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I. INTRODUCTION

Lawyers presenting or defending civil claims often terminate those claims by settlements. Thus, one expects that "the controlling legal principles" with respect to lawyer conduct for facilitating civil claim settlements would be "quite settled." In *Brewer v. National Railroad Passenger Corporation*[1] *("Brewer II")*, a case involving the civil claim settlement authority of a claimant's lawyer, the Supreme Court of Illinois declared that the principles governing lawyer conduct in a civil claim settlement were well settled in Illinois.[2] Despite the Illinois Supreme Court's declaration, however, the pre-*Brewer II* written laws and judicial precedents were quite unsettled. In *Brewer II*, the Illinois Supreme Court had a significant opportunity to settle much of this confusion. The court not only missed the opportunity to clarify the principles governing lawyer conduct, it also effectively added fuel to the fire by obfuscating many critical issues that arise when lawyers engage in settlement negotiations for their clients.

This Article will first examine *Brewer II*'s failure to recognize the unsettled nature of the "controlling legal principles."[3] Specifically, the *Brewer II* court was unclear about the doctrine of express authority and its burdens of proof. The court also failed to address the doctrine of apparent authority, choice of law, and separation of powers issues. As a result, current civil claim settlement authority guidelines for Illinois lawyers are confusing and unsettled. Next, this Article will examine familiar legal principles, including frequently overlooked standards in the Illinois Professional Code,[4] in order to clarify at least some of the issues. Finally, this Article will propose ways to resolve the unsettling questions about the civil claim settlement authority of lawyers under Illinois law.[5]

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1. Brewer v. National R.R. Passenger Corp., 649 N.E.2d 1331 (Ill. 1995) [hereinafter *Brewer II*], *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

2. *See id.* at 1333.

3. *See infra* Part II (discussing the rules governing express authority, apparent authority and burdens of proof).

4. *See infra* Part III (discussing relevant Illinois cases and the application of those authorities to this and other similar situations).

5. *See infra* Part IV (discussing methods to remedy the confusion surrounding civil claim settlements).

II. THE "SETTLED" PRINCIPLES OF *BREWER V. NATIONAL RAILROAD PASSENGER CORPORATION*

In *Brewer II*, the Illinois Supreme Court found "the controlling legal principles . . . quite settled."[6] At issue in *Brewer II* was the scope of a lawyer's settlement authority at a pretrial settlement conference.[7] The pretrial settlement agreement took place during an Illinois circuit court proceeding involving the Federal Employers' Liability Act ("FELA").[8] The FELA claim arose when Chester Brewer, a ten-year employee of the National Railroad Passenger Corporation ("Amtrak"), fell at work, injuring his head and lower back.[9] The accident rendered Chester unable to perform his previous responsibilities with Amtrak, although he could return if he was assigned "lighter duties."[10]

A settlement conference before the trial judge included Chester's and Amtrak's lawyers as well as an Amtrak "claims agent."[11] Although Chester and his wife were in the courthouse during the negotiations, they were not "in-chambers."[12] The in-chambers talks led to an oral agreement between the lawyers that included two forms of monetary payments by Amtrak and the condition that Chester resign his position with Amtrak.[13] Amtrak was to pay Chester $250,000, together with an additional amount of up to $50,000 for medical expenses if Chester had surgery within six months of the dismissal order in the case.[14] The parties reached an agreement only after Chester's lawyer left the judge's chambers to discuss the matter with Chester.[15] An order dismissing the case with prejudice followed the agreement and the trial court entered

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6. *Brewer II*, 649 N.E.2d at 1333.

7. *See id.*

8. *See* Brewer v. National R.R. Passenger Corp., 628 N.E.2d 331, 332 (Ill. App. Ct. 1st Dist. 1994) [hereinafter *Brewer I*] (giving a detailed background on the cause of action, including an explanation of the FELA), *rev'd*, 649 N.E.2d 1331 (Ill. 1995).

9. *See id.* at 333.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* In ruling on Amtrak's motion to enforce the settlement and on Chester's motion to vacate the dismissal order that was premised on the settlement agreement, "the trial judge specifically stated that he distinctly recalled the settlement conference and that plaintiff's resignation . . . was raised several times during the negotiations . . . [and] was a condition of the settlement offer made by defense counsel to plaintiff's attorney." *Id.* at 334. The trial judge's statement suggests that Chester's lawyer may have disputed the factual assertion that resignation was a condition of the defendant's offer and would explain why he may never have talked to Chester about resignation.

14. *See id.* at 333.

15. *See Brewer II*, 649 N.E.2d 1331, 1332 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

the order after the trial judge personally spoke to the plaintiff.[16] The plaintiff and the judge, however, did not discuss the plaintiff's resignation during their meeting.[17] Moreover, the dismissal order "incorporated only defendant's agreement to pay plaintiff" and, thus, it "did not incorporate an agreement that plaintiff would quit his job."[18] Furthermore, the order did not contain any provision retaining the circuit court's jurisdiction.[19]

One day after the dismissal order, Amtrak's claims agent mailed releases to Chester based upon his understanding of the agreement with Chester's lawyer.[20] Chester, however, "refused to execute the releases because he had not agreed to resign his position and wanted to keep the option of attempting to return to work."[21] As a result, Amtrak filed a motion to enforce the settlement offer.[22] Subsequently, Chester filed a motion to vacate the dismissal order.[23] Chester supported his motion to vacate with affidavits from himself, his wife, and his attorney, who each alleged "that plaintiff's resignation . . . had not been contemplated as a term of settlement and had not been accepted as part of the agreement orally agreed to by counsel."[24]

The "same trial court judge who had presided over the settlement conference" granted Amtrak's motion and enforced the settlement agreement.[25] The judge found that the resignation issue "was raised several times during the negotiations" and "was a condition of the settlement offer made by defense counsel to plaintiff's attorney."[26] The

16. *See id.* at 1332-33. The *Brewer II* court remarked that "the judge did not remember specifically mentioning the resignation issue" when personally speaking to Chester prior to dismissal of the case. *Id.* at 1333.

17. *See id.*

18. *Id.* In fact, the dismissal order expressly noted only the $50,000 payment, stating that the court was "advised in the premises that all matters in controversy have been compromised and settled" and that the $50,000 obligation was "part of the settlement." Brewer v. National R.R. Passenger Corp., No. 93-1454 (Ill. App. Ct. 1st Dist. Feb. 17, 1993) (dismissing case with prejudice).

19. *See* Brewer v. National R.R. Passenger Corp., No. 93-1454 (Ill. App. Ct. 1st Dist. Feb. 17, 1993).

20. *See Brewer I*, 628 N.E.2d 331, 333 (Ill. App. Ct. 1st Dist. 1993), *rev'd*, 649 N.E.2d 1331 (Ill. 1995).

21. *Id.*

22. *See Brewer II*, 649 N.E.2d at 1333 (discussing Amtrak's motion to enforce settlement).

23. *See id.* This motion was deemed timely under Illinois law. *See* 735 ILL. COMP. STAT. 5/2-1203(a) (West 1998) (allowing a party to file a motion to vacate a judgment within 30 days after entry of the judgment).

24. *Brewer I*, 628 N.E.2d at 333.

25. *Id.* at 333-34.

