk v. Linsk, 449 P.2d 760, 74 Cal. Rptr. 544 (1969); State v. Bentley, 46 N.J. Super. 193, 134 A.2d 445 (Super. Ct. App. Div. 1957) (within attorney's authority to refuse to interview a witness); State v. Mulvaney, 21 N.J. Super. 457, 91 A.2d 359 (Super. Ct. App. Div. 1952).

13. State v. Froah, 220 Iowa 840, 263 N.W. 525, 528 (1935).

14. Judson v. State, 227 So. 2d 554 (Fla. Dist. Ct. App. 1969) (defendant denied effective appellate review because attorney failed to file insolvency affidavit would be allowed full appellate review by means of habeas corpus).

15. Freeman v. State, 203 P. 1052 (Okla. Crim. App. 1922).

16. 266 Ky. 19, 98 S.W.2d 21 (1936). In *Herforth,* a doctor who had served as an expert witness and consultant in a case where defendants were contesting a will on grounds of mental incapacity had sued and obtained a judgment against defendants for payment of his fees. Defendants in appealing the judgment contended that the attorney they employed to contest the will had no authority to hire a medical expert for aid in preparation of the case. The court held that the attorney had implied authority to take the necessary steps to contest the will including incurring the necessary expense of expert assistance from the doctor.

17. *Id.* at 23, 98 S.W.2d at 23.

18. King Constr. Co. v. Mary Helen Coal Corp., 194 Ky. 435, 239 S.W. 799 (1922). There, plaintiff company, which was being sued by a group of landowners for damages to their property on which plaintiff began construction of a railroad spur for defendant, crossclaimed against defendant corporation alleging that it was liable on any damage claims arising under their contract. Defendant's attorney, who was also one of the landowners involved in the suit against plaintiff, waived service of summons and put on no case resulting in a directed verdict for plaintiff on its cross petition. The court said that there was a universal rule:

The client is bound not only by his attorney's affirmative acts or commissions but also by his attorney's omissions.[19] The attorney's neglect is considered equal to neglect on the part of the client himself if the attorney is acting within the scope of his authority.[20] The client voluntarily chooses his counsel and thus he cannot avoid the omissions of that lawyer even though he may be penalized for the lawyer's oversights.[21] There are limitations on this imputation of negligent conduct to the client in that gross or inexcusable conduct of the attorney will not be imputed to the client.[22] Neither will negligent conduct be imputed if fraud is involved.[23] Certain misconduct by counsel, especially neglect of his implicit duty to devote reasonable amounts of time and energy to representing his client, clearly is not imputed to the client[24] so that dismissals of the client's case or defaults which occur as a result of the attorney's negligence or inaction will often be set aside.[25]

Even though the attorney has acted outside the realm of his authority, his client may ratify the attorney's unauthorized act and thereafter be bound by that act of the attorney.[26] Any act that the

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> [N]either acts of an attorney nor any other agent will bind the client or principal, without ratification where the attorney or agent is personally interested in the subject matter involved, or where there exists a conflict between the interests of the client or principal and that of the attorney.

Id. at 438, 239 S.W. at 801.

19. Lawrence v. Gayle, 294 Ala. 91, 312 So. 2d 385 (1975); Griffith v. Investment Co., 92 Fla. 781, 110 So. 271 (1926); Paras v. City of Portsmith, 115 N.H. 63, 335 A.2d 304 (1975); Sayer v. Lee, 40 S.D. 170, 166 N.W. 635 (1918).

20. Balmer v. Gagnon, 19 Ariz. App. 55, 504 P.2d 1278 (1973); Smith v. Wordeman, 59 S.D. 368, 240 N.W. 325 (1932); Swearingen v. Swearingen, 487 S.W.2d 784 (Tex. Civ. App. 1972).

21. Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962); Davis v. United Fruit Co., 402 F.2d 328 (2d Cir. 1968).

22. Citizens Bldg. & Loan Ass'n v. Shepard, 289 A.2d 620 (D.C. Ct. App. 1972) (gross neglience); Kirby v. Ashville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407 (attorney's neglect found excusable). *Contra,* Mockford v. Iles, 217 Ind. 137, 26 N.E.2d 42 (1940).

23. State v. Dubois Circuit Court, 250 Ind. 38, 233 N.E.2d 177 (1968) (if no fraud, even gross negligence by attorney binds clients).

