CLIENT LIABILITY FOR AN ATTORNEY'S TORTS: AN EVOLVING PROBLEM THAT WARRANTS A MODERN SOLUTION

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I. INTRODUCTION

Generally, when people hire attorneys, they do so with the expectation that, as their agent, the attorney will conform to the law and adhere to the rules of the legal profession. Unfortunately, attorneys occasionally fail to meet that expectation and commit torts against third parties. Under agency law, principals are generally liable for the torts of their agents. However, state courts are divided on the issue of imposing vicarious liability for the actions of attorneys onto their clients. In some jurisdictions, the courts find no vicarious liability. In others, courts impose vicarious liability, holding that the attorney-client relationship is a principal-agent relationship. While this is an issue that, fortunately, does not arise that often, it is relevant to the legal profession and extremely important to clients when it does.

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This Note seeks to address what may appear to be a relatively simple question: whether clients should be held liable for their attorney's torts. Traditionally, the issue has been governed by ancient principles of agency law, under which the clients are considered principals and are held liable for the misconduct of their attorney-agents.[1] However, at the end of the twentieth century, some jurisdictions began to hold that a client is not automatically held liable for his attorney's intentional torts just because the attorney is his agent.[2] These courts expressed concerns about the lack of control clients have over their attorneys and the inability to adequately monitor their actions.[3]

Part II of this Note will discuss the evolution of agency law, from its origins in ancient Rome to its application in the twenty-first century.[4] Part II also clarifies the confusion between *respondeat superior* and agency liability principles.[5] Additionally, Part II explores how courts have applied the traditional and modern approaches to the issue of client liability for an attorney's torts.[6] This Part concludes with an in-depth examination of the seminal case for the modern approach to client liability for his attorney's torts, *Horwitz v. Holabird & Root*.[7]

Part III examines the historic justifications and rationales for agency law and explains why the *Horwitz* court's approach merits consideration (particularly because the historic rationales do not generally apply to most modern attorney-client relationships).[8] Part III also examines questions of apparent authority and public policy concerns that arise when courts hold clients liable for their attorney's torts.[9] Due to the inapplicability of agency rationales to modern attorney-client relationships and the public policy concerns that follow, more courts should consider the modern approach to client liability for an attorney's torts.

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1. *See infra* Section II.B.
2. *See infra* Section II.C.
3. *See infra* Section II.C.
4. *See infra* Section II.A.
5. *See infra* Section II.A.3.
6. *See infra* Section II.B; *see also infra* Section II.C.
7. *See infra* Section II.C.1. *See generally* Horwitz v. Holabird & Root, 816 N.E.2d. 272 (Ill. 2004).
8. *See infra* Part III.
9. *See infra* Section III.B.1; *see also infra* Section III.C.

II. BACKGROUND

A. General Agency Principles

"Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[10] Generally, principals are liable for their agent's torts.[11] This is the modern doctrine of agency set forth by the Restatement (Third) of Agency, which was published in 2006.[12] However, this legal doctrine derives from ancient times and originally "embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since."[13]

1. Historic Origins

In ancient Rome, it was customary that slaves who committed harm against others were surrendered to the wronged party.[14] Unlimited liability of a slave owner for the torts of his slave "grew out of what had been merely a privilege of buying him off from a surrender to the vengeance of the offended party."[15] Oliver Wendell Holmes Jr. wrote that the principle of agency is a "fiction [which] is merely a convenient way of expressing rules that were arrived at on other grounds."[16] In ancient Rome, masters were liable for their servants' torts not because "the act of the servant was the act of the master," but rather because of the "special confidence necessarily reposed" in masters.[17] The law reflected the power dynamics within the society: "The practical fact of the master's power was at the bottom of the decision" to hold them accountable for their slaves' torts.[18]

In ancient England, family headship was the source of legal rights and duties and extended to cover the "relation of a master to freemen filling a servile place for the time being."[19] Wives, children, and servants