26. *Id.* at 334.

judge further found that the plaintiff's lawyer only accepted the offer "after leaving the chambers to confer with his client."[27]

The Illinois Court of Appeals affirmed the trial court's enforcement of the settlement agreement.[28] The appellate court first noted that the trial court had jurisdiction to enforce the agreement, even though the case had been dismissed with prejudice, because the plaintiff, Chester, opened a post-judgment proceeding by submitting a motion to vacate the initial dismissal order.[29] Then, the appellate court declared that the agreement was enforceable because the plaintiff could be bound by his lawyer's statements regarding an agreement, "particularly where the settlement was made in open court or in the presence of the client," even if the plaintiff misunderstood or mistook the terms of the agreement.[30]

The Illinois Supreme Court reversed the appellate court's enforcement of the settlement agreement.[31] The Illinois Supreme Court recognized the trial court's jurisdiction to enforce the agreement's alleged resignation provision because trial courts have "the power to enforce a settlement agreement entered into by the parties while the suit is pending before the court."[32] Next, however, the Illinois Supreme Court found that "the controlling legal principles," which were "quite settled" in Illinois, supported the conclusion that the settlement could not be enforced.[33] Specifically, the court recognized the "settled" legal principle that a lawyer may not settle a civil claim without "the client's

27. *Id.*

28. *See id.* at 335.

29. *See id.* at 334. However, the appellate court did not explain how the trial court had jurisdiction over the enforcement of a contract term not incorporated into a court order. The omission of the resignation agreement from the court order may have placed the issue of enforceability outside of the court's jurisdiction. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994) (stating that jurisdiction to enforce dismissal-producing settlement agreement exists only where court order embodies agreement or at least retains authority over the agreement); American Soc. of Lub. Eng. v. Roetheli, 621 N.E.2d 30, 34 (Ill. App. Ct. 1st Dist. 1993) (explaining that where jurisdiction is not retained "for the precise purpose of enforcing the settlement," plaintiff may need to file a separate lawsuit for breach of contract remedy). Jurisdictional issues could have been avoided if Amtrak's motion had been analyzed under 735 ILL. COMP. STAT. 5/2-1203(a) and characterized as a request to modify the initial dismissal order to contain the resignation duty and the retention of authority to enforce the new order. 735 ILL. COMP. STAT. 5/2-1203(a) (West 1998) (allowing a court to retain jurisdiction if a party moves for modification of the judgment within 30 days of the entry of the judgment).

30. *Brewer I*, 628 N.E.2d at 334-35.

31. *See Brewer II*, 649 N.E.2d 1331, 1333 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

32. *Id.* at 1333.

33. *Id.* at 1333-34.

express authorization to do so."[34] Therefore, because Chester's affidavits in support of his motion to vacate[35] provided "affirmative evidence" that Chester's lawyer did not have the necessary "express authorization" to agree that Chester would quit his job as part of the settlement agreement, the court invalidated the civil claim settlement.[36]

The court found support for this "settled" legal principle in two turn-of-the-century Illinois Supreme Court precedents[37] as well as in a dissenting supreme court opinion issued a few years before *Brewer II*.[38] These prior decisions, however, say little about when and how such express authority may be given. One court suggested that even where there is express authorization, a settlement by a lawyer on behalf of a client may be invalidated on the basis of "bad faith."[39] Furthermore, a civil claim settlement otherwise invalid due to a lawyer's lack of express authority may become valid if ratified by the lawyer's client.[40]

A second "settled" principle underlying *Brewer II* involved the burden of proof with respect to the issue of express authorization. Normally, when settlement talks occur outside the court, the party

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34. *Id.* at 1334. The *Brewer II* court stated that "[a]n attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so." *Id.* This differs significantly from the general rule in criminal case settlements where such authorization is not necessary. *See, e.g.*, ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after disclosure by the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."); ILL. SUP. CT. R. 402 (compliance with several notice and hearing requirements personally involving the criminal defendant are required before pleas of guilty may be entered).

35. *See supra* note 24 and accompanying text (describing the affidavits submitted to support Chester's motion to vacate).

36. *See Brewer II*, 649 N.E.2d at 1334.

37. *See* Danziger v. Pittsfield Shoe Co., 68 N.E. 534 (Ill. 1903) (holding that an attorney cannot settle a case out-of-court without "special authority"); McClintock v. Helberg, 48 N.E. 145 (Ill. 1897) (deciding that the acceptance of payment purporting to be a settlement amount by an attorney is not actually a settlement without the express authority of the client).

38. *See* Colvin v. Hobart Bros., 620 N.E.2d 375 (Ill. 1993) (Harrison, J., dissenting) (arguing that a party's assertion that it did not receive all of the facts before settlement constituted a lack of express authority and would support a summary judgment motion overturning the settlement).

39. *See McClintock*, 48 N.E. at 148. The *McClintock* court stated, "It is a well-settled rule that agreements by an attorney, which are so unreasonable as to imply bad faith, will operate as notice of such bad faith to the opposite side, and will have no binding effect upon the client." *Id.*

40. *See Danziger*, 68 N.E. at 536 (concluding that an agreement by a lawyer may bind the client where there is proof of "acquiescence on the part of the client after knowledge of the facts"); *McClintock*, 48 N.E. at 148 (stating that upon an agreement by an opposing party's lawyer, a "duty to inquire" arises as to "whether or not [the agreement was] ratified and accepted" by the opposing party).

alleging authority bears the burden of proving actual authority.[41] Thus, an attorney facing a settlement initiative or response from an opposing attorney has the responsibility "to make inquiry or to demand proof of the attorney's authority. . . ."[42] The burden shifts when settlement talks occur in "open court" because in that context "the existence of the attorney of record's authority to settle . . . is presumed *unless rebutted by affirmative evidence that authority is lacking.*"[43]

The principle regarding the burden of proof when settlement talks occur in "open court," however, is not so settled. Indeed, the Illinois Supreme Court has only recognized this open court presumption in dicta without reference to earlier case law or to other legal authority. In *Brooks v. Kearns*,[44] decided in 1877, the court stated: "[h]ad the agreement been made a part of the decree of court . . . presumptions would be indulged as to the authority of the solicitors in the premises; but this is an agreement made out of court . . . ."[45] This dicta, however, fails to explain why agreements in open court might be handled differently than agreements outside of court. The Illinois Court of Appeals recognized the presumption of express authority, but this recognition is also quite general and seems to be little more than dicta.[46] In its support of the presumption of express authority, the appellate court utilized two federal court decisions: the first involved an out-of-

41. *See Brewer II*, 649 N.E.2d at 1334 (citing *Danziger*, 68 N.E. at 536) (stating that "the party alleging the existence of authority to bind principals takes upon himself the burden of proving that fact").

42. *Id.* (citing *McClintock*, 48 N.E. at 148) (recognizing that when the opposing attorney offers settlement, the "opposite party . . . is put upon inquiry as to the attorney's authority . . . and, if he omits to make inquiry, or to demand the production of the authority, he deals with the attorney at his peril"). Both the *Brewer II* and *McClintock* opinions assume that upon inquiry or demand of proof, an opposing lawyer will reveal information as to express authorization. Yet such authorization may reasonably be viewed by some lawyers as part of confidential attorney-client communications that an attorney may not reveal without client consent. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 370 (1993) ("A lawyer should not, absent informed client consent, reveal to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement.").

43. *Brewer II*, 649 N.E.2d at 1334. The *Brewer II* court found support for this presumption in a very early high court precedent as well as in a decade-old intermediate appellate court decision. *See* Brooks v. Kearns, 86 Ill. 547, 551 (1877) (suggesting that an attorney has authority to settle matters discussed in open court); Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1211 (Ill. App. Ct. 1st Dist. 1982) (recognizing a presumption of express authority when settlements appear in open court).

44. Brooks v. Kearns, 86 Ill. 547 (1877).

45. *Id.* at 551.