24. Orange Empire Nat'l Bank v. Kirk, 259 Cal. App. 2d 347, 66 Cal. Rptr. 240 (1968); Railway Express Agency, Inc. v. Hill, 250 A.2d 923 (D.C. Ct. App. 1969); Sayer v. Lee, 40 S.D. 170, 166 N.W. 635 (1918).

25. *E.g.,* Orange Empire Nat'l Bank v. Kirk, 259 Cal. App. 2d 347, 66 Cal. Rptr. 240 (1968); Sayer v. Lee, 40 S.D. 170, 166 N.W. 635 (1918).

26. Story County Trust & Sav. Bank v. Youtz's Estate, 199 Iowa 444, 200 N.W.

client could have originally authorized his lawyer to perform may be ratified expressly or impliedly and either completely or partially.[27] The client may effectuate a ratification of his counsel's actions by either adopting or accepting the benefits of counsel's actions or by failing to object to them.[28] Ratification by acceptance of benefits can occur only when the client has full knowledge of the facts regarding his attorney's actions.[29] Thornton, in his treatise on attorneys at law, has said that an acceptance must be inconsistent with any other explanation of the client's conduct except that of approval of his attorney's acts.[30] Thus, a court-ordered acceptance of benefits and an unsuccessful attempt to take advantage of the transaction would be two quite common examples of acceptance without an implied ratification.[31]

Likewise, ratification of unauthorized attorney actions by failure to object to them is premised on a full knowledge of the facts involved. But it should be noted that a simple failure to expressly object to unauthorized conduct will not in and of itself be considered a conclusive ratification.[32] Furthermore, the fact that the client does not act to disavow his lawyer's unauthorized conduct at what would seem to be the logical time and place, at trial in the courtroom, will not allow one to presume ratification. One court has said that in this

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700 (1924); Morr v. Crouch, 19 Ohio St. 2d 24, 249 N.E.2d 780 (1969); 7 C.J.S. *Attorney and Client* §71 (1937).

27. Gran v. City of St. Paul, 274 Minn. 220, 143 N.W.2d 246 (1966); 1 E. THORNTON, *supra* note 9, at §211.

28. Absent proof to the contrary, ratification of an attorney's acts may be inferred from long acquiescence on the part of the owner of the judgement. McFry v. Stewart, 219 Ala. 216, 121 So. 517 (1929) (report to nonresident client that assignment was merely a collection was sufficient proof to the contrary to avoid imputing a ratification); Rolfstad, Winkjer, Suess, McKennett & Kaiser v. Hanson, 221 N.W.2d 734 (N.D. 1974) (long acquiescence with full knowledge of facts constituted a ratification).

"Ratification may be implied from the fact that the client accepted the fruits of the settlement or contract with knowledge thereof or from the client's negligence, inaction, or apparent acquiescence in the settlement." Morr v. Crouch, 19 Ohio St. 2d 24, 249 N.E.2d 780, 783 (1969).

29. *See, e.g.*, Moving Picture Mach. Operators Union Local 162 v. Glasgow Theatres, Inc., 6 Cal. App. 3d 395, 86 Cal. Rptr. 33 (1970) (client ratified unauthorized compromise settlement as an accord but it was never executed, therefore no satisfaction).

30. 1 E. THORNTON, *supra* note 9, at §212.

31. *Id.*

32. *Id.* at §213.

situation, so long as the client unequivocally repudiates an unauthorized agreement immediately after learning of it, where the court proceeded to explain that "immediately" means either within a few days or within a reasonable time, there will have been no ratification.[33]

An excessively large number of cases exist where courts deal with often quite narrowly circumscribed areas in which attorneys can or cannot bind their clients' interests or waive their rights. Some frequently recurring areas where courts discuss the attorney's implied authority or lack of it are service of process, making of contracts for the client, admissions and stipulations, compromise and consent to a confession of judgment, and matters involving the client's constitutional rights.

Service of Process

The generally recognized rule is that an attorney has no implied authority enabling him to accept or waive the initial service of process issued against his client.[34] If an attempt is made to serve the attorney who has been generally retained to represent the client, such service will be insufficient to give the court jurisdiction over the client's person where personal service is required.[35] As with the other areas discussed, an unauthorized acceptance of service of process may be ratified by the client and thus be effective against him.[36] After the lawyer achieves the status of attorney of record for his client by appearing for him in court and the original process has been served on the client, the attorney obtains the implied authority to accept service of papers and other notices, thus binding his client and imputing knowledge of their contents to him.[37]

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33. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 894 (10th Cir. 1945). The *Hayes* case concerned a settlement agreement arrived at between the attorney for a group of plaintiffs and the industry. Prior to the settlement negotiations, supposedly those suing the industry had agreed that majority rule would govern any settlement. The five plaintiffs in this suit, however, contended they never agreed to be bound by the majority and did not speak up when the judge asked if any were opposed to the settlement. The court said these clients' failure to speak out when asked if there were any objections did not constitute a ratification.