10. RESTATEMENT (THIRD) OF AGENCY §1.01 (AM. LAW INST. 2007).
11. *See id.* at §7.03.
12. *Id.* at §1.01.
13. Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345 (1891).
14. OLIVER WENDELL HOLMES, THE COMMON LAW 16–17 (1881).
15. Holmes, *supra* note 13, at 350.
16. *Id.* at 351.
17. *Id.*
18. *Id.*
19. *Id.* at 352.

were all a part of the family unit and were all under the control of the man of the household.[20] Thus, the relationship between masters and servants was generalized in the same identity realm as husband and wife (in which "the persona of the wife [was] swallowed up in and made part of her husband's.").[21] *Jones v. Hart* was the first judicial recognition of the doctrine of *respondeat superior* in 1698, in which Lord Holt wrote, "For whoever employs another, is answerable for him, and undertakes for his care to all that make use of him."[22]

By 1765, the principle of agency and *respondeat superior* had developed into a more comprehensive legal doctrine. William Blackstone wrote in his Commentaries that a master shall answer for the negligent acts his servant performed.[23] However, Blackstone clarified that "the damage must be done, while he is actually employed in the master's service."[24] Similarly, in 1838, the Supreme Court of Judicature of New York used the English common law to distinguish *respondeat superior* in the United States.[25] In *Wright v. Wilcox,* the court held that a master may be held liable for his servant's torts when they are in pursuit of his master's business, but not when the servant's act is a "wilful act of mischief."[26]

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20. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (AM. LAW INST. 1958) ("In early times the servant was a member of the family or of the mercantile household, and intimacy of relation is still the basic idea which today distinguishes the servant from the non-servant. When units were small and the assistants were chosen when young, frequently remaining until death, it was not difficult to regard the household or business as a unit and to deal with the act of any member of it as the responsibility of its head.").

21. Holmes, *supra* note 13, at 353.

22. Jones v. Hart, 2 Salk. 441, 90 Eng. Rep. (K.B. 1698); *see* Ralph L. Brill, *The Liability of an Employer for the Wilful Torts of his Servants*, 45 CHI.-KENT L. REV. 1 (1968).

23. 1 WILLIAM BLACKSTONE, COMMENTARIES *431–32 ("[If] a servant . . . by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior.").

24. *Id.*

25. Wright v. Wilcox, 19 Wend. 343, 432, 32 Am. Dec. 508 (N.Y. Sup. Ct. 1838).

26. *Id.* at 345 ("Either may be in the pursuit of his master's business, and negligence in servants is so common, that the law will hold the master to the consequences, as a thing that he is bound to foresee and provide against. But it is different with a wilful act of mischief.").

2. Modern Agency Principles

As the nature of agency evolved from the head of the household overseeing his wife, children, and servants to more modern, large-scale operations, the courts devised tests to determine when a relationship exists that causes the principal to be vicariously liable for his agent's torts.[27] The Restatement (Second) of Agency promulgated the control test in 1958, stating if the principal has the right to control the physical attributes of the agent's actions, the agent is a servant agent, and the principal may be held liable for his torts.[28] However, if the principal does not have the right to control the physical attributes of the agent's actions, the agent is an independent contractor, and generally, the principal may not be held liable for his torts.[29]

The Restatement (Third) of Agency abandoned the terms "master," "servant," and "independent contractor" in favor of "employer" and "employee."[30] Under this theory, an employer is held 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."[31] The Restatement (Third) refers to independent contractors as "nonservant agents."[32] Many courts still use the language from the Restatement (Second), including those deciding most of the cases cited in this Note, and therefore, the term independent contractor will be used for the purposes of this Note.

Attorneys are agents of their clients.[33] Generally, attorneys are viewed as independent contractor agents because clients do not control

27. RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958) ("[W]ith the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working under his direction and for his benefit. As a result of these considerations, historical and economic, the courts of today have worked out tests which are helpful in predicting whether there is such a relation between the parties that liability will be imposed upon the employer for the employee's conduct which is in the scope of employment.").

28. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

29. *Id.*

30. RESTATEMENT (THIRD) OF AGENCY §§ 2.04, 7.07 (AM. LAW INST. 2007).

31. *Id.*

32. *See id.* at § 1.01.

33. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. b (AM. LAW INST. 2000) ("Legal representation saves the client's time and effort and enables legal work to be delegated to an expert. Lawyers therefore are recognized as agents for their clients in litigation and other legal matters.").

the attorney's method of work, but they do authorize attorneys to act on their behalf.[34]

The actions of an agent bind the principal if the agent has actual or apparent authority.[35] "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."[36] Actual authority may be express or implied.[37] The principal can, orally or in writing, expressly ask or direct the agent to take action on the principal's behalf, which can include very general or specific instructions.[38] Implied authority requires that the principal manifest an intention that the agent has that authority.[39]

"Apparent authority is the power held by an agent or other actor to affect a principal's legal 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."[40] The Restatement (Third) of the Law Governing Lawyers states that the lawyer's act will be considered to be the client's act if "the client ratifies the act or if the act is reasonably believed by the lawyer to be required by law or by a tribunal."[41] The Restatement (Third) of the Law Governing Lawyers also specifically recognizes apparent authority with regards to attorneys and states that a client can be responsible for his attorney's actions 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."[42] When a client hires a lawyer, she implies that the lawyer is authorized to act for her in matters

34. *See* Russell v. City of Detroit, 321 Mich. App. 628, 641, 909 N.W.2d. 507, 515 (2017) ("The legal relationship between attorneys and their clients is one example of an agency relationship."); *see also* RESTATEMENT (SECOND) OF AGENCY §14N cmt. a (AM. LAW INST. 1958) ("[A]ttorneys . . . are independent contractors . . . since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, they fall within the category of agents.").

35. RESTATEMENT (THIRD) OF AGENCY §§ 2.01–.03 (AM. LAW INST. 2007) (defining "authority" and "apparent authority").

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26(1) (AM. LAW INST. 2000).

42. *Id.* at § 27.

relating to the representation, using means that are *reasonably appropriate* under the circumstances to carry it out.[43]

3. Confusion from Respondeat Superior & Agency Liability Principles

As independent contractors, the doctrine of *respondeat superior* does not apply to attorneys because clients lack the level of control over attorneys required for the rationale to apply.[44] Generally, there is no tort liability on a principal for the physical harm caused by the actions of a non-agent independent contractor.[45] Agency law provides an additional basis for tort liability outside of *respondeat superior*.[46] It is merely an alternative basis for liability, not a conflicting basis.[47]

The language in the Restatement (Second) of Agency implies that tort liability is possible even when the agent is not a servant:

> A master *or other principal* may be liable to another whose interests have been invaded by the tortious conduct of a servant *or other agent*, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.[48]

The "or other principal" and "or other agent" language suggests that principals may be liable for the torts of independent contractors who are also agents.[49] Therefore, under agency law, a client could be held responsible for an attorney's torts if the client actually authorized the attorney's actions or if the attorney's actions are within the apparent authority of the attorney.[50]

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43. *Id.* at § 27 cmt. c (emphasis added). See Section III.B.1 for additional discussion regarding what constitutes *reasonably appropriate* means for an attorney to further the interests of her client, and whether intentional torts should ever be perceived as within the apparent authority of an attorney.

44. Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 357 (2007).

45. *Id.*; *see also* RESTATEMENT (SECOND) OF AGENCY § 2 cmt. b (AM. LAW INST. 1958) (noting that liability for independent contractors is extremely limited).

46. Giesel, *supra* note 44, at 358.

47. *Id.*

48. RESTATEMENT (SECOND) OF AGENCY § 216 (AM. LAW INST. 1958) (emphasis added).

49. *Id.*

50. Giesel, *supra* note 44, at 358.

B. Traditional Approach to Client Liability for Attorney's Torts

Traditionally, courts have applied general agency law to the attorney-client relationship and held clients liable for their attorney's torts.