46. *See Szymkowski*, 432 N.E.2d at 1211. In *Szymkowski*, the recognition of the presumption of express authority appeared to be dicta based on significant evidence of express authorization, the lawyer's "apparent authority," and post-agreement ratification by the client. *See id.*

court settlement and a very different presumption under federal law,[47] and the other case involved either implied authority or ratification.[48] Finally, the appellate court relied on an Illinois high court decision that simply recognized, but did not employ, the dicta remarks of the Illinois Supreme Court.[49]

After applying these "settled" legal principles to the facts and concluding that there was no express authorization for Chester's lawyer to agree to Chester's resignation from employment, the *Brewer II* court then referenced three additional intermediate appellate court decisions issued in the last decade.[50] These decisions affirmed, but without significant analysis, the need for an individual client's express authorization of lawyer settlement power and for differing burdens of proof for in court and out of court lawyer agreements. Like the court in *Brewer II*, the applicable law in these decisions was viewed as clearly settled.[51] These decisions added to the legal analysis, in ways comparable to some of the other cases cited in *Brewer II*, by extending the discussion of lawyer settlement authority to issues beyond express individual client authorization and burden of proof.

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47. *See* Bradford Exch. v. Trein's Exch., 600 F.2d 99, 102 (7th Cir. 1979). In *Bradford Exchange*, which involved an alleged trademark violation, the court made no reference to state law. *See id.* Rather, the court employed several federal precedents to hold that "an attorney of record is presumed to have his client's authority to compromise and settle litigation" out-of-court, though the presumption may be rebutted. *Id.* The court noted that the injunction agreed to was "so onerous and costly that it is dubious whether Trein's would have given their attorneys authority to stipulate" to it and, therefore, held that the presumption was rebutted. *Id.*

48. *See* United States v. Kenner, 455 F.2d 1, 4-5 (7th Cir. 1972). The *Kenner* court made no reference to state law in a case involving a person's federal tax liabilities. *See id.* The court found that a person's attorneys had "implied authority" to consent to a court order because the person retained the attorneys for fifteen months following the order, and challenged the order three years later. *See id.* The *Kenner* court further reasoned that "the government without the consent of the attorneys was entitled to summary judgment" on the matters contained in the agreed order. *Id.*

49. *See* Danziger v. Pittsfield Shoe Co., 68 N.E. 534, 535-36 (Ill. 1903) (recognizing the necessity of express authority to settle a case, but instead implying that the settlement amount was simply a payment on an account, and thereby not a settlement at all).

50. *See Brewer II*, 649 N.E.2d 1331, 1334 (Ill. 1995) (citing Kazale v. Kar-Lee Flowers, 541 N.E.2d 219 (Ill. App. Ct. 2d Dist. 1989)), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993); Knisely v. City of Jacksonville, 497 N.E.2d 883 (Ill. App. Ct. 4th Dist. 1986); County of Cook v. Patka, 405 N.E.2d 1376 (Ill. App. Ct. 1st Dist. 1980)).

51. *See Knisely*, 497 N.E.2d at 886. The *Knisely* court noted that "[t]he general rules concerning settlements are well-known . . . . The law is clear that an attorney may bind his client to a settlement agreement . . . . However, . . . [the attorney] must receive express consent or authorization . . . [but] the existence of the attorney of record's authority to settle in open court is presumed unless rebutted . . . ." *Id.*; *see also Patka*, 405 N.E.2d at 1380 ("[I]t is firmly established in Illinois that an attorney employed to represent his client in litigation has no authority to compromise . . . without the express consent or authorization of that client.").

In *Knisely v. City of Jacksonville*,[52] for instance, the court recognized the possible applicability of the doctrine of "apparent authority," which would allow a lawyer to bind a client to a civil claim settlement without any actual or presumed express authorization.[53] The *Knisely* court specifically stated: "[w]here a party silently stands by and permits his attorney to act in his behalf in dealing with another in a situation where the attorney may be presumed to have authority, the party is estopped from denying the agent's apparent authority as to third persons."[54] This language comes from *Szymkowski v. Szymkowski*,[55] which itself relied on *Kalman v. Bertacchi*.[56]

In *Kalman*, the court applied the apparent authority doctrine to bind two codefendants to a settlement that a third defendant made in open court in their absence and without express authorization delegated either to the defendants' lawyer or to the third defendant.[57] The *Kalman* court determined that apparent authority was applicable because "events and actions . . . would reasonably lead an ordinarily prudent person to believe" the third defendant "was acting on behalf of all the defendants."[58]

The doctrine of apparent authority employed in *Kalman* has been used in settings where the apparent agent is an Illinois civil claimant's or civil defendant's lawyer, rather than a co-party. Specifically, in *Sakun v. Taffer*,[59] a lawyer's signature on behalf of two civil defendants bound the defendants to a settlement agreement, even though the defendants did not expressly agree to the settlement terms and were unaware of them.[60] The *Sakun* court determined that apparent authority operated as a "logical implied extension" of the lawyer's express authority to enter into and carry on settlement negotiations.[61] The court further determined that this authority lasted for approximately one year, during which time the lawyer had "continually apprised" the defendants

52. Knisley v. City of Jacksonville, 497 N.E.2d 883 (Ill. App. Ct. 4th Dist. 1986).

53. *See id.* at 886. The court cited *Szymkowski v. Szymkowski*, 432 N.E.2d 1209, 1211 (Ill. App. Ct. 1st Dist. 1982), to support the applicability of the doctrine of apparent authority.

54. *Knisley*, 497 N.E.2d at 886. In *Knisely*, the doctrine of apparent authority was clearly inapplicable to the alleged settlement agreement and the defendant did not argue it as a basis for enforcing the agreement. *See id.* Furthermore, *Knisely* involved a settlement agreed to by most, but not all, of the 61 plaintiffs who joined in the lawsuit. *See id.*

55. Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1211 (Ill. App. Ct. 1st Dist. 1982).

56. Kalman v. Bertacchi, 373 N.E.2d 550 (Ill. App. Ct. 1st Dist. 1978).

57. *See id.* at 556.

58. *Id.*

59. Sakun v. Taffer, 643 N.E.2d 1271 (Ill. App. Ct. 1st Dist. 1994).

60. *See id.* at 1276-78.

61. *See id.* at 1278.

and the trial judge of what was happening.[62] Moreover, the court held that the settlement authority of the lawyer could be "presumed" from the defendant's silence and other conduct during the negotiations, at least where plaintiffs and their lawyer could have reasonably believed that the "scope of authority" of the defendant's lawyer included settlement authority.[63]

Additionally, in *County of Cook v. Patka*,[64] the court placed a special or different application of the express authorization rule in cases involving state or municipal bodies.[65] The court stated that "the rule is especially applicable when a person seeks to establish a waiver against a municipal body since estoppel against public bodies is not favored . . . and a governmental body cannot be estopped by an act of its agent which exceeds the authority conferred on him."[66] Thus, anyone "dealing with a governmental body takes the risk of accurately ascertaining" the authority of governmental agents, even where the agents are personally unaware of their own limitations.[67]

III. UNSETTLING QUESTIONS AFTER *BREWER V. NATIONAL RAILROAD PASSENGER CORPORATION*

As with many of its predecessors, *Brewer II* finds the prevailing laws involving the authority of Illinois lawyers to settle their clients' civil claims embodied within a few "quite settled" principles.[68] Upon closer examination of the decision—the precedents it employs and the precedents and other laws it fails to mention—several unsettling questions arise about the so-called "settled" legal principles governing the settlement of civil cases.[69] Accordingly, this Article will focus on the legal principles actually explored in *Brewer II*, and will then examine other legal principles on lawyer settlement authority unaddressed in *Brewer II* where, in at least some instances, exploration would have been useful and perhaps determinative.[70] Finally, it will

62. *See id.*

63. *See id.* at 1277.

64. County of Cook v. Patka, 405 N.E.2d 1376 (Ill. App. Ct. 1st Dist. 1980) (holding that the assistant state's attorney was not authorized to waive the county's right to a demolition lien).

65. *See id.* at 1380-81.

66. *Id.* at 1380.

67. *Id.* at 1380-81.

