SANCTIONING CLIENTS FOR LAWYERS’ MISCONDUCT—PROBLEMS OF AGENCY AND EQUITY

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TABLE OF CONTENTS

INTRODUCTION ................................................................. 835
I. AGENCY LAW AS A BASIS FOR SANCTIONING CLIENTS FOR LAWYERS’ MISCONDUCT ......................................................... 841
   A. Understanding Lawyers’ Agency Status and Vicarious Liability ................................................................. 842
   B. Courts’ Soft and Sporadic Retreat from Link ................................................................. 847
   C. Apparent Authority as a Basis for Sanctions ........................................................................ 850
   D. Summary and Synthesis ........................................................................ 853
II. DETERMINING RESPONSIBILITY FOR SANCTIONS: BEYOND AGENCY ......................................................... 859
   A. The Trend Toward Personal Accountability and Away from Vicarious Liability ......................................................... 859
   B. The Rare Case When Vicarious Liability for Sanctions Is Appropriate ......................................................... 862
CONCLUSION ........................................................................ 866

INTRODUCTION

Litigation is a breeding ground for misconduct by lawyers and those they represent.1 In cases of misconduct, courts have several options for sanctioning lawyers and litigants. For example, courts may invoke their inherent powers to sanction lawyers and parties who act in bad faith.2 Courts

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1. This unfortunate reality is to some extent understandable. Litigation can generate strong emotions on the part of lawyers and clients and, accordingly, taint their behaviors. The high stakes in some cases animate misjudgments by lawyers and parties alike. The deadlines, time pressures, and evidentiary and procedural rules that characterize litigation test lawyers’ competence, diligence, and judgment in ways that other practice areas generally do not.

may invoke their inherent powers to sanction even when misconduct is not expressly covered by a rule or statute. Although sanctions imposed under courts’ inherent powers must be reasonably proportionate to the misconduct, in extreme circumstances this power includes the discretion to dismiss a case. Of course, courts may impose sanctions under rules of civil procedure and statutes. The best known of these rules is Federal Rule of Civil Procedure 11, which applies to pleadings, motions, and other documents filed with federal courts and, when focused on representations to a court, permits the court to “impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.” Many states have analogous rules. The most prominent statute is 28 U.S.C. § 1927, which states in pertinent part: “An attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

It is understandable that a party that engages in bad faith conduct in litigation may be sanctioned by a court. It is also logical that where a law-

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Court of State, 263 P.3d 224, 229 (Nev. 2011) (stating that trial courts “have broad discretion to impose sanctions for professional misconduct at trial”); Kelly v. Kelly, 806 N.W.2d 133, 145 (N.D. 2011) (“A district court also has inherent authority to sanction a litigant for misconduct.”). The scope of courts’ inherent authority varies between jurisdictions. See, e.g., Vidrio v. Hernandez, 92 Cal. Rptr. 3d 178, 186 (Ct. App. 2009) (noting that California trial courts’ inherent powers do not include imposing monetary sanctions).


4. See Weinberg v. Dickson-Weinberg, 229 P.3d 1133, 1142 (Haw. 2010); Emerson, 263 P.3d at 230 (citing Heinle v. Heinle, 777 N.W.2d 590, 602 (N.D. 2010)); Kelly, 806 N.W.2d at 145 (citing Dronen v. Dronen, 764 N.W.2d 675, 693 (N.D. 2009)).

5. Salmoron v. Enter. Recovery Sys., Inc., 579 F.3d 787, 793 (7th Cir. 2009) (citing Montaño v. City of Chicago, 535 F.3d 558, 563 (7th Cir. 2008)).


7. FED. R. CIV. P. 11(c)(1) (referring to violations of Rule 11(b)).

8. 28 U.S.C. § 1927 (2006). The showing of bad faith necessary to impose sanctions under § 1927 is similar to that required to invoke the court’s inherent power to sanction. Enmon v. Prospect Capital Corp., 675 F.3d 138, 143 (2d Cir. 2012) (citing Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986)). The essential difference between sanctions imposed by a court pursuant to its inherent authority and those issued under § 1927 is that sanctions under § 1927 may be imposed only against lawyers, while sanctions based on a court’s inherent authority may be imposed against lawyers, parties, or both. Id. at 144 (citing Oliveri, 803 F.2d at 1273).

yer and the lawyer's client are guilty of coordinated litigation misconduct, the court may sanction them both and either hold them liable jointly and severally, or allocate or apportion sanctions between them. But what of the situation where the lawyer alone commits misconduct and the court visits the lawyer's sins on the innocent client when awarding sanctions, as perhaps by striking the client's pleadings, precluding the introduction of evidence or testimony favorable to the client, fining the client, or even dismissing the client's case with prejudice? In a tragic Illinois product liability case, for example, the court struck the defendant manufacturer's pleadings—a so-called "death penalty" sanction—as punishment for the defense lawyers' serious misconduct in discovery. Stripped of its liability defenses, the defendant settled with the plaintiffs for an estimated $15 million.

In a North Carolina case, lawyers representing both a corporate defendant, Jacobs Engineering Group, Inc., and an individual defendant, Donald Pottner, secretly spirited Pottner out-of-state during trial to avoid further damaging testimony by him and lied to the court in an unsuccessful effort to conceal their ploy. Basically, they told the court that Pottner had become catastrophically ill overnight and was thus unavailable to testify. If Pottner was sick at all, his condition was not serious and he clearly could have returned to court to finish testifying. The defense lawyers' ruse was apparently exposed when the plaintiffs' lawyer obtained Pottner's medical rec-
ords and alerted the court. Because Pottner and Jacobs shared counsel and were "united in interest," the court struck Jacobs' answer as well as Pottner's answer, and ordered the trial to proceed solely on the issue of damages.

In a Midwestern case, the plaintiffs alleged that a defense lawyer's dishonesty in discovery and breaches of his duty of candor to the trial court when arguing before it were grounds for punitive damages against the lawyer's corporate client. The court's embrace of this theory and related rulings powered the defendant's decision to settle.

With the partial exception of the North Carolina case, there was no evidence of the clients' complicity in the lawyers' alleged misconduct in any of these cases. The courts nonetheless sanctioned the clients.

Courts and others who seek to hold parties liable for their lawyers' misconduct often deploy agency law as a basis for doing so. This is a superficially appealing approach. The attorney-client relationship is an agency relationship, with the client cast as the principal and the lawyer as the agent. It is a general rule of agency law that a principal is bound by its agent's acts when the agent is acting with actual or apparent authority or when the principal ratifies the agent's acts. Thus, a Connecticut court held that a defendant could be held liable for violating the Connecticut Unfair Trade Practices Act based on its lawyer's conduct during negotiations to sell land. Because the lawyer was acting within the scope of his authority at

16. See id. at 5 (reciting the plaintiff's request to review Pottner's medical records).
17. Id. at 9.
18. My knowledge of this unreported case comes from my involvement as an expert witness for the defense.
19. In the North Carolina case, Jacobs had a representative at trial, but it appears that while he knew Pottner was supposedly ill, he did not know Pottner's true condition. See id.
20. See, e.g., Gripe v. City of Enid, Oklahoma, 312 F.3d 1184, 1189 (10th Cir. 2002) ("Plaintiff argues against the harshness of penalizing him for his attorney's conduct. But there is nothing novel here. Those who act through agents are customarily bound by their agents' mistakes. It is no different when the agent is an attorney."); Everyday Learning Corp. v. Larson, 242 F.3d 815, 817 (8th Cir. 2001) (stating that "this court follows the well-established principle that a party is responsible for the actions and conduct of his [or her] counsel") (alteration in original) (quoting Boogaarts v. Bank of Bradley, 961 F.2d 765, 768 (8th Cir. 1992)); Mendoza v. McDonald's Corp., 213 P.3d 288, 305 (Ariz. Ct. App. 2009) (allowing punitive damages against an insurer for the conduct of its lawyers based on the lawyers' status as the insurer's agents); Peterson v. Worthen Bank & Trust Co., 753 S.W.2d 278, 280 (Ark. 1988) (applying agency law in holding client liable for abuse of process based on attorney's actions).
22. RESTATEMENT (THIRD) OF AGENCY §§ 2.01, 2.03, 4.01 (2007).
the time of the conduct at issue, his actions could be imputed to the defendant for purposes of establishing a CUTPA violation. 24 Similarly, a Texas court held that two plaintiffs were bound by a settlement agreement their lawyer signed while he represented them, notwithstanding their later protests that the agreement was invalid. 25 Closer to the immediate point, an Indiana court relied on agency law in holding that a guarantor was not entitled to post-judgment relief based on his lawyer’s failure to raise as a defense the alleged forgery of the guarantor’s signature on the guaranty. 26 The court rejected the guarantor’s argument that his lawyer’s neglect should not be attributed to him as running contrary to Indiana’s “longstanding rule that a client is bound by his attorney’s actions.” 27