34. Schultz v. Schultz, 436 F.2d 635 (7th Cir. 1971); 7 C.J.S. *Attorney and Client* §83 (1937); 1 E. THORNTON, *supra* note 9, at §253.

35. Souter v. Carnes, 229 Ga. 220, 190 S.E.2d 69 (1972).

36. Fail's Adm'r v. Presley's Adm'r, 50 Ala. 342 (1874); Story County Trust & Sav. Bank v. Youtz's Estate, 199 Iowa 444, 200 N.W. 700 (1924).

37. Preston v. Preston, 107 N.J. Super. 44, 256 A.2d 802 (1969); 1 E. THORN-

Making or Altering a Contract

It is well established that absent some expressed authority the attorney has no implied plenary power to make, enter into, or alter a contract on behalf of his client.[38] Because the lawyer serves as special agent and not as a general agent, he derives no power to make contracts merely by virtue of his employment.[39] This denial of ability to bind a client's interest in an all-important area of the law is explained by the accepted argument that dealings with contracts involve, where the attorney has not been given express authority to so act, agreements collateral to or independent of the subject matter of the attorney's employment.[40] If the attorney has been retained to prepare and file a complaint, clearly he does not have authority to execute a contract or give evidence thereof on behalf of his clients.[41] Likewise, authority of a lawyer hired to obtain a national bank charter for a group of bank organizers does not include the implied authority to bind them by entering into a stock subscription contract for the bank.[42] It then follows that without express authority an attorney may not exercise options for his client,[43] grant extensions of time on a contract to purchase real property, waive forfeitures, or alter the terms of an existing contract.[44] Nevertheless, unauthorized contracts made by a lawyer may be ratified by the client just as may any other unauthorized acts.[45]

Admissions and Stipulations

Counsel's implied authority to make admissions and stipulations affecting his client's rights and interests must comply with the general limitation that the attorney's actions based on implied authority relate to procedure and remedies and not disrupt substan-

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TON, *supra* note 9, at §254.

38. Wilson v. Eddy, 2 Cal. App. 3d 613, 82 Cal. Rptr. 826 (1969); Miller v. Mueller, 28 Md. App. 141, 343 A.2d 922 (1975); 1 E. THORNTON, *supra* note 9, at §202.

39. Nellis v. Massey, 208 Cal. App. 2d 724, 239 P.2d 509 (1952); Teague Brick & Tile Co. v. Snowden, 440 S.W.2d 419 (Tex. Civ. App. 1969).

40. Erickson v. Civic Plaza Nat'l Bank, 422 S.W.2d 373 (Mo. App. 1967).

41. Watson v. McCabe, 381 F. Supp. 124 (M.D. Tenn. 1974), *aff'd*, 527 F.2d 786 (6th Cir. 1975).

42. Erickson v. Civic Plaza Nat'l Bank, 422 S.W.2d 373 (Mo. App. 1967).

43. Paul Voisin Corp. v. Torrey, 271 So. 2d 624 (La. App. 1973).

44. Ashworth v. Hankins, 248 Ark. 567, 452 S.W.2d 838 (1970).

45. *See* notes 32-34 *supra* and accompanying text.

tive rights or the cause of action. Distinct and formal admissions, judicial admissions, made by the lawyer during the course of the trial are binding on the client.[46] Implied authority may certainly be found to permit the attorney to make admissions in formal pleadings. Authority is less clear for making admissions in more informal documents such as the pretrial memorandum when it is obviously contemplated that there will be a formal pretrial conference with admissions included in a pretrial order.[47] The attorney may also make evidential admissions if they are within the scope of his authority. His implied authority in this area permits him to make admissions which will bind his client concerning the management of the case.[48] Frequently the cases state that to be binding, counsel's evidential admissions must be made expressly for the purpose of dispensing with formal proof of some fact in dispute and serve as substitutes for legal evidence of the fact.[49] Courts say that the attorney merely because of his employment as counsel in pending or prospective litigation cannot affect his client by out of court admissions of fact which were not made in order to dispense with formal proof.[50] The test to be used in determining whether the client is bound by his attorney's out of court admission requires the showing of a direct relationship to the management of litigation.[51]

Counsel will have adequate implied authority to make stipulations regarding procedural matters but he cannot stipulate away the substance of his client's cause of action without express authority.[52]

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46. United States v. Cravero, 530 F.2d 666 (5th Cir. 1976); United States v. Adams, 422 F.2d 575 (10th Cir. 1970); State v. Hughes, 22 Ariz. App. 19, 522 P.2d 780 (1974).