68. *See Brewer II*, 649 N.E.2d 1331, 1333 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

69. *See supra* Part II (discussing the "settled" legal principles of *Brewer II*).

70. *See, e.g.*, People v. Pecor, 606 N.E.2d 1127, 1131 (Ill. 1992) (stating that the reviewing court's responsibilities of finding a just result and maintaining a sound body of precedent can override the consideration of waiver that arises from an adversarial legal system).

note a few important issues implicated in *Brewer II* relating to civil claim settlements, but not to lawyer settlement authority.[71]

A. Unsettling Questions About Quite Settled Principles

The first "settled" principle in *Brewer II* involved the need for "the client's express authorization" of any civil claim settlement.[72] Unfortunately, the nature of both the required expression and the authorization remain unclear.

As to expression, the court in *Brewer II* was unclear whether a valid settlement required Chester to have "expressly" authorized his lawyer to agree that he "would quit his job," given that resignation was neither mentioned in the trial court dismissal order nor in the trial judge's conversation with Chester before the dismissal.[73] The *Brewer II* court did not discuss why it viewed resignation as so important to Chester, given that he was also receiving at least a quarter of a million dollars[74] and that he could never resume his old job duties. Perhaps, though not likely, the *Brewer II* court meant to require that every party "expressly" agree to every term of any agreement worked out by the lawyers before it can be effective. If this was not the court's intention, then it failed to provide any guidance as to what settlement terms do require "express authorization." If, by contrast, the *Brewer II* court meant the client only must "expressly" authorize lawyer settlement authority even if it is in advance of any settlement talks, it again failed to provide guidance.[75] While it seems that Chester may not have discussed resignation with his lawyer, the case does not reveal what Chester did say to his lawyer and what the lawyer said to Chester.

With respect to which contractual terms of lawyer negotiated tentative agreements that civil litigants must "expressly" accept, the *Brewer II* court could have been guided by the "bad faith" analysis, which suggests that "unreasonable" terms require express party

71. *See infra* Part III.C (discussing other unsettling questions relating to civil claim settlements).

72. *Brewer II*, 649 N.E.2d at 1333-34.

73. *Id.* at 1334.

74. *See id.* at 1332 (stating that under the agreement, an additional $50,000 would be paid if Chester underwent back surgery within six months of case dismissal).

75. *Compare* Tiernan v. DeVoe, 923 F.2d 1024, 1033 (3d Cir. 1991) (using Pennsylvania law, finding that express authority "must be the result of explicit instructions regarding settlement"), *with* Smedly v. Temple Drilling Co., 782 F.2d 1357, 1360 (5th Cir. 1986) (finding that "it is permissible for a client to give its lawyer general authority to settle cases").

consent.[76] In other words, the *Brewer II* court could have distinguished between settlement issues that are so important that lawyers must "expressly" discuss them with their clients and settlement issues that clients may expressly or implicitly leave to their lawyers.

As to authorization, the "bad faith" analysis reveals another shortcoming of *Brewer II* as a general guide to Illinois lawyers. *Brewer II* is silent regarding the possible timing of express client authorizations, except after lawyers have reached a tentative pact. Indeed, the *Brewer II* court did not resolve whether lawyers can receive some forms of express authorization to settle before scheduling a particular pretrial settlement conference, or prior to engaging in a scheduled out-of-court settlement talk with opposing counsel. Additionally, the court left open the question of whether a client may grant some express authorizations during a civil case for all future settlement discussions wherever they occur. Moreover, the court failed to address whether some forms of express authorization to settle an accrued claim may be granted to a lawyer upon retainer, prior to the commencement of any legal work or lawsuit. Finally, the *Brewer II* court never answered whether some forms of express authorization of lawyer settlement power involve at least partial settlements of future civil claims, as opposed to accrued civil claims, on such matters as compulsory arbitration or liquidated damages.

Thus, the most unsettling questions about client authorization of lawyer settlement power include issues of how and when clients may communicate settlement authorization to lawyers and whether there is any limitation on the scope of this authorization. The judicial precedents relied upon in *Brewer II*, and their respective rationales, raise other troubling questions about authorization. Specifically, questions arise as to whether there should be different settlement authorization guidelines for different civil litigants.[77] Furthermore, questions arise as to who, besides lawyers, may be authorized to settle a person's or a party's claim.[78]

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76. *See* McClintock v. Helberg, 48 N.E. 145, 148 (Ill. 1897) (holding that where an agreement by a lawyer is so "unreasonable" for her client, it has "no binding effect upon the client" because the adverse party has notice of the lawyer's "bad faith").

77. *See supra* note 53 and accompanying text (discussing the doctrine of apparent authority). In *County of Cook v. Patka*, 405 N.E.2d 1376, 1380-81 (Ill. App. Ct. 1st Dist. 1980), for instance, the court held that it is generally more difficult for governmental agents to bind their principals than it is for other agents.

78. *See* Kalman v. Bertacchi, 373 N.E.2d 550, 556 (Ill. App. Ct. 1st Dist. 1978). *Kalman* was the basis for the holding in *Szymkowski v. Szymkowski*, which the *Brewer II* court utilized. *See Brewer II*, 649 N.E.2d at 1334. In *Kalman*, one defendant was found to have been authorized to settle claims pending against two codefendants. *See Kalman*, 373 N.E.2d at 556. In *Brewer II*

The second "settled" principle in *Brewer II* involved distinctions between settlements in "open court" and settlements "out-of-court" for burden of proof purposes. Neither *Brewer II* nor its cited precedents fully discuss the rationales underlying this distinction. Thus, there is scant guidance on what constitutes "open court" settlements. Indeed, it is unclear from *Brewer II* whether "open court" means that the public can sit in on the proceedings, or whether "open court" proceedings, at least in this setting, include off-the-record, in-chambers settlement conferences presided over by the trial judge.[79]

In *Brewer II*, there may have been both types of proceedings, as there were at least settlement discussions in the judge's chambers and later settlement discussions in the courtroom.[80] Seemingly, in *Brewer II* the relevant settlement proceedings were limited to those occurring in the trial judge's chambers in the absence of Chester because the resignation issue arose only during those discussions.[81] In *Brooks v. Kearns*, the only high court case cited in *Brewer II* on the "open court" presumption of lawyer authority,[82] however, the Illinois Supreme Court only spoke of indulging a presumption for an agreement "made a part of the decree of court."[83] Furthermore, in *Szymkowski v. Szymkowski*, the court attached the "open court" presumption to a lawyer negotiated settlement where the settlement terms were "announced to the court" in a proceeding at which the client was present and sat silently as the terms were discussed and recounted.[84]

B. Unsettling Questions on Other Issues of Lawyer Settlement Authority

Beyond the legal principles involving express authorization and open court proceedings, the *Brewer II* court failed to explore several other

itself, Amtrak appeared to authorize a "claims agent," rather than (or together with) its lawyer, to settle a pending claim. *See Brewer II*, 649 N.E.2d at 1332.

79. Outside of Illinois, "in court" proceedings for presumptive lawyer settlement authority purposes may even include proceedings that do not involve trial court judges. *See, e.g.*, Miller v. Ryan, 706 N.E.2d 244, 252 (Ind. Ct. App. 1999) (stating that a medical review panel meeting is an in court proceeding because the presiding official is a statutorily-approved panel chairperson and the meeting is required by disputing parties).

80. *See Brewer II*, 649 N.E.2d at 1332-33. After hearing these settlement discussions and speaking to Chester personally, the trial judge entered a dismissal order. *See id.*

81. *See id.* at 1333 (noting that the trial judge did not remember specifically mentioning the resignation issue when he personally spoke to Chester).

82. *See supra* note 40 and accompanying text (discussing how a civil claim settlement can be valid if the client ratifies it, notwithstanding his attorney's lack of express authority).