Yet agency law is not an entirely satisfying basis for imputing a lawyer’s misconduct to a client in the sanctions context. 28 The hallmark of an agency relationship is the agent’s ability when acting with appropriate authority to bind the principal contractually. 29 That understanding explains, for example, the foregoing Connecticut and Texas decisions. 30 In contrast, principals are not ordinarily liable for their agents’ torts. 31 Vicarious liability typically requires a master–servant relationship between the defendant and the tortfeasor. 32 This requirement is central to the well-known respondeat superior doctrine. 33 Respondeat superior liability premised on a master–servant relationship is analogous to the situation in which a court imputes a

24. Id.
27. Id. at 867.
29. WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 49, at 113 (3d ed. 2001) (describing this as “the really distinguishing characteristic of the agent”).
30. The decision in the Indiana case is explained by the agency law concept of inherent authority. See Koval v. Simon Teletek, Inc., 693 N.E.2d 1299, 1301 (Ind. 1998) (explaining that a client’s retention of a lawyer equips the lawyer with “the inherent power to bind [the] client to the results of a procedure in court”).
33. See Macaluso v. Travelers Cas. & Sur. Co., 2010-1478, p. 5-6 (La. App. 1 Cir. 2/23/11); 59 So. 3d 454 (equating vicarious liability with the respondeat superior doctrine).
lawyer’s misconduct to the lawyer’s faultless client for the purpose of imposing sanctions.34

But while principal–agent and master–servant relationships may overlap, they are not interchangeable. All masters are principals and all servants are agents, but not all principals are masters, nor are all agents servants.35 As a rule, lawyers are not their clients’ servants even though they are their agents. Rather, lawyers generally are independent contractors in relation to their clients.36 Here, then, courts’ reliance on agency law to penalize clients for their lawyers’ misconduct begins to falter.37 Even shifting from vicarious liability based on respondeat superior to liability premised on the agency law doctrine of apparent authority, which does not require a master–servant relationship and therefore applies to independent contractors, is no answer.38 However broad a lawyer’s apparent authority to act for a client may be, it is prudently limited to activities that are legal and proper;39 it generally should not be held to encompass the types of misconduct for which sanctions will lie.40

Courts’ imprecise use of the term “agent” and related misconceptions may be the most apparent flaws in this aspect of sanctions law, but they are not the only ones. There is also the fundamental problem that sanctioning innocent parties for lawyers’ misconduct is frequently unfair and is unlikely

34. See Bradt v. West, 892 S.W.2d 56, 76 (Tex. App. 1994).
37. Cf. Palmer v. Ted Stevens Honda, Inc., 238 Cal. Rptr. 363, 368 (Ct. App. 1987) (“While much of what an attorney does in litigation is contractually binding on the client . . . where it is tortious the client is not vicariously liable merely for retaining the attorney who is an independent contractor.”).
38. An Indiana court avoided the independent contractor barrier to vicarious liability by holding that the uniqueness of the attorney client relationship made both the absence of a master–servant relationship and independent contractor doctrine irrelevant to the issue of a client’s liability for its lawyer’s conduct so long as the lawyer was acting within the scope of his authority. United Farm Bureau Mut. Ins. Co. v. Groen, 486 N.E.2d 571, 574 (Ind. Ct. App. 1985). It is not clear from the Groen decision, however, whether the lawyer’s conduct was wrongful such that it ought not to have been deemed to be authorized by the client. See id. at 572. Nor does it appear that the client made that argument. See id.
40. See Allen, 440 A.2d at 234 (explaining that the general rule that a lawyer’s acts are imputed to the client may yield “to the special circumstances of a case,” such as when “an attorney acts in bad faith or intentionally neglects the client’s business”); Terrazzano, 1993 WL 104423, at *2 (stating that “where an attorney acts in bad faith, without the knowledge of his or her client, such acts should not be imputed to the client”).
to remedy the misconduct or to deter similar misbehavior in the future. To be effective, sanctions should be personal to the offender.\textsuperscript{41}

In summary, clients should be sanctioned for or in connection with their lawyers' misconduct in only two situations. The first is where the client is complicit in the lawyer's misconduct. Courts that sanction clients in this situation often describe a "coordinated effort" or a "concerted effort" between the lawyer and the client.\textsuperscript{42} The second is where a sanction will be meaningful only if it affects the client, or it is impossible to remedy the lawyer's misconduct without sanctioning the client. For example, a lawyer's misconduct at trial may necessitate sanctions affecting the client even though the client did not influence the lawyer's decisions or tactics because any other approach would not alleviate the harm suffered by other parties or cure any prejudice to the court. Moreover, sanctioning a client for its lawyer's misconduct at trial is consistent with the general rule that both clients and lawyers are bound by trial strategy. This Article advocates courts' adoption of these two approaches to sanctions based on agency law and equitable principles.

\textbf{I. AGENCY LAW AS A BASIS FOR SANCTIONING CLIENTS FOR LAWYERS' MISCONDUCT}

The persistent assumption that agency law provides a proper basis for sanctioning parties for their counsel's misconduct traces back to the Supreme Court's 1962 decision in \textit{Link v. Wabash Railroad Co.}\textsuperscript{43} In \textit{Link}, the Court concluded that a district court acting on its inherent authority to achieve the orderly and expeditious disposition of cases had the discretion to dismiss a complaint for failure to prosecute without giving notice of its intention to do so or providing an adversary hearing before acting.\textsuperscript{44} The district court in \textit{Link} dismissed the case after plaintiff William Link's lawyer chose not to attend a pretrial conference because he thought it more important to remain in his office to work on another case for a different client.\textsuperscript{45} Link protested that under the circumstances, the dismissal of his case

\begin{footnotesize}
\begin{enumerate}
\item \textit{See, e.g.,} Estate of Calloway v. Marvel Entm't Grp., 9 F.3d 237, 239 (2d Cir. 1993) (imposing joint and several liability for sanctions where the Rule 11 violation was "a coordinated effort" between the party and counsel); Velocity Micro, Inc. v. Edge Interactive Media, Inc., No. 3:08cv135, 2008 WL 4952605, at *2 (E.D. Va. Nov. 7, 2008) (imposing sanctions and describing a "concerted effort" by a party and its former lawyer "to mislead [the] court and gain an unfair advantage in [the] litigation").
\item 370 U.S. 626 (1962).
\item \textit{Id.} at 633.
\item \textit{Id.} at 627-29. The lawyer called the district judge's chambers roughly two hours before the long-scheduled pretrial conference to tell the judge he was too busy working on
\end{enumerate}
\end{footnotesize}
was an unjust penalty. The Court rejected this argument as contrary to our system of representative litigation in language since widely quoted by courts:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."[7]

The lawyer's conduct was wildly irresponsible, and it is easy to see why the district court and the Supreme Court were offended by it to the point that a severe response was assured. Still, the Court in Link offered no agency law analysis to support its position.48

A. Understanding Lawyers' Agency Status and Vicarious Liability

In fact, when clients retain lawyers to represent them, the lawyers' agency status is settled: they are independent contractors. That is certainly lawyers' role in litigation. That does not mean that lawyers cannot bind clients contractually or otherwise, of course, because it is possible to be both an independent contractor and an agent. What it does mean, however, is that it is generally inappropriate to hold innocent clients vicariously liable for their lawyers' litigation-related misconduct based on the respondeat superior doctrine. Agency status alone will not support vicarious liability under respondeat superior.

another case to attend the pretrial conference, but he could make himself available on other days. Id. Because the judge was on the bench when he called, the lawyer left the message with the judge's secretary. Id.

46. Id. at 633.
47. Id. at 633-34 (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)).
48. Id.
50. See Lynn v. Superior Court, 225 Cal. Rptr. 427, 428 (Ct. App. 1986) (stating that in their role as trial counsel, lawyers are independent contractors).
52. See, e.g., Horwitz, 816 N.E.2d at 278 (concluding that where a lawyer "acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client"); Baldasarre, 625 A.2d at 465 ("An innocent client should not be held vicariously
Like all general rules, the rule that a principal cannot be vicariously liable for an independent contractor's torts based on respondeat superior doctrine contains exceptions, the most relevant of which relates to control of an independent contractor's work. To explain, the defense to vicarious liability that an independent contractor's status as such generally provides may be lost if the person who engaged the independent contractor ordered or directed the independent contractor's specific actions. As an Arkansas court outlined, when one who hires an independent contractor "goes beyond certain limits in the directing, supervising, or controlling the performance of the [independent contractor's] work, the relationship changes to that of employer-employee, and the employer is liable for the employee's torts." In other words, a principal's control over the details of an agent's activities transforms the principal into a master and the agent into a servant, and thus gives rise to vicarious liability.

When analyzing this exception to the general rule of non-liability, the term "control" should be narrowly understood. Indeed, for a principal to be vicariously liable for an independent contractor's actions, "[t]here must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." A general right to control the independent contractor's work, on the other hand, furnishes no basis for vicarious liability.