47. Taylor v. Allis-Chalmers Mfg. Co., 320 F. Supp. 1381, 1385 (E.D. Pa. 1969).

48. *Id.*

49. Beaulieu v. Elliot, 434 P.2d 665, 669 (Alas. 1967); Harris v. Diamond Constr. Co., 184 Va. 711, 36 S.E.2d 573 (1946).

50. Eldridge v. Melcher, 226 Pa. Super. Ct. 381, 313 A.2d 750 (1973). *See* Annot., 97 A.L.R. 374 (1935).

51. United States v. Dolleris, 408 F.2d 918, 921 (6th Cir. 1969) (client gave attorney power of attorney to participate in conferences with treasury agents so attorney's statements were authorized, binding admissions). *See generally* 7 AM. JUR. 2d *Attorneys at Law* §122 (1963).

52. In Linsk v. Linsk, 449 P.2d 760, 762-63, 74 Cal. Rptr. 544, 546-47 (1969), *quoting* Armstrong v. Brown, 12 Cal. App. 2d 22, 28, 54 P.2d 1118, 1121 (1936), the court stated:

> In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or

Cases where this dichotomy is clearly reflected have allowed an attorney to stipulate to a trial without a jury and to deposition testimony by distant witnesses subject to the granting of a continuance,[53] to stipulate to items at issue in a will contest,[54] or to vacate a default judgment,[55] but the cases do not allow a stipulation to enter judgment against the defendant-client without express authority.[56]

Compromise and Consent to or Confession of Judgment

According to the great weight of American authority, an attorney at law has no implied authority to compromise his client's cause of action although he has the right and duty to advise his client to accept an advantageous compromise.[57] Only after acquiring express authority in the form of his client's consent may the attorney compromise his client's claim or cause of action on such conditions and terms as he feels necessary.[58] It should be remembered that some jurisdictions have modified the general rule by statute[59] and that a

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incidental to the general authority conferred and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.

53. Middleton v. Stavely, 124 Colo. 88, 235 P.2d 596 (1951).

54. *In re* Estate of Burson, 51 Cal. App. 3d 300, 124 Cal. Rptr. 105 (1975).

55. Holmgren v. Newcom, 133 Ill. App. 2d 76, 272 N.E.2d 820 (1971).

56. Associates Discount Corp. v. Goldman, 524 F.2d 1051 (3d Cir. 1975); Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 136 (10th Cir. 1966).

57. Kimball v. First Nat'l Bank, 455 P.2d 894 (Alas. 1969); Cross-Aero Corp. v. Cross-Aero Serv. Corp., 326 So. 2d 249 (Fla. Dist. Ct. App. 1976); Palm Beach Royal Hotel v. Breeze, 154 So. 2d 698, 699 (Fla. Dist. Ct. App. 1963); Keel v. Miller, 323 P.2d 986 (Okla. 1958); 1 E. THORNTON, *supra* note 9, at §215-16. *See generally* Annot., 30 A.L.R.2d 944 (1953); 66 A.L.R. 107 (1930).

58. Massachusetts Cas. Ins. Co. v. Forman, 469 F.2d 259 (5th Cir. 1972); Milewski v. Roflan Co., 195 F. Supp. 68 (D. Mass. 1961); Manning v. Wymer, 273 Cal. App. 2d 519, 78 Cal. Rptr. 600 (1969); City of Des Plaines v. Scientific Mach. Movers, Inc., 9 Ill. App. 3d 438, 292 N.E.2d 154 (1972); Gailbraith v. Monarch Gold Dredging Co., 160 Or. 282, 84 P.2d 1110 (1938).