83. Brooks v. Kearns, 86 Ill. 547, 551 (1877).

84. Szymkowski v. Szymkowski, 432 N.E.2d 1209, 1210-11 (Ill. App. Ct. 5th Dist. 1982).

significant legal issues relating to lawyer settlement authority,[85] such as the doctrine of apparent authority, choice of law, and separation of powers. First, the doctrine of apparent authority can be confusing because it is occasionally described as a form of express authorization, which usually involves acts between the attorney and client.[86] The doctrine of apparent authority involves the ways in which the conduct of a party might reasonably appear to authorize a lawyer to settle, whether or not that party has, in fact, delegated express authority.[87]

Arguably, in *Brewer II*, Chester's conduct reasonably appeared to Amtrak to authorize Chester's lawyer to settle on Chester's behalf. Chester was in the courthouse on the day his lawyer agreed to Chester's resignation, a fact known to Amtrak as well as to the trial court judge. In addition, Chester appeared to meet with his lawyer immediately before the parties reached the agreement on resignation.[88]

Brewer II also failed to explore the issue of choice of law. The gravamen of Chester's claim rested on FELA,[89] a federal statute that requires "uniformity in adjudication" such that state courts hearing FELA claims may not employ "strict" local civil procedure laws to defeat federally created rights.[90] Regarding the resolution of disputes over releases of FELA claims, the United States Supreme Court wrote:

> We agree . . . that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal

85. Legal issues not raised by any party on appeal, but for which there is a complete factual record, can be utilized to affirm a lower court decision. *See* Brooks v. Brennan, 625 N.E.2d 1188, 1193 (Ill. App. Ct. 5th Dist. 1994). "Indeed, a court of review is free to affirm the lower court on any grounds called for in the record, regardless of the reasoning or grounds relied upon by the lower court." *Id.*

86. *See, e.g.*, Sakun v. Taffer, 643 N.E.2d 1271, 1278 (Ill. App. Ct. 1st Dist. 1994) (finding a lawyer's authority to enter settlement negotiations and to carry them on for almost a year while giving the trial court and his client notice of what was occurring logically "implied" the extension of this authority to full settlement power); Bradford v. Denny's Inc., No. 97C1531, 1998 WL 312009, at *4 (N.D. Ill. June 4, 1998) (citing *Sakun*, 643 N.E.2d at 1278). The *Bradford* court confused the concept of implied actual authority with the doctrine of apparent authority. *See Bradford*, 1998 WL 312009, at *4.

87. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 (Tentative Draft No. 5, March 29, 1996).

88. *See Brewer II*, 649 N.E.2d 1331, 1332 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993); *see also Sakun*, 643 N.E.2d at 1278 (holding that a lawyer had apparent authority to settle because he engaged in several settlement negotiations about which he informed both his client and the court).

89. 45 U.S.C. § 51 (1994).

90. *See* Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949). Outside of FELA claims, the same standard is often applied when federal law causes of action are in state courts. *See, e.g.*, Felder v. Casey, 487 U.S. 131, 138 (1988) (discussing civil rights claims under 42 U.S.C. § 1983).

> rather than state law . . . . State laws are not controlling in determining what the incidents of this federal right shall be . . . . Manifestly the federal rights . . . could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes . . . . Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration . . . . Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law.[91]

Yet the *Brewer II* court did not explain why federal law principles were not relevant when determining whether the actions by Chester's lawyer liquidated the FELA claim.[92]

Finally, *Brewer II* neglects to examine the issue of separation of powers. Specifically, the court assumed the applicability of Illinois law to any lawyer settlement authority questions and failed to discuss the intrastate allocation of lawmaking responsibilities. Both the General Assembly and the courts share lawmaking duties and exercise concurrent powers at times with some exclusive judicial powers in limited settings.[93] Lawyer conduct that facilitates a client's civil claim settlement may be addressed by civil procedure lawmaking,[94] by lawyer

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91. Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 361-62 (1952) (citations omitted). While the alleged release in *Dice* preceded the filing of the lawsuit and the alleged release in *Brewer II* came after the civil action was commenced, the rationales employed in *Dice* arguably fit both settings.

92. *Cf.* 29 U.S.C. § 626(f)(1)(A) (1994) (wavier by an individual of a federal Age Discrimination in Employment Act claim must be in a written "agreement between the individual and the employer").

93. Exclusive high court authority most likely arises with issues significantly implicating the regulation of the legal (judges and lawyers) profession. *See, e.g.*, Cripe v. Leiter, 703 N.E.2d 100, 105 (Ill. 1998) (stating that Illinois rules governing attorney conduct have historically been recognized as within the inherent and exclusive authority of the high court). For a discussion of the general division of lawmaking responsibilities relating to court procedures and the legal profession, see Jeffrey A. Parness & Bruce Keller, *Increased and Accessible Illinois Judicial Rulemaking*, 8 N. ILL. U. L. REV. 817 (1988).

94. This occurs when the General Assembly and the Illinois courts, via both rulemaking and procedural common law decision making, each have significant responsibilities with regard to lawyer conduct.

professional conduct lawmaking,[95] and by substantive contract lawmaking.[96]

On the legal questions raised in *Brewer II*, any of these varying forms of lawmaking might be relevant. Civil procedure laws govern many aspects of civil case proceedings in the Illinois circuit courts, including some matters relating to settlement conferences overseen by circuit judges.[97] Professional conduct laws for lawyers govern many aspects of the legal representation of clients with pending civil claims.[98] Additionally, substantive contract laws generally govern many aspects of agency-principal relationships and capacity to submit to binding agreements.[99]

The nature of the common law precedents on the two legal principles actually explored in *Brewer II* is somewhat unclear. "Express authorization" to settle suggests a substantive contract law matter; however, the "burden of proof" sounds like a civil procedure law matter. Yet with both principles there is a strong inclination to say that most guidelines on lawyer authority to act for clients be embodied within professional conduct laws. The Illinois Professional Conduct Rule 1.2(a), which generally holds that a lawyer shall abide by a client's decision regarding a civil claim settlement, however, is mentioned neither in *Brewer* nor in any of the judicial precedents it employs.

C. Other Unsettling Questions Relating to Civil Claim Settlements

Beyond the examined principles and unexplored issues relating to lawyer civil claim settlement authority, *Brewer II* raises further important questions about civil claim settlement laws, unrelated to lawyer settlement authority, which involve required writings. Specifically, the court failed to answer when civil claim settlement pacts must be in writing in order to be effective and when oral agreements may be binding. In *Brewer II*, the court did not require a writing as to

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95. This occurs when the Illinois Supreme Court asserts exclusive authority over lawyer conduct.

96. This occurs when the General Assembly has the most significant powers over lawyer conduct. The General Assembly's work, however, may be supplemented by the substantive common law decision making of the courts.

97. *See, e.g.*, ILL. SUP. CT. R. 218 (discussing pretrial procedure).

98. *See, e.g.*, ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1993) (client's decision to accept a civil claim settlement offer); Rule 1.6(a) (maintenance of client's confidences or secrets) and 1.7 (general rule on conflicts of interest barring representation).

99. *See* Advance Mortg. Corp. v. Concordia Mut. Life Ass'n, 481 N.E.2d 1025, 1029 (Ill. App. Ct. 1st Dist. 1985) (concluding that express contract can create agent-principal relationship from which agent may bind principal under notions of actual authority, apparent authority, or inherent power).