Distinguishing between "agents," "servants," and "independent contractors" has always been laborious. The Restatement (Third) of Agency has condensed or simplified vicarious liability terminology by abandoning...
"master" and "servant" in favor of "employer" and "employee." Under this approach, an employer is vicariously liable for torts committed by employees acting within the scope of their employment, with "employee" defined as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work" for the principal. Regardless, the Restatement (Third) of Agency does not support holding faultless clients vicariously liable for their lawyers' wrongs, as a comment to Section 2.04 makes clear:

Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent that makes the relationship between principal and agent performing the service one of employment . . . . In general, employment contemplates a continuing relationship and a continuing set of duties that the employer and employee owe to each other. Agents who are retained as the need arises and who are not otherwise employees of their principal normally operate their own business enterprises and are not, except in limited respects, integrated into the principal's enterprise . . . . Therefore, respondeat superior does not apply.

Courts have been justifiably reluctant to hold clients liable for their lawyers' alleged misconduct. To be responsible for a lawyer's misconduct, a client generally "must be 'implicated in some way [beyond simply] having entrusted its representation to the [lawyer]." In the leading case of Horwitz v. Holabird & Root, the Illinois Supreme Court rejected a claim that a client could generally be vicariously liable for its lawyers' tortious con-

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60. Id. § 7.07(3)(a).
61. Id. § 2.04 cmt. b.
62. See, e.g., Guthrie v. Buckley, 79 F. App'x 637, 638-39 (5th Cir. 2003) (applying Texas law); Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1484 (D.C. Cir. 1995) ("Like other courts, we disfavor sanctioning a party for counsel's misconduct unless the party itself is somehow implicated."); Bakker v. Grutman, 942 F.2d 236, 242 (4th Cir. 1991) (concluding that decision not to sanction plaintiffs was appropriate because they always acted on advice of counsel and entrusted to counsel all decisions in the litigation); Murray v. Playmaker Servs., LLC, 548 F. Supp. 2d 1378, 1382-83 (S.D. Fla. 2008) (denying attorney's fees against plaintiff for defending in bad faith, but awarding fees against plaintiff's counsel); Whiteside v. Infinity Cas. Ins. Co., No. 4:07-CV-87 (CDL), 2008 WL 3456508, at *14 (M.D. Ga. Aug. 8, 2008) (refusing to hold insurer liable for defense lawyers' alleged breaches of fiduciary duty in representation of insured where there was no evidence that the insurer "authorized, knew of, or ratified" the alleged breaches (quoting Plant v. Trust Co. of Columbus, 310 S.E.2d 745, 747 (Ga. Ct. App. 2003)); Lynn v. Superior Court, 225 Cal. Rptr. 427, 429 (Ct. App. 1986) (discussing lawyer's role as trial counsel); Plant, 310 S.E.2d at 746-47 (discussing lawyer's role as independent contractor and scope of agency authority); Edelman, Combs & Latturner v. Hinshaw & Culbertson, 788 N.E.2d 740, 752-53 (Ill. App. Ct. 2003) (discussing lawyer's status as independent contractor); Bradt v. West, 892 S.W.2d 56, 76-77 (Tex. App. 1994) (discussing liability for sanctions as well as tort liability).
63. Guthrie, 79 F. App'x at 639 (quoting Bradt, 892 S.W.2d at 76).
64. 816 N.E.2d 272 (Ill. 2004).
Sanctioning Clients for Lawyers’ Misconduct

In so holding, the Horwitz court applied settled independent contractor doctrine. In so holding, the Horwitz court applied settled independent contractor doctrine. 66

Horwitz arose out of a dispute between the plaintiffs and the architectural firm of Holabird & Root over unpaid fees for architectural services. 67 Holabird & Root retained the law firm of Sabo & Zahn to collect the plaintiffs’ debt. 68 Sabo & Zahn used sensitive information obtained from the plaintiffs pursuant to a confidentiality agreement in its collection efforts, and the plaintiffs’ business relationships with their investors allegedly suffered as a result. 69 The plaintiffs sued both Sabo & Zahn and Holabird & Root on multiple theories, including tortious interference with business relationships. 70 In one of the tortious interference counts, the plaintiffs asserted that Holabird & Root was liable “as a principal acting by and through its attorneys, Sabo & Zahn.” 71 Holabird & Root won summary judgment on that count in the trial court, but an appellate court reversed, and the firm appealed to the Illinois Supreme Court. 72

The Illinois Supreme Court in Horwitz concluded that where a lawyer “acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions.” 73 The court observed that clients generally seek out lawyers because they are unfamiliar with the law and are therefore unable to perform the work for which they retain the lawyer. 74 As a result, a lawyer “usually pursues a client’s legal rights without specific direction from the client [and exercises] independent professional judgment to determine the manner and form of the work.” 75 A lawyer is thus properly characterized as an independent contractor, and vicarious liability will not flow from the lawyer’s actions. 76

The court noted that a person may be both an independent contractor and an agent with the power to bind a principal in business negotiations within the scope of her agency, and that lawyers generally “fit squarely within this category.” 77 Nonetheless:

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65. Id. at 277-81.
66. See id.
67. Id. at 274.
68. See id.
69. Id.
70. Id.
71. Id.
72. Id. at 274-76.
73. Id. at 278.
74. Id.
75. Id. at 279.
76. Id.
77. Id.
When attorneys act pursuant to the exercise of independent professional judgment, they possess such considerable autonomy over the details and manner of performing their work that they are presumptively independent contractors for purposes of imposing vicarious liability. Accordingly, where a plaintiff seeks to hold a client vicariously liable for the attorney’s allegedly intentional tortious conduct, a plaintiff must prove facts demonstrating either that the client specifically directed, controlled, or authorized the attorney’s precise method of performing the work or that the client subsequently ratified acts performed in the exercise of the attorney’s independent judgment. If there is no evidence that the client directed, controlled, authorized, or ratified the attorney’s allegedly tortious conduct, no vicarious liability can attach.\(^78\)

There was no evidence that Holabird & Root influenced its lawyers’ allegedly tortious conduct; indeed, there was no evidence that Holabird & Root knew of its lawyers’ actions beforehand.\(^79\) The fact that Sabo & Zahn believed it was performing the task it was hired to accomplish when it committed the acts complained of did not establish that Holabird & Root authorized, controlled, or directed its lawyers’ conduct so as to defeat the independent contractor barrier to vicarious liability.\(^80\) Nor was there any basis in the record for the plaintiffs to argue that Holabird & Root ratified Sabo & Zahn’s alleged misdeeds.\(^81\) Among other things, there could be no ratification because Holabird & Root did not benefit from Sabo & Zahn’s allegedly wrongful conduct.\(^82\)

Continuing, the court dispatched the possible argument that the agency aspect of the attorney–client relationship, lawyers’ duty of loyalty to clients, or lawyers’ duty to defer to clients in accordance with certain rules of professional conduct undercut its conclusion.\(^83\) The court specifically noted that lawyers “cannot blindly follow their clients’ directions, even if those directions are particular and express, if doing so would require them to violate their ethical obligations.”\(^84\) In fact, a number of ethics rules mandate lawyers’ exercise of independent professional judgment and prohibit them from acting in accordance with clients’ directions or instructions under certain circumstances.\(^85\)

Finally, the court noted that practical considerations compelled its conclusion.\(^86\) Were it to hold otherwise, the court reasoned, it would effec-

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78. Id.
79. Id.
80. Id. at 279-80.
81. Id. at 280.
82. See id.
83. See id. at 280-81. The court specifically refuted a comment to Restatement (Second) of Agency §253 that seemed to discount lawyers’ professional obligations as a factor supporting lawyers’ characterization as independent contractors. Id. at 280.
84. Id.
85. Id. at 280-81 (citing ILL. RULES OF PROF’L CONDUCT Rs. 2.1, 1.2(f), 1.2(i), 1.16(a)(1), preamble (2003)).
86. Id. at 281.
tively require clients to micromanage their representations, to supervise everything their lawyers do, and to seize control of their cases at the first sign of potential misconduct by their lawyers. The duty to supervise lawyers' conduct would make plaintiffs reluctant to sue and discourage defendants from vigorously defending themselves, thus chilling the willingness of all Illinois citizens to vindicate their legal rights. It would also have the effect of making litigants responsible for their own representations, when, in fact, they had hired lawyers for that purpose.

The reasoning of Horwitz and the other courts that have reached similar conclusions in tort cases apply equally to clients' vicarious liability for sanctions. There is no material difference in this context between vicarious tort liability and liability for sanctions premised on respondeat superior. As a result, lawyers' independent contractor status should shield clients from vicarious liability for sanctions solely attributable to their lawyers' misconduct.