59. *E.g.*, Section 34-3-21 of the Alabama Code (1975) provides as follows: "An attorney has authority to bind his client in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of court."

client may ratify any unauthorized action of his attorney.[60]

One exception to the majority position, that an attorney cannot on the basis of implied authority effect a compromise, arises in emergency situations. In a situation requiring prompt action to avoid injury to the client's interests and where no opportunity is available for the attorney to communicate with his client the attorney may compromise a claim without clear and unequivocal special authority to do so.[61] It is said that this authority to bind the client's interests arises out of necessity and the lawyer should utilize his position as much as possible to accomplish good for his client and to minimize bad aspects. If there is time to communicate with the client the attorney must do so.[62] Thus, in a landlord-tenant suit, *Brumberg v. Chunghai Chan*,[63] where the landlord was suing for a substantial amount of past due rent and the tenant was counterclaiming for money spent for alteration work, the attorney for the tenant was held to have acted within his implied authority in compromising the suit because of the emergency situation that arose. There the landlord was about to evict the tenant's son from the house while the tenant was overseas on important family business and the attorney could not reach him.

The compromise of a claim without express authority having been granted to the attorney is not rendered void as such but merely becomes voidable at the election of the client. If the client chooses not to ratify the compromise and so repudiates it, he may proceed with the original suit, begin a new one, or set aside the compromise and reinstate the old cause of action. Should the client decide to exercise his option to void the compromise, he must act to do so promptly after learning of the unauthorized compromise to avoid an argument by the other side of laches or implied ratification.[64]

As stated, the general rule is that compromises based solely on the attorney's implied authority are voidable and not binding on the client. Despite that general rule, courts have been inclined to let stand compromises which are not so unreasonable as to be dis-

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60. *E.g.*, Gran v. City of St. Paul, 274 Minn. 220, 143 N.W.2d 246 (1966).

61. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 893 (10th Cir. 1975); Cole v. Myers, 128 Conn. 223, 21 A.2d 396 (1941); Burstein v. Green, 172 So. 2d 472 (Fla. Dist. Ct. App. 1965); Brumberg v. Chunghai Chan, 25 Misc. 2d 512, 204 N.Y.S.2d 315 (1959).

62. 1 E. THORNTON, *supra* note 9, at §218.

63. 25 Misc. 2d 312, 204 N.Y.S.2d 315 (1959).

64. 1 E. THORNTON, *supra* note 9, at §221.

claimed by everyone as such or to cast aspersions on the fairness of the attorney's judgment.[65] This notion was first set forth by Chief Justice Marshall in *Holker v. Parker,*[66] a complex case in which plaintiff was suing a former partner who had amassed large debts in the partnership name and collected large sums of money and who then absconded from the country. Plaintiff, whose bail in another case where he was being sued for partnership debts was conditioned on his not leaving Philadelphia, was not allowed despite repeated requests to attend the trial in his suit against his former partner then occurring in Boston. After delaying the trial several times the judge was about to dismiss the case, and, in order to obtain some recovery for his client, plaintiff's attorney entered into a compromise for $5000 on the mistaken belief that such amount was the extent of defendant's assets. The Court held the compromise invalid since the plaintiff was not negligent and his attorney acted under a mistake in entering the compromise, but thereafter some courts expressed the idea that there is a rebuttable presumption that the attorney of record has the implied authority to compromise.[67]

Although the above view is espoused by the overwhelming majority of American jurisdictions, at least one, Maine, follows the English view of authority allowing a lawyer to enter compromises without the express consent of his client. Both English solicitors and barristers are permitted to compromise claims of their clients in pending litigation solely on the basis of their implied authority. They may not, however, compromise a claim before the proceedings have begun, and all such compromises are subject to subsequent

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65. Holker v. Parker, 11 U.S. (7 Cranch) 435, 452 (1813).

66. 11 U.S. (7 Cranch) 435 (1813).

67. United States v. Beebe, 180 U.S. 343 (1901); Whitebird v. Eagle-Picher Co., 258 F. Supp. 308, 311 (N.D. Okla. 1966); Aiken v. National Fire Safety Counsellors, 36 Del. Ch. 136, 127 A.2d 473 (1956).

> A judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. *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. Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted.

United States v. Beebe, 180 U.S. at 352.

client ratification or rejection.[68] In *Bonney v. Morril,*[69] the Maine court aligned itself with the English view and allowed plaintiff's attorney to compromise a claim for certain profits where he thought it would be in the best interest of his client to avoid litigation and to speedily and successfully terminate the suit as economically as possible.[70] Plaintiff had sued defendant for the profits from some real property he owned that had arisen during the period of the defendant's wrongful dispossession. Controversy had arisen whether plaintiff's attorney had accepted a compromise for the profits defendant had taken while improperly occupying plaintiff's property.