Chester's resignation, even though the matter of resignation was not explicitly addressed in the trial court dismissal order.[100] Therefore, it is unclear as to whether a writing was unnecessary in *Brewer II*. The traditional Statute of Frauds mandates do not include contracts, such as the alleged pact between Chester and Amtrak, which parties can perform within a year.[101] The court failed to address, however, whether the traditional Statute of Frauds dictates are applicable, or applicable in different ways, to civil claim settlement agreements.[102]

Other questions on civil claim settlement laws involve judicial discretion to order those with ultimate settlement authority in civil cases to attend pretrial conferences that will, or may, involve settlement discussions or negotiations. In *Brewer II*, the trial court judge presided over settlement negotiations between the attorneys for plaintiff and defendant.[103] An Amtrak claims agent attended these settlement negotiations; however, Chester and his wife were not present but were in the courthouse at the time.[104]

At the time of *Brewer II*, the Illinois Supreme Court rule on pretrial procedure explicitly recognized that in addition to "counsel familiar with the case and authorized to act," the court could direct "the parties" to appear at the initial case management conference.[105] The rule, however, did not expressly recognize that settlement "shall be considered" at the conference.[106] Several months after *Brewer II*, the rule was amended to delete the court's expressly-recognized authority to direct party appearance, but also to add that "the possibility of settlement" shall be considered at the initial conference.[107] Thus, in *Brewer II*, it is unclear why the court did not require Chester to attend the conference given that his presence seemingly would have eliminated, or at least dramatically reduced, the prospect of later

100. *See Brewer II*, 649 N.E.2d 1331, 1335 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

101. *See* 740 ILL. COMP. STAT. 80/1 (West 1998). "No action shall be brought . . . upon any agreement that is not to be performed with the space of one year from the making thereof, . . . unless the promise shall be in writing." *Id.*

102. *See* Kalman v. Bertacchi, 373 N.E.2d 550, 556 (Ill. App. Ct. 1st Dist. 1978) (stating that "[i]t is not the intention of the Statute of Frauds to affect stipulations made in a court and subject to the court's supervision and control").

103. *See Brewer II*, 649 N.E.2d at 1332.

104. *See id.*

105. ILL. SUP. CT. R. 218 (amended 1995).

106. *See id.*

107. ILL. SUP. CT. R. 218 (amended 1995); *see also* CHI. DAILY L. BULL., June 2, 1995, at 5-6 (containing both the old and the new proposed versions of Rule 218, which were actually adopted by the Illinois Supreme Court in 166 Ill.2d I, cvii).

confusion over settlement terms. Further, it is unclear why, given Chester's absence, the court placed the fault on Amtrak for failing "to make inquiry or to demand proof" of Chester's lawyer's authority,[108] rather than holding Chester's lawyer responsible for exercising authority not delegated to him.[109]

Other questions from *Brewer II* involve the prerequisites for judicial enforcement of civil claim settlements. Generally, trial courts may, but need not, be available to enforce terms of civil claim settlement agreements when alleged breaches occur.[110] Thus, for instance, the United States Supreme Court has said that federal district courts have ancillary jurisdiction to enforce a settlement agreement resulting from an order of voluntary dismissal "either by separate provision, such as a provision 'retaining jurisdiction' over the settlement agreement or by incorporating the terms of the settlement agreement in the order."[111]

In *Brewer II*, the Illinois Supreme Court found that "the trial court retained jurisdiction to enforce the settlement agreement."[112] The portion of the agreement Amtrak sought to enforce, the alleged job resignation by Chester, was not incorporated into the trial court order. Furthermore, there was no express provision retaining subject matter jurisdiction in the trial court order. Nevertheless, in *Brewer II* the Illinois Supreme Court held that the trial court retained enforcement jurisdiction because the suit was pending, insofar as Chester had moved to vacate the dismissal order.[113] The trial court retained jurisdiction over that case for thirty days after the final order of judgment.[114] Clarification of the prerequisites to judicial enforcement of civil claim settlement pacts are especially important in Illinois because there is often no calendar system wherein a single judge hears all aspects of a certain case. Moreover, often many months pass between the time of a settlement agreement and the time of attempted enforcement, thereby making the availability of the same judge in both settings unlikely. Thus, the trial judge involved in the attempted enforcement of a civil

108. *Brewer II*, 649 N.E.2d at 1334 (citing McClintock v. Helberg, 48 N.E. 145 (Ill. 1897)).

109. *See* Sakun v. Taffer, 643 N.E.2d 1271, 1279 (Ill. App. Ct. 1st Dist. 1994). Though defendants are bound by a settlement with plaintiffs entered into by defendants' lawyer with apparent (but no actual) authority, defendants may have cause of action against their lawyer. *See id.*

110. *See Brewer II*, 649 N.E.2d at 1333 (stating that the trial court has the power to enforce the settlement agreement).

111. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994) (deciding that the court may make compliance with the settlement part of its order).

112. *Brewer II*, 649 N.E.2d at 1333.

113. *See id.*

114. *See id.*

claim settlement often has no independent recollection or knowledge of the original settlement agreement's terms.

IV. BETTER CIVIL CLAIM SETTLEMENT PRINCIPLES FOR ILLINOIS LAWYERS

Illinois needs to establish better civil claim settlement principles for lawyers. The pursuit of this objective would be best accomplished by undertaking a comprehensive lawmaking initiative in Illinois that examines issues relating to the civil claim settlement authority of lawyers. The agenda should include not only the principles involving express authorization and burden of proof, which *Brewer II* actually explored, but also the issues of apparent authority and choice of law, which *Brewer II* failed to examine. A more ambitious lawmaking initiative worthy of consideration, though not strongly suggested by *Brewer II*, would also include other matters relating to civil claim settlement laws, including required writings, judicial discretion regarding attendance or availability at case management conferences, and judicial enforcement.

A. Comprehensive Lawmaking

Comprehensive lawmaking, at least on matters of lawyer civil claim settlement authority, may be pursued in a variety of ways. First, in deciding a pending case and, perhaps, even when determining whether to accept review in a case, the Illinois Supreme Court should clarify the unsettling legal principles related to attorney civil claim settlement authority. This "common law" approach, that the Illinois Supreme Court uses, is not without persuasive authority; the Indiana Supreme Court recently employed it in *Koval v. Simon Telelect, Inc.*,[115] a case involving a certified question on Indiana civil claim settlement law came from a federal district court.[116] This approach, however, has significant drawbacks. In particular, it may not provide all who are interested in discussing or debating the issues with sufficient opportunity to do so.[117] Furthermore, the facts of the relevant case may

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

116. *See id.* at 1301. In *Koval*, the issue was whether a "settlement [is] binding between third parties and the client" when "an attorney settles a claim as to which the attorney has been retained, but does so without the client's consent." *Id.*

117. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 775-79 (1969) (Douglas, J., dissenting) (reviewing the benefits of public hearings for administrative agency rulemaking when new standards are developed).

constrain the court from a full consideration of all important matters;[118] thus, the case results would not be integrated into the relevant written laws such as the rules of civil procedure and the rules of lawyer or judicial conduct, creating the potential that they escape much of the attention that they require.[119]

The pursuit of comprehensive lawmaking, at least on matters of lawyer civil claim settlement authority, would be best accomplished through coordinated judicial rulemaking proceedings. These proceedings should involve the Illinois Supreme Court committees that advise on possible amendments to the civil procedure rules, the lawyer professional conduct rules, and the judicial conduct rules.[120] Under this method of revision, access and the opportunity to be heard are usually assured,[121] deliberations are not constrained by the limited facts of any case, and the results would be easily discovered.

B. More Settled Principles

Without prejudging the results of any comprehensive, and hopefully robust, debate about civil claim settlement laws, it is worthwhile to consider a few additional thoughts on the major principles and issues emanating from *Brewer II*.

1. Actual Authority

The phrase "express authorization" as used in *Brewer II* should be recharacterized as "actual authorization," under which a party in a civil action could either expressly or implicitly authorize her lawyer to settle. Express authorization embodies language and/or conduct directed by the party to her lawyer *clearly* indicating the party's intent that the lawyer strike a certain deal or negotiate the best available deal, where there may or may not be maximum/minimum monetary amounts or

118. To sweep too broadly, going beyond what the actual factual and legal disputes require for a decision, invites later characterization of the judicial decision as mere dicta, unworthy of significant respect.