B. Courts' Soft and Sporadic Retreat from \textit{Link}

Although it should be plain that merely characterizing a lawyer as a client's agent is too simplistic a basis for imposing vicarious liability for sanctions, \textit{Link}'s agency rationale for holding clients accountable for their lawyers' misconduct endures. Nonetheless, courts wisely appear to be re-

87. Id.
88. Id.
89. Id.
90. Id. (citing Bradt v. West, 892 S.W.2d 56, 77 (Tex. App. 1994)).
91. See Bradt, 892 S.W.2d at 76-77 (analogizing vicarious liability for sanctions and vicarious liability in tort).
92. See id.
93. See, e.g., Maples v. Thomas, 132 S. Ct. 912, 922-24 (2012) (reciting \textit{Link} and claiming to leave the decision and its reasoning undisturbed, but avoiding the holding by reasoning that in the case before it the lawyer-agents had abandoned their client); Wescott Agri-Prosds., Inc. v. Sterling State Bank, Inc., 682 F.3d 1091, 1096 (8th Cir. 2012) (citing \textit{Link} v. Wabash R.R., 370 U.S. 626, 633 (1962)) (invoking \textit{Link} in refusing to award attorney's fees to punish litigation misconduct); Robinson v. Wix Filtration Corp., 599 F.3d 403, 409-10 (4th Cir. 2010) (upholding sanction of dismissal based on \textit{Link}); Gripe v. City of Enid, Oklahoma, 312 F.3d 1184, 1189 (10th Cir. 2002) (examining \textit{Link} in connection with dismissal of plaintiff's case for his lawyer's repeated failure to comply with court orders); Top Entm't, Inc. v. Ortega, 285 F.3d 115, 119 (1st Cir. 2002) (citing \textit{Link} and using the opinion as authority for "reject[ing] the argument that appellants should not be punished for the misdeeds of their counsel"); Eby v. State, 228 P.3d 998, 1003-04 (Idaho 2010) (referring to \textit{Link} in discussing whether the petitioner was potentially entitled to post-conviction relief based on counsel's neglect); Lisanti v. Amper, Politziner & Mattia, P.C., No. L3184-04,
treated from the holding in *Link* and, when possible, attempting to address litigation misconduct by lawyers and clients separately rather than treating them as unitary when imposing sanctions. A Third Circuit case, *Carter v. Albert Einstein Medical Center*, is illustrative.

In *Carter*, the district court dismissed plaintiff Frederick Carter's complaint after his lawyer failed to comply with a discovery order and later failed to respond to the defendant's motion to dismiss for failing to provide the required discovery under Federal Rule of Civil Procedure 37. Suffice it to say that the lawyer had been inexcusably dilatory leading up to the dismissal. Acting pro se, Carter moved for reconsideration. Carter alleged that his lawyer had misled him into believing she had complied with the discovery order and that he learned otherwise only when he checked the court's docket on his own initiative. The district court faulted Carter for trusting his lawyer as long as he did and not proceeding on his own sooner, and denied his motion. Still acting pro se, Carter appealed to the Third Circuit.

The Third Circuit concluded that the district court should have sanctioned Carter's lawyer personally rather than dismissing Carter's case. The court noted that while "the *Link* principle remain[ed] valid," it had "increasingly emphasized visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault." The court also discounted the alternative approach of affirming the dismissal and leaving Carter to sue his lawyer for legal malpractice as speculative and inefficient. As the court explained:

> Although an action for malpractice is a possibility when a lawyer's negligence results in dismissal, that remedy does not always prove satisfactory. It may be difficult for the client to obtain and collect a judgment for damages. Perhaps more importantly, public confidence in the administration of justice is weakened when a party is prevented from presenting his case because of the gross negligence

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95. 804 F.2d 805 (3d Cir. 1986).

96. *Id.* at 806.

97. *See id.* at 807 (calling the lawyer's conduct "inexcusable" and "flagrant and deserving of sanctions").

98. *Id.* at 806.

99. *Id.*

100. *See id.* at 806-07.

101. *Id.* at 806.

102. *Id.*

103. *Id.* at 807.

104. *Id.* at 808.
of his lawyer who is, after all, an officer of the court. As we pointed out in Poulis, this remedy "would only multiply, rather than dispose of litigation."

We think it critical that the importance of an attorney’s professional responsibility for his client’s interest be brought home to the erring lawyer quickly and unmistakably. Allowing derelictions to await possible punishment through lengthy malpractice litigation or disciplinary board proceedings is not likely to be effective in deterring future misconduct.105

In the end, the Third Circuit decided that Carter’s complaint should be reinstated and that he should be given reasonable time to retain new counsel or to proceed pro se.106 The court acknowledged that the defendant had incurred unnecessary legal fees because of the dereliction of Carter’s former lawyer.107 Because this loss could be cured by imposing monetary sanctions on the lawyer personally, the Third Circuit directed the district court on remand to assess such sanctions in an amount reasonable under the circumstances.108

Although the district court in Carter criticized the plaintiff for not seizing control of his case sooner than he did, the lawyer clearly bore all fault for the plaintiff’s predicament.109 In departing from Link the Third Circuit simply chose to disregard the Supreme Court’s concept of agency in representational litigation in the interest of fairness.110 Interestingly, in other cases where courts have adhered to the rule that clients are responsible for their lawyers’ misconduct when it comes to sanctions, they arguably were influenced by the fact that the sanctioned party was complicit in the wrongful conduct.111

In Wade v. Soo Line Railroad Corp.,112 for example, the Seventh Circuit affirmed the district court’s dismissal of plaintiff Michael Wade’s complaint as a sanction for his lawyer’s misconduct in discovery, stating that “[a]torneys’ actions are imputed to their clients, even when those actions cause substantial harm. A litigant bears the risk of errors made by his cho-

105. Id. (citations omitted) (quoting Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984)).
106. Id.
107. Id.
108. Id.
109. Id. at 806-07.
110. See id. at 807-08 (setting forth the rationale for the court’s decision).
111. But see Ozergolu v. Hershewe Law Firm, P.C., 451 F. App’x 620, 621 (8th Cir. 2011) (affirming sanctions against client based solely upon lawyer’s misconduct in rigid adherence to the rule that clients are responsible for their lawyers’ actions and dismissing the harshness of this result by reasoning that aggrieved clients may sue their lawyers for malpractice); In re Marriage of Davenport, 125 Cal. Rptr. 3d 292, 306-16, 315 n.17 (Ct. App. 2011) (sanctioning a party for her lawyer’s serious misconduct pursuant to a California statute mandating that result).
112. 500 F.3d 559 (7th Cir. 2007).
sen agent." Wade’s lawyer was George Brugess. The immediate cause of the court’s displeasure was Brugess’s calculated concealment of evidence that would have revealed a scheme to defraud Wade’s employer. In short, Wade falsely claimed to have hurt himself on the job, and a doctor with whom Brugess had a continuing professional relationship was willing to falsify his diagnosis to support Wade’s allegations to the extent he could. But as that description of the controversy indicates, Wade was neck deep in the wrongful conduct. Indeed, he set the case in motion with his dishonesty, and he never came clean once litigation was underway. Wade is therefore best understood as a joint and several liability case based on the coordinated effort of the lawyer and client.

C. Apparent Authority as a Basis for Sanctions

Even if a principal is not vicariously liable for an independent contractor’s tortious conduct under respondeat superior, the principal may still be liable based on agency law if the independent contractor acted with apparent authority. Vicarious liability based on respondeat superior and liability premised on apparent authority are separate theories of responsibility. Thus, a client may be liable for its lawyer’s misconduct even though the lawyer is an independent contractor if the lawyer acted with apparent authority. Backing up for a moment, “apparent authority” describes the power of an agent or other actor “to affect a principal’s . . . relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.”

The argument that a client may be sanctioned for its lawyer’s misconduct based on the lawyer’s apparent authority assumes that the client–principal, by enlisting the lawyer’s services, “represents to the opposing party and to the court that the attorney-agent has the authority to speak and

113. Id. at 564.
114. Id. at 560.
115. Id. at 560-62.
116. Id.
117. See id.
118. Id. at 560-62.
120. Inter Mountain Mortg., Inc. v. Sulimen, 93 Cal. Rptr. 2d 790, 794 n.4 (Ct. App. 2000); Grease Monkey Int’l, Inc., 904 P.2d at 473.
122. RESTATEMENT (THIRD) OF AGENCY § 2.03 (2007).
act as is customary in such a setting.” 123 But that approach will not support sanctioning an innocent client for its lawyer’s alleged offenses because the lawyer’s authority “to speak and act as is customary” should not be held to encompass misconduct by the lawyer. 124 As a Georgia court stated, a client’s “general retention of an attorney to do all things necessary to pursue a claim or defense . . . should in legal contemplation mean the attorney has authority to do all things legal and proper; not otherwise.” 125 Certainly, in ordinary cases clients do not manifest to other parties or to the court that their lawyers are authorized to commit misconduct. 126 It would be unreasonable for an adversary or a court to rely on a lawyer’s mere representation of a party to invoke apparent authority as a basis for sanctions because the types of misconduct for which sanctions are imposed do not reflect regular litigation practice, are not customary features of relationships between lawyers and judges or between lawyers and other counsel, and are detrimental to the client. 127 Apparent authority cannot be based solely on the target lawyer’s conduct or statements. 128

The fact that courts should not presume lawyers’ apparent authority to act for clients in this context does not mean that a client will necessarily avoid sanctions for its lawyer’s actions. A court that is concerned that a client may have authorized a lawyer’s misconduct may always inquire into that possibility by hearing or otherwise. 129 If the client authorized or ratified the alleged misconduct, then the client may be sanctioned for acting in concert with the lawyer. In that case, however, the client is being sanctioned for his own misdeeds rather than being held vicariously liable for his lawyer’s misconduct.