Because there is such broad agreement that an attorney has no implied authority to compromise his client's claim, it seems unusual that there is a decisive split among courts whether it is within an attorney's implied authority to consent to or confess a judgment for his client. Some courts go so far as to describe the position that counsel has the implied authority to consent to or confess a judgment on behalf of his client as the majority rule.[71] Courts which allow the attorney to enter a consent judgment based on such authority will not set aside a judgment for lack of express authority on the attorney's part, particularly in the absence of any showing of pecuniary irresponsibility by the attorney, unless fraud or collusion is evident.[72] Those courts which do not recognize the implied authority of counsel to consent to judgment apparently consider that this is so much like compromise of a client's cause of action that it should be treated in the same manner.[73]

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68. W. ANSON, ANSON'S LAW OF CONTRACT 558 (23d ed. A. Guest 1969) (solicitor's implied authority to compromise); 1 E. THORNTON, *supra* note 9, at §224.

69. 57 Me. 368 (1869).

70. *Id.* at 374.

71. Addressograph-Multigraph Corp. v. Cooper, 60 F. Supp. 697 (S.D.N.Y. 1945); Midtown Chains Hotel Co. v. Merriman, 204 Ga. 71, 48 S.E.2d 831 (1948); Bielby v. Alexander, 330 Mich. 12, 46 N.W.2d 445 (1951); Renken v. Sidebotham, 227 S.W.2d 99 (Mo. App. 1950). *See generally* 1 E. THORNTON, *supra* note 9, at §§268-70, 5 AM. JUR. *Attorneys at Law* §101 (1936).

72. Midtown Chains Hotel Co. v. Merriman, 204 Ga. 71, 48 S.E.2d 831 (1948); Bielby v. Alexander, 330 Mich. 12, 46 N.W.2d 445, 447 (1951).

73. Pfister v. Wade, 69 Cal. 133, 10 P. 369 (1886); Village of Dolton v. S. Ellen Dolton Estate, 331 Ill. 88, 162 N.E. 214 (1928); Younkins v. Younkins, 121 Ill. App. 2d 416, 257 N.E.2d 521 (1970); Fessler v. Weiss, 348 Ill. App. 21, 107 N.E.2d 795 (1952); Town of Bath v. Norman, 226 N.C. 502, 39 S.E.2d 363 (1946).

Client's Constitutional Rights

The focal point of the relationship between the attorney's implied authority and his client's constitutional rights lies within the issue whether an attorney, obligated by the ABA Code of Professional Responsibility to the duty of zealous representation of his client within the bounds of the law, should be allowed to waive his client's constitutional rights without consulting or obtaining the consent of the client to the waiver.[74] The United States Supreme Court dealt with this issue in *Fay v. Noia.*[75] The Court held in that case that where a habeas corpus applicant after consulting with counsel knowingly and understandingly had foregone the alternative of adjudication of his federal claims in state court, thus deliberately bypassing state procedures, the federal court could deny him relief. The Court, however, also said that a choice made by the attorney and not participated in by the client was not an automatic bar to relief.[76] The Court refined this idea of attorney's waiver of constitutional rights in *Henry v. Mississippi*[77] where Justice Brennan explained that in exceptional circumstances trial strategy adopted by counsel without prior consultation with the accused would not preclude the accused from asserting constitutional claims. Thus counsel's waiver of this client's constitutional rights as a part of trial strategy were binding if no exceptional circumstances were involved.[78]

Where, however, in *Brookhart v. Janis,*[79] counsel attempted to enter a plea inconsistent with the expressed desires of his client and thus effectively waived his client's right to plead not guilty and confront witnesses against him, the Court acknowledged the *Henry* concept of preclusion by counsel of client's assertion of constitutional claims except in exceptional circumstances but then said nothing in that case would allow the attorney to override the client's in-court expression of a desire to plead not guilty and confront witnesses against him.[80] The rule, arrived at by considering these and other cases, is that waivers by counsel as a matter of trial strategy

74. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7; Ethical Consideration 7-7.

75. 372 U.S. 391 (1963).

76. *Id.* at 439.

77. 379 U.S. 443 (1965).

78. *Id.* at 451-52.

79. 384 U.S. 2 (1966).