119. It is possible for a judicial precedent to be integrated later into relevant written laws, with the benefit that the lawmakers can gauge the experience with the precedent, assuming enough time has passed. *See* Hickman v. Taylor, 329 U.S. 495 (1947) (holding that the burden rests on one requesting discovery to show necessity of an attorney's work product); *see also* FED. R. CIV. P. 26(b)(3) (incorporating the work-product guidelines set forth in *Hickman*).

120. The Rules Committee of the Illinois Supreme Court reviews all high court rules in areas in which no other committee is specifically charged with rule review to facilitate the administration of justice. *See* ILL. SUP. CT. R. (3)(c)(2) (West 1998). Other committees may be appointed to undertake review of a designated body of rules. *See* ILL. SUP. CT. R. 3(d)(1).

121. *See* ILL. SUP. CT. R. 3(a) (rulemaking procedures designed "to provide an opportunity for comments and suggestions by the public, the bench, and the bar").

other limitations. Implied authorization would embody language and/or conduct directed by the party to her lawyer from which a reasonable person could infer that the lawyer was authorized to strike the deal on the client's behalf. Although not so described in *Brewer II*, Illinois case law has often recognized these two forms of actual authority both in the lawyer civil claim settlement authority context[122] and outside it.[123] This recognition in the lawyer settlement context arose despite the strong suggestion in the Illinois Professional Conduct Rules that the client's decision making power regarding civil claim settlement may not be delegated to her lawyer.[124] As these two forms of settlement authority (with others) now appear in the recently completed American Law Institute ("ALI") formulations on the law governing lawyers, as in other settings[125] the Illinois Supreme Court and other lawmakers should employ the ALI pronouncements at least as starting points.[126]

2. Burdens of Proof and Open Court Proceedings

The rebuttable presumption recognized in *Brewer II* for lawyers involved in all "open court" proceedings should be eliminated.[127] As noted earlier, *Brooks v. Kearns* stands as the most significant precedent used by *Brewer II* to support this presumption; yet, the decision in *Brooks* references in-court proceedings where an agreement was "made a part of the decree of court."[128] In *Brewer II*, the resignation issue, which was at the heart of the dispute between Chester and Amtrak, was never part of any in-court proceeding as defined in *Brooks*, because Chester's resignation was not mentioned in the trial court dismissal order.[129]

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122. *See, e.g., In re* Marriage of Clarke, 550 N.E.2d 1220, 1224 (Ill. App. Ct. 1st Dist. 1990). The First District concluded "that Rebecca's attorney had actual authority to negotiate a settlement on her behalf. To the extent [the attorney] exceeded his express authority . . . we find that his authority was the logical, implied extension of his express authority." *Id.*

123. *See, e.g.*, FDL Foods v. Kokesch Trucking, 599 N.E.2d 20, 27 (Ill. App. Ct. 2d Dist. 1992) (stating that an agent's "actual authority may be either express or implied").

124. ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1993) (stating that a "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter").

125. *See, e.g.*, Nelson v. Hix, 522 N.E.2d 1214, 1217 (Ill. 1998) (utilizing the RESTATEMENT OF CONFLICT OF LAWS § 45 (1971)).

126. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 (Proposed Final Draft No. 1, Mar. 29, 1996).

127. *See supra* notes 41-45 and accompanying text (discussing the rebuttable presumption in "open court" proceedings).

128. Brooks v. Kearns, 86 Ill. 547, 551 (1877).

129. *See Brewer II*, 649 N.E.2d 1331, 1333 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

More germane to presumptions about lawyer civil claim settlement authority than distinctions between open-court and out-of-court proceedings,[130] or between recorded and unrecorded agreements, are those based on distinctions between court proceedings at which each party must appear personally, or appear through a representative with actual settlement authority, and court proceedings where the presence of those with actual settlement authority is not demanded. Recently, the Indiana Supreme Court expressly recognized such a distinction.[131] Presumption of lawyer settlement authority makes sense where the adjudicatory body directs personal notice to the parties that it expects them "to appear by settlement authorized representatives"[132] and where the ensuing conference is attended only by lawyers. A presumption here would be fair, with a "heavy burden" placed on those seeking to rebut a presumption.[133]

3. Apparent Authority

The apparent authority doctrine, unexplored in *Brewer II*, should be recognized as applicable to lawyer settlement authority. This should include a clear indication that apparent authority depends upon the client's words or acts, including silence,[134] as reasonably viewed by others especially an adverse party, and not upon the acts occurring between the party/client and her lawyer, which, of course, implicate actual authority, whether express or implied. Unfortunately, this distinction is not always recognized. For instance, one Illinois court ignored the distinction when it found that the lawyer's "apparent

130. Many jurisdictions, but not all, make such distinctions, but the rationales for them are rarely explained. *See* Koval v. Simon Telelect, Inc., 693 N.E.2d 1299, 1306 (Ind. 1998) (suggesting the rationales involve the need to promote "the efficiency and finality of courtroom proceedings" and to avoid "stop and go disruption of the court's calendar").

131. *See id.* at 1301 (employing the phrase "inherent power," distinguished from actual or apparent authority).

132. *Id.* at 1310 (noting that proceedings regulated by the ADR rules are properly characterized as court proceedings).

133. *See id.* at 1306 n.10 (citing Surety Ins. Co. of Cal. v. Williams, 729 F.2d 581, 582-83 (7th Cir. 1984); Bradford Exch. v. Trein's Exch., 600 F.2d 99, 102 (7th Cir. 1979)). An attorney of record is presumed to have client authority, but authority may be set aside by affirmative proof that the attorney had no right to consent. *See id.*

134. *See, e.g.*, Sakun v. Taffer, 643 N.E.2d 1271, 1277 (Ill. App. Ct. 1st Dist. 1994). The *Sakun* court stated, "[t]he authority of an agent may be presumed from the silence of the alleged principal when he knowingly allows another to act for him as his agent . . . [w]here the principal places an agent in a situation where he may be presumed to have authority to act for her, the principal is estopped as against a third [party] from denying the agent's apparent authority." *Id.*

authority" to settle was "the logical implied extension of his express authority."[135]

A good starting point providing a fresh look at a lawyer's apparent authority to settle a civil claim is the following American Law Institute statement:

> A lawyer's act is considered to be that of the client in proceedings before a tribunal or in dealings with a third person if the tribunal or third person reasonably assumes that the lawyer is authorized to do the act on the basis of the client's (and not the lawyer's) manifestations of such authorization.[136]

Illinois courts have followed Institute pronouncements in other arenas. The very recent ALI formulations on lawyer conduct seem better suited to lawyer settlement work than do earlier, and more general, ALI pronouncements on principal-agent relations.

4. Choice of Law

Although unexplored in *Brewer II*, there is a need for establishing choice of law guidelines applicable to lawyer settlement authority issues arising in civil actions in Illinois courts, in other adjudicatory or dispute resolution facilitation bodies in Illinois, and in private discussion/negotiation efforts involving the settlement of accrued or foreseeable civil claims. A quest for certainty may prompt Illinois lawmakers to establish that Illinois law always applies. This approach may be compatible with Full Faith and Credit,[137] if not Supremacy Clause,[138] principles because there are legitimate Illinois governmental interests in the work of lawyers in Illinois. These interests include the discussion/negotiation of civil claims, regardless of which government is most directly related to the parties, their lawyers, and the substantive laws applicable to the claims. Thus, even if in *Brewer II*, Chester, his

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135. *In re* Marriage of Clarke, 550 N.E.2d 1220, 1224 (Ill. App. Ct. 1st Dist. 1990) (finding authority because the change was nominal and did not prejudice the party's custodial rights).

136. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 (Tentative Draft No. 5, Mar. 29, 1996).

137. U.S. CONST. art. IV, § 1; *see also* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502-03 (1939) (stating that there is "little room" for the United States Supreme Court under Full Faith and Credit principles to deny a state the authority to apply exclusively its own law in its courts to "persons and events within the state").

138. U.S. CONST. art. VI, § 2. As noted earlier, the Supremacy Clause of the United States Constitution demands the application of federal law to issues involving the release of a federal law claim presented in a state court, especially where a uniform approach nationwide is desirable and where the application of state law would too often defeat the purposes underlying the federal law. *See supra* notes 89-92 and accompanying text (quoting the United States Supreme Court regarding the use of federal law in state courts to resolve federal questions).

lawyer, Amtrak and its claims agent and lawyer were based outside of Illinois, application of Illinois law to the civil claim settlement authority issues may be appropriate as the relevant discussions/negotiations occurred in Illinois.[139] Yet, Illinois law should not apply where, via a retainer agreement or otherwise, the lawyer and client choose to employ some other law should future disputes arise.[140]

5. Required Writings

Although unexplored in *Brewer II*, and usually unrelated to lawyer civil claim settlement authority, guidelines on required writings for civil claim settlements should be considered. In fact, the factual disputes arising in *Brewer II* over what was said during the settlement talks demonstrate why writing requirements should be promulgated for many, if not all, civil claim settlements. The Texas Civil Procedure Rule 11 provides a good starting point for a required writings standard deemed applicable to civil claim settlements.[141] Rule 11 states:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.[142]

The rationale of this rule was recently described by the Texas high court as follows:

> Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety.[143]

If the required writings rule is too broad, however, it can also create problems. The "practical realities of modern trial practice" often make

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139. Illinois lawmakers may determine that in some instances, the laws of other states may apply to civil claim settlement authority issues arising during settlement talks in Illinois. *See, e.g.*, ILL. RULES OF PROFESSIONAL CONDUCT Rule 8.5(b) (1993) (choice of law standard in Illinois lawyer disciplinary proceedings indicates that at times the laws of other states should be employed).

140. *See* McAllister v. Smith, 17 Ill. 328, 33 (1856) (finding the chosen law will not apply where "dangerous" or "immoral").

141. *See* Kennedy v. Hyde, 682 S.W.2d 525, 526 (Tex. 1984) (reviewing the history of Rule 11 and its rationales and with strong dissents as to its general applicability to all civil claim settlement pacts).

142. *Id.* (quoting Rule 11 of the Texas Rules of Civil Procedure).

143. Padilla v. LaFrance, 907 S.W.2d 454, 460 (Tex. 1995).

the reduction of a "gentleman's agreement" to writing and signature difficult, time consuming and inefficient, especially where an oral agreement contains clear terms which are not likely to be in dispute.[144] Furthermore, special required writing norms may be appropriate for settlements arising in particular contexts (e.g., mediation proceedings)[145] or for settlements involving particular claims (e.g., discrimination).[146]

6. Compelled Party Attendance or Availability

Illinois lawmakers should consider some guidelines regarding whether the discretionary powers over issues such as party attendance or availability (as by telephone), may be judicially compelled at settlement conferences in civil actions in the Illinois circuit courts.[147] In *Brewer II*, Chester was in the courthouse when the alleged settlement pact was reached, but was not himself present when the alleged deal was struck, though he did talk thereafter to the trial court judge, who was present when the alleged agreement had been entered earlier.

Unfortunately, in Illinois, an express civil procedure rule recognizing these discretionary powers was removed in the 1995 amendment to Supreme Court Rule 218(a). This removal, however, did not deprive trial courts of their "inherent" powers to order attendance or availability.[148] A newly promulgated recognition will not remove all questions,[149] but will more likely prompt the development of significant and accessible standards for judges and lawyers. A model for any Illinois lawmaking initiative should be Rule 16 of the Federal Rules of Civil Procedure, which expressly recognizes trial court discretion to "require that a party or its representative . . . be present or reasonably

144. *Kennedy*, 682 S.W.2d at 532 (Gonzalez, J., dissenting).

145. *See, e.g.*, S. DIST. W. VA. L. R. CIV. P. 5.01(f) (settlements from mediation conferences must be in "writing and signed by all parties to the agreement").

146. *See* 29 U.S.C. § 626(f)(1)(A) (1994) (agreements waiving federal age discrimination claims must be "written").

147. Compelling attendance or availability of those "with authority to settle" is not a mandate that the person "must come to court willing to settle . . . but only that they come to court in order to consider the possibility of settlement." G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989).

148. *See id.* at 652 (stating that these powers enable trial courts "to preserve the efficiency, and more importantly the integrity of the judicial process").

149. *See In re* Novak, 932 F.2d 1397, 1408 (11th Cir. 1991) (finding no discretion for trial court to order attendance by employee of non-party insurer of the defendants).

available by telephone in order to consider possible settlement of the dispute."[150]

7. Judicial Enforcement

Finally, Illinois lawmakers should consider guidelines for Illinois circuit court enforcement of civil case settlements. It seems clear that civil case settlements which are incorporated into court orders, so that duties are owed to the court as well as to adverse parties, are judicially enforceable through varying forms of contempt proceedings.[151] And, it seems clear that civil case settlements resulting from talks outside the courthouse (and thus not involving judicial officers) are not enforceable through contempt proceedings where later voluntary dismissal requests lead to court orders that neither contain the settlement terms nor retain subject matter jurisdiction. In *Brewer II*, the initial dismissal order incorporated one, but not all, of the settlement terms; the later disputed term was not incorporated into the dismissal order.[152] Rather, the term of the agreement actually incorporated was subject neither to a retention of jurisdiction nor to a mandate to comply. Indeed, the dismissal order only said that the trial court was "fully advised" of the term "in the premises"; yet, the trial court was also fully advised in the premises of the unincorporated term for judicial enforcement was sought.

Judicial enforcement of a civil case settlement generally should be permitted only where trial court jurisdiction is retained in an order accompanying voluntary dismissal. All the settlement terms, or at least those terms for which possible enforcement is contemplated, should be in a writing accompanying the dismissal. These terms may become a portion of the dismissal order itself, or may be an agreement filed with the trial court (perhaps under seal) that is separate from the dismissal order.

V. CONCLUSION

The Illinois laws guiding lawyer civil claim settlement authority are not well settled and should be reexamined to provide lawyers with clear standards when they agree to a settlement on behalf of their clients. A

150. FED. R. CIV. P. 16(c). On the standard governing judicial determinations to exercise such powers, see *G. Heileman Brewing Co.*, 871 F.2d at 653-54 (decision predating relevant Rule 16 amendment which relies upon inherent judicial power to compel availability or attendance).

151. *See, e.g.*, People v. Warren, 671 N.E.2d 700, 710 (Ill. 1996) (distinguishing between civil and criminal contempt in enforcement proceedings).

152. *See Brewer II*, 649 N.E.2d 1331, 1333 (Ill. 1995), *rev'g* 628 N.E.2d 331 (Ill. App. Ct. 1st Dist. 1993).

comprehensive rulemaking initiative pursued by the Illinois Supreme Court is the best vehicle to settle the principles of lawyer conduct. In undertaking such an initiative, the Illinois Supreme Court should clarify issues of actual authority, apparent authority, burdens of proof, and open court presumptions. Furthermore, the Illinois Supreme Court should address other laws directly impacting upon, but unrelated to, lawyer settlement authority, including laws regarding choice of law, separation of powers, required writings, compelled attendance and judicial enforcement issues. The principles governing civil claim settlements will become clear and settled only after such a comprehensive revision is complete.