This is a difficult area because of the nature of apparent authority. It is sometimes hard to demarcate those things agents may do and those they may not. 130 It is important, however, to recognize the distinction between the consequences of a lawyer’s errors, which a client may have to bear via apparent authority, and sanctions for a lawyer’s sole misconduct, which the lawyer should bear alone. This difference is illustrated below.

123. Giese!, supra note 121, at 361.
126. Plant, 310 S.E.2d at 747.
127. See RESTATEMENT (THIRD) OF AGENCY § 2.03, cmt. c, d (2007) (explaining apparent authority, the rationale for apparent authority, and the reasonable belief element of apparent authority).
128. Id. § 2.03 cmt. c.
129. See Plant, 310 S.E.2d at 747 (stating that “the circumstances of the particular case must be examined” when deciding whether to hold a party responsible for its lawyer’s abusive conduct).
130. GREGORY, supra note 29, § 21, at 59.
In Case *A*, a lawyer fails to appear for a pretrial conference because she forgets about it, and the court dismisses the client’s case as a consequence of her failure. In Case *B*, the lawyer deliberately blows off the pretrial conference either because he is unhappy with the client or because he considers another client’s matter to be more important. Regardless, the court dismisses the client’s case based on the lawyer’s failure to appear.

In Case *A*, the lawyer’s failure to appear at the pretrial conference saddles the client with the consequences under apparent authority doctrine because (1) the other parties and the court could reasonably rely on the lawyer to appear for the client as scheduled; and (2) the client can fairly be said to have assumed the risk of the lawyer’s inadvertent procedural failures within the temporary confines of the proceeding. If the client cannot get the default set aside based on excusable neglect or a similar principle, its remedy is to sue the lawyer for professional negligence, file an ethics complaint against the lawyer, or both. In contrast, in Case *B*, the client is not bound by the lawyer’s apparent authority because an agent’s actions are not imputed to the principal where the agent’s interests are adverse to the principal. 131 Certainly, in Case *B*, the lawyer’s interests were adverse to the client’s. 132 So, too, can adversity be presumed in any case of reckless or intentional misconduct by a lawyer that warrants sanctions. 133 Putting aside for the moment the legal precept that a client’s retention of a lawyer to pursue a claim or defense should mean the lawyer’s authority is confined to those efforts that are “legal and proper,” 134 as a factual matter it is an extraordin-

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131. McRaith v. BDO Seidman, LLP, 909 N.E.2d 310, 331 (Ill. App. Ct. 2009) (“Generally, the knowledge and conduct of agents are imputed to their principals. . . . An exception to this rule exists where the agent’s interests are adverse to the principal.”). The client in Case *B* might also be able to argue that it should not be bound by its lawyer’s actions because the lawyer abandoned it. See Seacall Dev., Ltd. v. Santa Monica Rent Control Bd., 86 Cal. Rptr. 2d 229, 231 (Ct. App. 1999) (explaining abandonment theory); Willis v. Placke, 903 S.W.2d 219, 221 (Mo. Ct. App. 1995) (noting the general rule that the negligence of a party’s lawyer is imputed to the party, but recognizing an exception to this rule where there is evidence that the lawyer abandoned the client without notice). What constitutes abandonment of a client depends on the facts of the particular case. Seacall Dev., Ltd., 86 Cal. Rptr. 2d at 231. Even where a client can demonstrate its abandonment by its lawyer, however, courts also consider equitable factors in deciding whether to afford the client relief. Id. at 231-32 (listing factors that courts consider).

132. Similarly, a court might hold that the lawyer’s actions cannot be imputed to the client because the lawyer acted in bad faith. See Phx. Ins. Co. v. Terrazzano, No. 34 15 39, 1993 WL 104423, at *2 (Conn. Super. Ct. Mar. 25, 1993) (stating that a lawyer’s conduct cannot be imputed to the client when the lawyer acts in bad faith). That presumption can be overcome by a showing that the lawyer acted with the client’s actual authority or that the client ratified the misconduct. See Horwitz v. Holabird & Root, 816 N.E.2d 272, 278-79 (Ill. 2004). The court may scrutinize the circumstances of the case either on its own initiative or because another party requests that it do so. See Plant, 310 S.E.2d at 747.

133. Terrazzano, 1993 WL 104423, at *2; Plant, 310 S.E.2d at 747.

134. Terrazzano, 1993 WL 104423, at *2; Plant, 310 S.E.2d at 747.
nary case in which a client authorizes its lawyer to engage in the sort of activities that might draw sanctions. As a rule, clients authorize their lawyers only to reasonably advance their objectives. There is no logical reason to believe that most clients would knowingly authorize the harm to their cases that misconduct by their lawyers might wreak. Indeed, clients seldom can be said to have even contemplated misconduct by their lawyers.

D. Summary and Synthesis

Agency law seldom supplies a basis for holding innocent clients liable for lawyers' misconduct. Respondeat superior liability rarely fits the attorney–client relationship. When representing clients, lawyers presumptively are independent contractors. Exercising their independent professional judgment, lawyers assert claims and defenses, decide what arguments to make or emphasize and which to subordinate or abandon, prepare pleadings and briefs, formulate discovery responses and evaluate what discovery to resist, decide what discovery should be undertaken and how it should be conducted, pursue fact investigations, retain expert witnesses, schedule key events, argue before courts, and more—all with little or no client guidance. Indeed, it is common for clients to be unaware of lawyers' specific activities until afterwards. The client's control of the objectives of the representation is not sufficient control to implicate the respondeat superior doctrine.

“Control” for purposes of respondeat superior liability is granular or intrusive; it describes a right more detailed than the right of control that all principals possess.

The alternative theory of apparent authority liability is also inapposite. A client's mere retention of a lawyer does not cloak the lawyer with apparent authority to engage in misconduct. As a general rule, a lawyer's apparent authority to act for a client is limited to conduct that is "legal and proper." In most cases, clients do not manifest to other parties or to the court that their lawyers are authorized to commit misconduct.

135. Cf. Restatement (Third) of the Law Governing Lawyers § 27 cmt. c (2000) (explaining that “a lawyer has apparent authority to do acts that reasonably appear to be calculated to advance the client’s objectives in the representation”); Stephen M. Bainbridge, Agency, Partnerships & LLCs 72 (2004) (stating that it is generally assumed that principals will never authorize agents to be negligent).

136. Bainbridge, supra note 135, at 64 (explaining that this position is based on the fact that “clients have little, if any, control over the day-to-day conduct of their lawyer”).

137. See generally Model Rules of Prof'L Conduct R. 1.2(a) (2012) (stating that “a lawyer shall abide by a client’s decisions concerning the objectives of representation”).


139. Terrazzano, 1993 WL 104423, at *2; Plant, 310 S.E.2d at 747.

140. Terrazzano, 1993 WL 104423, at *2; Plant, 310 S.E.2d at 747.
For a client to be sanctioned for a lawyer’s misconduct under agency principles, the client must authorize, control, direct, or ratify the lawyer’s misdeeds.\footnote{141} In cases of actual authority and ratification, the client has as­ sented to bearing the consequences of its lawyer’s misconduct. If the client sufficiently controls or directs the lawyer’s misconduct, the client effective­ ly converts the lawyer from an independent contractor into an employee and thus exposes itself to potential vicarious liability. It is certainly possible that a client might do just that, as where a corporate general counsel immerses herself in litigation being handled by outside counsel and guides the lawyers’ strategy and tactics in minute detail.\footnote{142}

Embracing independent contractor doctrine and thereby rejecting in­ nocent clients’ vicarious liability for lawyers’ sanctionable misconduct as the presumptive rule is potentially controversial. First, it appears to contra­ dict the established principle that “parties are bound by the actions (and failures to act) of their attorneys.”\footnote{143} Visiting lawyers’ sins on their clients supposedly inheres in the adversary system.\footnote{144} Proponents of this position might argue that any other rule would make representative litigation un­ manageable. To the extent a party’s lawyer errs, the proper course of action is not to relieve the party from the lawyer’s mistake, but to allow the party to sue the lawyer for malpractice.\footnote{145}

But this principle is not as absolute as its advocates would suggest. In fact, parties may sometimes be relieved from the consequences of their lawyers’ actions or inaction if they can establish excusable neglect\footnote{146} or if they can demonstrate their lawyers’ gross negligence.\footnote{147} Various jurisdictions allow parties to escape default based on their lawyers’ errors.\footnote{148} In Montana, for example, a party may obtain relief from a judgment if it can show (1)
Sanctioning Clients for Lawyers' Misconduct

“extraordinary circumstances, such as gross neglect or actual misconduct by an attorney”; (2) that it moved “to set aside the judgment within a reasonable period of time”; and (3) that it “was blameless.” To be sure, relief based on excusable neglect and similar concepts is the exception rather than the rule, but cases in which innocent clients seek to avoid sanctions for their counsel’s misconduct similarly represent a small portion of litigated matters.