80. *Id.* at 7-8.

bind the accused, while waiver of a right not constituting trial strategy will not be binding on the accused unless he participated in the waiver.[81]

Exceptional circumstances that call for a personal waiver of the constitutional right by the client—waiver of a right not a part of trial strategy—comprise two broad categories: first, where there is evidence of gross neglect, fraud, or incompetence on the part of counsel and, second, where an inherently personal right of fundamental importance is involved.[82] The right to plead guilty, to waive trial by jury, to waive appellate review, and the right to testify personally are included within the concept of inherently personal fundamental rights.[83] An excellent example of an inherently personal fundamental right that the court held should have been personally waived by the defendant is found in *People v. Whitfield.*[84] In that case defendant's attorney and the prosecutor agreed to a compromise whereby defendant would plead guilty to manslaughter and the prosecutor would drop murder charges and recommend probation. This compromise was never discussed with the client; only the client's mother talked with the attorney about it. The court said that the choice to plead guilty or not guilty was the defendant's and not that of his mother or his attorney. This fundamental personal right was improperly waived by the attorney.[85]

The test for a binding waiver of the client's constitutional rights has also been expressed in terms of when the waiver occurred and when the decision on which it was based occurred. Subject to established limitations—"exceptional circumstances"—a waiver by counsel based on implied authority will be binding on the client when it occurs during the trial and results from decisions made in the course of the trial. Attorney's waivers of the client's constitu-

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81. People v. Hill, 67 Cal. 2d 105, 429 P.2d 586, 60 Cal. Rptr. 234 (1967) (attorney can waive client's rights on matters of trial tactics and control of court proceedings); People v. Whitfield, 40 Ill.2d 308, 239 N.E.2d 850, 852 (1968); People v. Nichols, 27 Ill. App. 3d 342, 327 N.E.2d 186 (1975) (waivers by attorney as part of trial strategy are binding but if not part of trial strategy are not binding unless client participates in waiver); Jones v. Warden, Md. Penitentiary, 2 Md. App. 343, 234 A.2d 472 (1967).

82. Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973).

83. *Id.* at 179; Townsend v. Superior Court of Los Angeles Co., 15 Cal. 3d 774, 780, 543 P.2d 619, 624, 126 Cal. Rptr. 251, 256 (1975); McClendon v. People, 174 Colo. 7, 481 P.2d 715, 719 (1971).

84. 40 Ill. 2d 308, 239 N.E.2d 850 (1968).

85. *Id.*, 239 N.E.2d at 851-52.

tional rights without consent will not bind the client if the waiver occurs before or after trial or results from a decision made during the pretrial period.[86]

These decisions reflect a balancing process. The client's interest in securing all the protections guaranteed him by state and federal constitutions must be weighed against the attorney's duty to act in the best possible interest of his client, utilizing his skill and knowledge of the law and against a strong interest in promoting the administration of justice in an efficient manner. The attorney is the expert acting to achieve the same result the client seeks, and to require client consultation and consent for each waiver of a constitutional right during the course of a trial would unduly impede the trial and distract and confuse the jury. Both counsel and the judge would have to make certain that the client had been sufficiently informed and made a truly intelligent waiver in every situation where an attorney's action or inaction might involve any possible constitutional right. In light of these considerations the balance has been struck allowing the attorney to make waivers of a client's constitutional rights as a part of trial strategy.[87]

Conclusion

It appears that a substance-procedure type of dichotomy is an excellent base for an analysis of an attorney's implied authority to bind his client's interests and waive his client's rights. Court decisions generally seem to be based on this test: if procedure or remedies are involved, an attorney may exercise this implied authority to act on behalf of his client, but if substantive rights or the claim may be affected, the attorney may not exercise this implied authority. Perhaps the attorney does not have the implied authority to affect these rights and interests of his client to the extent of a statement found in Thornton's treatise on attorneys at law: "Indeed it has been said that within the scope of his employment, there is nothing that counsel may not do in the interest of his client provided the manner of doing it is courteous and respectful."[88] A lawyer does, however, have a broad expanse of implied authority to aid him in meeting his professional responsibility to his client.

Carol A. McCoy

86. Lanier v. State, 486 P.2d 981 (Alas. 1971).
87. *Id.* at 986-87; Winters v. Cook, 489 F.2d 174, 177-78 (5th Cir. 1973).
88. 1 E. THORNTON, *supra* note 9, at 353.