Correctly identifying lawyers as independent contractors does not change opposing parties’ ability to rely on their representations or procedural compliance because independent contractors are still their principals’ agents and still possess actual and apparent authority to bind their principals as to the various types of agreements commonly made in litigation. The argument that a client could escape the consequences of her lawyer’s procedural failures or tactical blunders by invoking the lawyer’s independent contractor status ignores (1) actual and apparent authority doctrine; (2) the fact that consequences of lawyers’ procedural defaults, tactical errors, and similar missteps are generally only that—they are not “sanctions” (which ties back to actual and apparent authority); and (3) the fact that deadlines and procedural requirements are reasonably equivalent to contractual obligations to which agents may bind principals. On this last point, the Supreme Court has observed that scheduling matters are among those actions or decisions entrusted to counsel, such that lawyers may commit their clients to them.

Of course, the recognition that actual and apparent authority may require clients to bear the consequences of lawyers’ procedural defaults does not mean that those doctrines must in turn provide a basis for sanctioning clients for their lawyers’ misconduct. Again, misconduct by lawyers war-

150. See, e.g., Ambrose v. Michelin N. Am., Inc., 37 Cal. Rptr. 3d 1, 5 (Ct. App. 2005) (concluding that counsel’s failure to request continuance of summary judgment hearing due to conduct falling below the professional standard of care did not constitute excusable neglect).
151. GREGORY, supra note 29, ¶ 7, at 18-19, ¶ 21, at 59.
152. See Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1301 (Ind. 1998) (explaining that a client’s retention of a lawyer equips the lawyer with “the inherent power to bind [the] client to the results of a procedure in court”).
153. This point is illustrated by the decision in United States v. Daugerdas, No. 53 09 Cr. 581(WHP), 2012 WL 2149238 (S.D.N.Y. June 4, 2012), in which the court held that the failure by lawyers for defendant David Parse to alert the court to a juror’s dishonest answers during voir dire waived Parse’s right to a new trial based on the juror’s misconduct. Id. at *28-*37. The waiver was simply the consequence of the lawyers’ failure to act as they reasonably should have; the court did not impose the waiver as a sanction. Id. at *37.
155. Id. (citing New York v. Hill, 528 U.S. 110, 115 (2000)).
ranting sanctions is generally not the sort of action that clients may reasonably be said to have actually or apparently authorized. 156

Second, vicarious liability advocates argue that it is wrong to shield innocent clients from the effects of their lawyers' misconduct because it is not they who need protection, but, rather, the innocent third parties who are harmed by the lawyers' misconduct. 157 Professor Grace Giesel, for one, asserts that "special treatment for clients is misguided" because a "wronged client has the protection of both the attorney discipline system and a malpractice action." 158 Courts have articulated similar views. 159 This position is tenuous at best.

To begin with, third parties who are aggrieved by an opposing lawyer's misconduct also have the protection of the professional discipline system. Rules of professional conduct contain no privity requirement; anyone may report allegedly unethical conduct by a lawyer to the appropriate professional authorities. Even if a lawyer's misconduct has caused some financial harm to a third-party or imposed costs on a court, that is still no basis for holding the lawyer's client responsible. In an appropriate case a court can compensate the injured third-party or recoup its own loss by imposing monetary sanctions against the offending lawyer personally. 160 Finally, forcing the client to sue its lawyer for malpractice is inefficient because it creates unnecessary additional litigation that will further jam the already crowded docket of any court in which it is filed. 161 It certainly subjects the client to unnecessary aggravation and expense. Such delay in penalizing the lawyer also dilutes any deterrent effect that might result from the immediate imposition of sanctions on the lawyer. 162 Of course, even if the client ulti-

157. Giesel, supra note 121, at 349.
158. Id.
160. See, e.g., Toborg v. United States, No. 1:11–cv–150 (GLS/RFT), 2012 WL 3643841, at *2–*3 (N.D.N.Y. Aug. 23, 2012) (opting to impose monetary sanctions against lawyer rather than party where the lawyer admitted that he alone was responsible for the discovery delays warranting sanctions); FED. R. CIV. P. 11(c)(1) (permitting a court to sanction lawyers and law firms).
162. Id.
mately sues the lawyer and prevails, there is no guarantee that the client will be able to collect the judgment from the lawyer. 163

Third, the weight of authority bluntly describes lawyers as clients' "agents." With rare exception, courts do not distinguish between types of agents in this context. That may stem from the concern that different terminology would signal an unwise retreat from the principle that clients are bound by their lawyers' actions. As the Restatement (Third) of the Law Governing Lawyers notes, yoking clients and lawyers has the advantage of requiring the client to bear the cost of the lawyer's misconduct rather than imposing such costs on an innocent third party. 164 But as the Restatement—which uses broad agency terminology in its comments—further observes, clients may be excused from the consequences of their lawyers' misconduct when that can be done without seriously harming others. 165 More particularly, the Restatement explains that courts may depart from the traditional agency regime when evaluating whether a client should be sanctioned for its lawyer's misconduct. 166

A tribunal considering whether to impose sanctions on a litigant . . . can go beyond the usual assumption . . . that acts done by a lawyer in the litigant's name were done in accordance with the litigant's wishes. Sanctions against clients and lawyers for procedural defaults and misconduct have become increasingly common . . . . Courts are generally accorded broad discretion when deciding whether to grant a litigant a second chance, for example by allowing a new trial or an amendment to a pleading or setting aside a default. 167

Actually, the Restatement's invitation to courts to "go beyond the usual assumption" that clients are bound by their lawyers' acts or inaction suggests that the simplest way for courts to avoid the complexities of agency theory in the sanctions context is to, well, avoid agency theory. 168 The fact that questions concerning responsibility for sanctions may be answered under agency law does not mean they must be. Courts can easily discard agency law in this context. Sanctions include a significant equitable component. 169 It is therefore reasonable for courts weighing sanctions to avoid the

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163. *Id.* For this reason, a court that invokes a client's theoretical malpractice remedy against its lawyer "should ascertain whether that is a meaningful alternative, given the nature and amount of the relief sought in the action and the wherewithal of counsel to provide a meaningful remedy." JOSEPH, *supra* note 6, § 5(E)(1)(c)(iii), at 2-68; see also *id.* § 16(E)(1)(a), at 2-296 (making the same point).


165. *Id.*

166. *Id.* § 29 cmt. d.

167. *Id.*

168. See Mureiko, *supra* note 28, at 754 (urging courts to abandon the agency theory when deciding whether to sanction "a relatively innocent client").

169. See, e.g., Bull v. United Parcel Serv., Inc., 665 F.3d 68, 83 (3d Cir. 2012) (stating that "all sanctions originate from the realm of equity"); Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986) (explaining that a court must "balance the equities" when deciding to
murky or complicating aspects of agency law and allocate responsibility between lawyers and clients based on concepts of fairness and the facts and circumstances of a particular case.

When balancing the equities, courts should consider the interests of all concerned, including opposing parties.\textsuperscript{170} The court may also consider the effect of the challenged conduct on it and the judicial process as a whole.\textsuperscript{171}

Courts' avoidance of agency law is also consistent with their inherent authority to manage their affairs in ways that promote the orderly and effective disposition of cases. It is certainly reasonable to believe that individual cases and courts' dockets overall are more effectively and efficiently administered when irresponsible lawyers personally bear the consequences of their actions.

More acutely, any allegations of misconduct by a lawyer that are alleged to justify sanctions or an award of damages against the party the lawyer represents risk derailing the case because of the potential conflict of interest between the lawyer and the client.\textsuperscript{172} There should be no conflict if the lawyer and client are able to present a common defense to the opponent's allegations of wrongdoing,\textsuperscript{173} but such unity of interests is not assured. It may be necessary for the client to waive its attorney-client privilege or work product immunity to defend itself, and the lawyer will naturally be required to withdraw from the case if she and the client must point fingers at one another in their defense.\textsuperscript{174} A lawyer's advocacy of a position that challenges the court's inherent authority to manage its affairs is not a concession that the court's decision is wrong, but rather an assertion that the court's authority to manage its affairs is such that it is capable of finding a sanction appropriate in light of the equities of the case.


170. Courts routinely balance prejudice to opposing parties when deciding whether the involuntary dismissal of the plaintiff's case is an appropriate sanction. See, e.g., Kasalo v. Harris & Harris, Ltd., 656 F.3d 557, 559, 561 (7th Cir. 2011) (reversing involuntary dismissal of plaintiff's case); Kovacic v. Tyco Valves & Controls, LP, 433 F. App'x 376, 381-83 (6th Cir. 2011) (affirming dismissal); West v. Goord, 423 F. App'x 66, 68 (2d Cir. 2011) (reversing dismissal in part because defendants were not prejudiced).


174. Id.; see also JOSEPH, supra note 6, § 16(E)(2), at 2-300 (observing that when a court is called upon to allocate sanctions between parties and their lawyers, "[t]he risk of intruding on the attorney-client relationship is exacerbated by the fact that counsel are at liberty to disclose privileged information to exonerate themselves").
antagonistic to a client in this context presents a conflict of interest that cannot be waived. In some cases, such disruption of the attorney-client relationship may in fact be one of the opponent's goals in seeking sanctions or in otherwise attempting to impute the lawyer's conduct to the client. Regardless, the case is bound to be delayed and complicated as a result, with a ripple effect on the court's docket.

II. DETERMINING RESPONSIBILITY FOR SANCTIONS: BEYOND AGENCY

Courts are increasingly discarding blunt agency principles and rejecting the historical view that clients should bear the brunt of sanctions attributable to their lawyers' misconduct. This is a positive development that should be encouraged. In some cases, however, it is not feasible for courts to remedy lawyers' misconduct without sanctioning clients either directly or indirectly.

A. The Trend Toward Personal Accountability and Away from Vicarious Liability

When considering sanctions, some courts continue to adhere to simplistic notions of agency and visit lawyers' misconduct on their innocent clients. These courts are glued to the idea that clients choose lawyers at their peril and that parties are uniformly responsible for their lawyers' actions. Increasingly, however, courts are willing to focus sanctions on cul-


176. Some lawyers allegedly make a habit of accusing opposing counsel of misconduct for tactical gain. See, e.g., United States v. Forbes, No. 3:02CR00264 (AWT), 2006 WL 680562, at *1 (D. Conn. Mar. 16, 2006) (observing that defense counsel "had engaged in a pattern in this case of arguing, premised on speculation, that opposing counsel had engaged in improper conduct").

177. See, e.g., Ozeroglu v. Hershewe Law Firm, P.C., 451 F. App'x 620, 621-22 (8th Cir. 2012) (citing Nick v. Morgan's Foods, Inc., 270 F.3d 590, 596-97 (8th Cir. 2001)); Robinson v. Wix Filtration Corp., 599 F.3d 403, 409 (4th Cir. 2010) (penalizing client for his lawyer's "willful blindness" related to case scheduling); Comiskey v. JFTJ Corp., 989 F.2d 1007, 1010 (8th Cir. 1993) (entering default judgment despite there being no evidence that party committed any misconduct and over party's complaint that discovery misconduct "was the sole fault of its prior counsel"). In some cases, courts may lessen the effect of their sanctions rulings on innocent parties by assessing the overwhelming amount of fault for the misconduct, and thus the vast majority of any monetary penalty in cases in which monetary sanctions are imposed, against the culpable lawyers. See, e.g., Libaire v. Kaplan, No. 06 CV 1500(DRH)(ETB), 2012 WL 273080, at *4 (E.D.N.Y. Jan. 30, 2012) (concluding that the plaintiff should be responsible for 10% of the sanctions award, with the plaintiff's lawyers bearing 90%). Although this approach may be less unfair to an innocent client, it is not fair.

pable lawyers rather than imputing liability for lawyers’ misdeeds to innocent clients.\textsuperscript{179} Under this approach, the mere fact that a client entrusted its representation to a lawyer is no basis for sanctioning the client when the lawyer acts wrongfully.\textsuperscript{180} Rentz v. Dynasty Apparel Industries, Inc.,\textsuperscript{181} leads this line of authority.

Rentz arose out of a protracted business dispute between plaintiff Richard Rentz and four defendants: former National Football League star wide receiver Paul Warfield and his company, Jemesco, Inc., and brothers Armando and Ignacio Mendez.\textsuperscript{182} In summary, Rentz alleged that the defendants reneged on promises to pay him a commission for helping to arrange for the Menendez brothers to obtain a license to produce NFL apparel for sale by Kmart and other retailers.\textsuperscript{183} Unfortunately for Rentz, he never reduced his agreements with the Mendez brothers or Warfield to writing.\textsuperscript{184}

Rentz sued the defendants on several theories, including breach of contract.\textsuperscript{185} He was represented by lawyers Paul Leonard and Randall Roach.\textsuperscript{186} During his deposition, Rentz testified that he had no contract with Jemesco and that while he had an understanding with Warfield, his commission “was coming out of the deal,” such that he “suppose[d]” the Mendez brothers were actually responsible for paying it.\textsuperscript{187} Despite this testimony, Leonard prepared an amended complaint that perpetuated Rentz’s breach of contract claims against Warfield and Jemesco, and Roach prepared a memorandum in opposition to Warfield’s and Jemesco’s summary judgment mo-
tion on all claims against them. Warfield and Jemesco moved for sanctions against Rentz and his lawyers under Rule 11 and 28 U.S.C. § 1927 for litigating baseless claims. The district court heard the sanctions motion in October 1999 and then astonishingly took nearly eight years to rule. When it finally decided the motion in August 2007, the district court imposed modest monetary sanctions on Leonard and Roach, but declined to sanction Rentz. Warfield and Jemesco appealed several aspects of the district court’s ruling to the Sixth Circuit, including the decision not to sanction Rentz.

On appeal, Warfield and Jemesco argued that the district court abused its discretion in not sanctioning Rentz for violating Rule 11 in connection with his amended complaint and memorandum opposing summary judgment because he “was actively involved in the litigation and allowed his attorneys to make allegations . . . that he knew to be untrue.” Rentz acknowledged his active participation in the litigation, but insisted he was always consistent and truthful when making factual assertions, and that as a layperson “‘[h]e was not in a position to evaluate whether the allegations asserted in the two pleadings, now couched in . . . legal parlance as distinct legal theories, were equivalent to the accounts he provided of those meetings and events.” The Sixth Circuit agreed with Rentz.

The district court had declined to sanction Rentz because there was no evidence that he had misled his lawyers into making the allegations or arguments they did, nor was there evidence that Rentz ever deceived defense counsel. This, the Sixth Circuit concluded, was a proper exercise of discretion. Rentz’s deposition testimony was accurate and truthful, albeit contrary to the claims Leonard and Roach asserted on his behalf against Warfield and Jemesco. If the lawyers improperly characterized Warfield’s statements as reported by Rentz as creating a “contract” or constituting a “promise,” it was nonetheless reasonable for Rentz as a layperson to trust their professional judgment. Furthermore, the offending allegations were not purely factual; rather, they were mixed questions of law and fact for

188. Id. at 394.
189. Id. at 392-93.
190. Id. at 394.
191. Id.
192. Id. at 391.
193. Id. at 397-98.
194. Id. at 398 (first alteration in original) (quoting Rentz’s brief).
195. Id.
196. Id. at 398-99.
197. Id. at 399.
198. Id. But cf. Byrne v. Nezhat, 261 F.3d 1075, 1118 (11th Cir. 2001) (indicating that it is proper to sanction a client under Rule 11 “when he misrepresents facts in the pleadings” or “when it is clear that [the client] is the ‘mastermind’ behind the frivolous case”), abrogated by Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1151 (11th Cir. 2011).
which a layperson should not be held responsible. Accordingly, the Sixth Circuit affirmed the district court’s decision not to sanction Rentz personally.

Rentz was correctly decided. It is common for clients to report facts to their lawyers and for the lawyers to thereafter formulate legal theories, prepare pleadings, craft strategy, and plot tactics. Clients seldom dictate legal theories, the contents of pleadings, or strategy or tactics—what ethics rules characterize as the “means” of a representation. To the contrary, clients usually defer to their lawyers in these areas. Many clients have no choice but to defer to their lawyers’ decisions and judgments; they lack the education, training, or experience to effectively monitor their lawyers’ activities. Even sophisticated clients and those with legal training routinely defer to their lawyers’ choices and judgments for a host of valid practical reasons. In any event, so long as the means of a representation are not corrupted by a client’s dishonesty or other misconduct, the client is not complicit in the lawyer’s use of wrongful means, or the client is not prodding the lawyer to achieve improper objectives, it is generally correct to confine any sanctions to the errant lawyer. Certainly, a court should never sanction a party for its lawyer’s misconduct if it does not sanction the lawyer personally.

B. The Rare Case When Vicarious Liability for Sanctions Is Appropriate

Although courts generally should not sanction innocent parties for their lawyers’ misconduct for the reasons explained previously, there are rare exceptions. For instance, there may be a case in which a lawyer’s derelictions are so obvious or recurring that the client is effectively on notice that its failure to replace the lawyer or to take other corrective measures will expose it to sanctions. A client disregards such warning signals at his own peril. A party who is also a lawyer may be charged with her counsel’s

199. Rentz, 556 F.3d at 399.
200. Id.
201. See MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2012) (observing that “[c]lients normally defer to the special knowledge and skill of their lawyer[s] with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters”).
202. Id.
203. See Horwitz v. Holabird & Root, 816 N.E.2d 272, 281 (Ill. 2004) (stating that most clients lack the ability to closely monitor their lawyers’ activities).
204. See Rentz, 556 F.3d at 399.
205. See In re Porto, 645 F.3d 1294, 1306 (11th Cir. 2011).
207. See id. (affirming dismissal of case as sanction following at least nine significant procedural defaults by lawyer).
Sanctioning Clients for Lawyers' Misconduct

neglect or misconduct.208 More common are cases in which a sanction will be meaningful only if it affects the party or where it is impossible for the court to remedy the lawyer's misconduct without penalizing the party the lawyer represents.209 This scenario is most likely to arise out of a lawyer's serious misconduct at trial. In cases of trial misconduct, sanctioning the lawyer exclusively is often insufficient to cure the prejudice to the opposing party and to the court caused by the lawyer's misconduct. The imposition of sanctions against a client for its lawyer's conduct at trial is consistent with the general rule that both lawyers and clients "are bound by [lawyers'] trial strategy."210

*O2 Micro International Ltd. v. Beyond Innovation Technology Co.*211 is a recent case in this category. *O2 Micro* sued the defendant, commonly referred to as BiTEK, for inducing the infringement of two *O2 Micro* patents on current inverter controllers used to light electronic displays in computers and smart phones.212 Prior to trial, *O2 Micro* moved in limine to prevent BiTEK from referring to *O2 Micro*’s selection of the Cayman Islands as the location of its corporate headquarters.213 The court granted the motion in part; it held that BiTEK could refer to the fact that *O2 Micro* was a Cayman Islands corporation, but it further held that BiTEK could not offer evidence regarding the tax advantages obtained by *O2 Micro* through its foreign incorporation.214 The district court warned the lawyers for both sides to approach the bench before exploring a subject covered by the motion in limine.215 During voir dire, BiTEK's lawyer, without first approaching the bench, asked the jury panel, "'Now, are there any of you who have a problem with a company that puts its headquarters offshore on a Caribbean island in order to avoid paying U.S. taxes?'"216

*O2 Micro* objected to the question and, after a side bar and a hearing, the district court found that BiTEK’s lawyer had willfully violated the in limine order.217 Invoking its inherent power to sanction litigants and lawyers, the district court held BiTEK’s lawyer in contempt, declared a mistrial

208. *See, e.g.*, Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 667 (2d Cir. 1980) (reasoning that a lawyer-plaintiff was "clearly chargeable with his lawyer's neglect").

209. *See, e.g.*, Smith v. United States, 834 F.2d 166, 169-71 (10th Cir. 1987) (affirming dismissal of case as a sanction where district court declined to reopen discovery and the plaintiff's lawyer then said that the plaintiff refused to proceed to trial on the scheduled date without further discovery).

210. *Id.* at 171.

211. 449 F. App'x 923 (Fed. Cir. 2011).

212. *Id.* at 925.

213. *Id.*

214. *Id.*

215. *Id.* at 926.

216. *Id.* (quoting J.A. at 472).

217. *Id.*
at O2 Micro's request, and reset the case for trial before a new jury.\textsuperscript{218} The court also imposed several other sanctions, including precluding BiTEK from presenting expert testimony on the issue of infringement.\textsuperscript{219} The case eventually proceeded as a bench trial after BiTEK dropped its state law counterclaims and O2 Micro opted to seek only injunctive relief.\textsuperscript{220} The district court found that BiTEK had induced two companies to infringe O2 Micro's patents and entered a permanent injunction for O2 Micro.\textsuperscript{221} BiTEK appealed to the Federal Circuit, with one of the points on appeal being the district court's preclusion of its expert witness's testimony on infringement.\textsuperscript{222} According to BiTEK, the district court imposed the "death penalty" when it barred BiTEK's expert from testifying there was no infringement.\textsuperscript{223} This allegedly was an abuse of discretion because, among other things, it "punished BiTEK for its attorney's misconduct [for] which BiTEK was not culpable."\textsuperscript{224}

The Federal Circuit disagreed. In reasoning that the district court did not abuse its discretion in precluding BiTEK from presenting expert testimony on infringement, the \textit{O2 Micro} court noted that BiTEK was not challenging the district court's finding that its counsel knowingly violated the in limine order in bad faith.\textsuperscript{225} Rather, BiTEK contended that the district court erred because it did not find bad faith by BiTEK itself.\textsuperscript{226} The Federal Circuit easily rejected that argument on the basis that the district court specifically found that BiTEK caused the mistrial through its counsel.\textsuperscript{227} Contrary to BiTEK's claim that the district court sanctioned it for misconduct that was solely attributable to its lawyer, "the finding that BiTEK was acting through its counsel comport[ed] with the well-settled principle that a client is responsible for its attorney's conduct in the courtroom."\textsuperscript{228}

BiTEK fared no better on its related argument that the district court's preclusion of its expert's testimony on infringement effectively was a "death penalty sanction[]."\textsuperscript{229} To be sure, the exclusion of BiTEK's expert witness's intended testimony hampered its ability to present its non-infringement theory, but that sanction was far short of dismissal given the

\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 927.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 929.
\textsuperscript{224} Id.
\textsuperscript{225} Id. at 930.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id. (citing Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962)).
\textsuperscript{229} See id. at 930-31.
other evidence at BiTEK’s disposal.230 As the O2 Micro court explained, BiTEK still had the ability to defeat O2 Micro’s infringement claims through documentary evidence and direct testimony by its technical fact witnesses, and by cross-examining O2 Micro’s infringement expert.231 In addition, the exclusion of BiTEK’s expert was necessary to deter future trial misconduct by BiTEK’s counsel and by other lawyers.232

BiTEK complained that the other sanctions imposed by the district court—such as limiting its voir dire time, limiting its peremptory challenges, requiring it to pay the costs and fees associated with the failed jury selection, and telling the jurors in the second trial that its reduced voir dire time was a punishment—were sufficient to compensate O2 Micro and deter future misconduct.233 The court rejected this argument as well.234 The district court specifically found that monetary sanctions were insufficient in this context because they would basically allow a litigant to buy a new jury panel by intentionally violating court orders.235 More broadly, the O2 Micro court declined to second-guess the district court’s conclusions about the necessity of the sanctions it chose.236 In the end, the Federal Circuit affirmed the district court’s exclusion of BiTEK’s expert witness’s testimony as a sanction for its lawyer’s misconduct during voir dire.237 It also affirmed the district court’s entry of a permanent injunction against BiTEK.238 The sanctions in O2 Micro were unquestionably stiff, and BiTEK understandably felt as though it was being penalized for conduct over which it had no control. Based on the facts in the opinion, BiTEK could not have anticipated its lawyer’s blatant violation of the district court’s in limine ruling and, in any event, the misconduct for which it was punished was uniquely within its lawyer’s control. Unfortunately for BiTEK, during trial a client and lawyer essentially are one for tactical purposes, including responsibility for the consequences of tactical misjudgments.239 This is a practical requirement; sanctioning the lawyer alone is often insufficient to cure the prejudice to the opposing party and to the court attributable to the lawyer’s misconduct in trial.

230. Id. at 931.
231. Id.
232. Id.
233. Id. at 926, 931.
234. See id. at 931.
235. Id.
236. Id.
237. Id.
238. Id. at 934.
239. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26, cmt. b, d (2000) (outlining when a lawyer’s act is considered to be that of a client in proceedings before a tribunal).
In this case, as in most cases of trial misconduct by lawyers, the district court had to balance the parties' competing interests when weighing possible sanctions. It was reasonable in that balancing for the district court to conclude that O2 Micro’s interests were superior to BiTEK’s.\textsuperscript{240} It was also reasonable for the court to factor in its own interest in the orderly and efficient administration of cases on its docket when fashioning a remedy for the serious misconduct of BiTEK’s lawyer. In short, \textit{O2 Micro} was a case in which the district court concluded either that it was impossible to remedy the lawyer’s misconduct without penalizing the party the lawyer represented or that the party had to be penalized to make any sanction meaningful. It was therefore a proper exercise of discretion to strike BiTEK’s expert as a sanction for its lawyer’s misconduct and, more broadly, to take an equitable approach instead of applying independent contractor doctrine in doing so.

CONCLUSION

Courts and others who seek to hold parties liable for their lawyers’ misconduct have long invoked agency law as a basis for doing so. This is a superficially appealing approach; after all, the attorney–client relationship is plainly an agency relationship. Yet agency law is not a reliable basis for imputing a lawyer’s misconduct to a client in the sanctions context. Vicarious liability based on respondeat superior requires a master–servant relationship, but lawyers are not their clients’ servants even though they are their agents. Rather, lawyers generally are independent contractors. Liability based on a lawyer’s apparent authority is no answer for several reasons, the most fundamental being that a lawyer’s apparent authority generally extends only to conduct that is legal and proper. In addition, sanctioning innocent clients for lawyers’ misconduct is often unfair and is unlikely to remedy the misconduct or to deter misbehavior in the future. To be effective, sanctions should be personal to the offender. Courts should therefore depart from agency law when considering sanctions that may penalize a client for its lawyer’s misconduct and instead rely on equitable principles in fashioning an appropriate penalty.

In a nutshell, clients should be sanctioned for their lawyers’ misconduct in only two situations. The first is where the client is complicit in the lawyer’s misconduct, as where the misconduct is the product of their coordinated effort. The second is where a sanction will be meaningful only if it affects the client or if it is impossible to cure the lawyer’s misconduct without penalizing the client. Some courts now follow these courses, discarding

\textsuperscript{240} See \textit{id.} § 26 cmt. b (explaining that while it can sometimes be unfair to bind clients to the acts of their lawyers, a court may regard it as more appropriate for the consequences of a lawyer’s misconduct to be borne by the client rather than by an innocent third party).
imprecise and often inaccurate notions of agency law in the process. All courts should do so.