In 1873, the Michigan Supreme Court, in *Foster v. Wiley,* established the scope of an attorney's authority as his client's agent and the client's vicarious liability for his attorney's torts.[51] In *Foster*, there was an issue regarding the timing of ownership of property and the execution of that property by an attorney who Wiley hired for collection.[52] Wiley acquired a judgment against Foster, which would have resulted in Wiley taking ownership of the property, but Foster submitted an appeal to the circuit court.[53] Wiley's attorney took possession of the property after the appeal was submitted, and Foster sued the attorney for trespass, claiming that Wiley should also be held liable for his attorney's tort.[54] Wiley's counsel insisted at trial that "the act of the attorney in such a case being a naked tort . . . no presumption of his client's agency can be indulged in, and he alone must be held responsible for the trespass which followed unless affirmative evidence is given that the client was consenting to his action."[55]

The *Foster* court considered this approach and the relevant cases, which supported the position, but ultimately rejected it.[56] Instead, the court reasoned that when the client hired his attorney, he conferred the authority to the attorney to make legal decisions on his behalf.[57] Therefore, the torts committed by the attorney are "approved by the client in advance . . . even though they prove to be unwarranted by the law."[58] In extending vicarious liability to the client for his attorney's torts, the *Foster* court established the principle of traditional agency

51. Foster v. Wiley, 27 Mich. 244, 246, 15 Am. Rep. 185 (1873).
52. *Id.*
53. *Id.* at 246.
54. *Id.*
55. *Id.* at 247.
56. *Id.* at 249 ("A plaintiff can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the [trespass that occurred during irregularly served execution of process], in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law.").
57. *Id.*
58. *Id.*

between a client and his attorney, regardless of whether the attorney's conduct was lawful.

In 1988, the Texas Court of Appeals held in *Southwestern Bell Telephone v. Wilson* that a client was liable for his attorney's intentional tortious acts that were committed for the purpose of accomplishing the mission entrusted to the attorney.[59] Wilson was a creditor who was awarded damages at trial for "unreasonable collection efforts, intentional and negligent infliction of emotional distress, assault, battery, and false imprisonment, arising from Bell's efforts to collect."[60] On appeal, Bell argued that it was not vicariously liable for the acts of its attorneys or other employees.[61] Regarding their attorneys, the court held, "While there is no direct evidence that Bell encouraged or ordered the tortious behavior, the acts were committed for the purpose of accomplishing the mission entrusted to the attorneys" and, accordingly, affirmed the trial court's finding that Bell was vicariously liable for its attorney's torts.[62]

In *SouthTrust Bank v. Jones, Morrison, Womack & Dearing*, the Alabama Court of Civil Appeals applied general agency law to hold that a client can be responsible for the tortious actions of the client's attorney.[63] The decision relied on Alabama precedent and the Restatement (Second) of Agency § 253, which imposes liability on a principal in the context of legal proceedings.[64] The court held that the client could be held responsible for an attorney's intentional torts if the acts were "[1] in the line and scope of his employment . . . ; *or* [2] . . . in furtherance of the business of [the principal] . . . ; *or* [3] . . . participated in, authorized, or ratified [by the principal]. . . ."[65] The court concluded

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59. Sw. Bell Tel. v. Wilson, 768 S.W.2d 755, 759 (Tex. Ct. App. 1988) ("Here, the alleged intentional torts were committed in furtherance of the collection efforts for Bell's benefit. While there is no direct evidence that Bell encouraged or ordered the tortious behavior, the acts were committed for the purpose of accomplishing the mission entrusted to the attorneys. This is unlike those cases in which the agent or employee committed a tortious act because of some personal animosity.").

60. *Id.* at 757.

61. *Id.* at 759.

62. *Id.*

63. *See* SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So. 2d. 885 (Ala. Civ. App. 2005).

64. *Id.* at 904–05; *see* RESTATEMENT (SECOND) OF AGENCY § 253 (AM. LAW INST. 1958) ("A principal who authorizes a servant or other agent to institute or conduct such legal proceedings as in his judgment are lawful and desirable for the protection of the principal's interests is subject to liability to a person against whom proceedings reasonably adapted to accomplish the principal's purposes are tortiously brought by the agent.").

65. *SouthTrust*, 939 So. 2d. at 904–05 (alteration in original) (internal quotation marks omitted) (quoting Joyner v. AAA Cooper Transp., 447 So. 2d 364, 365 (Ala. 1985)).

that the client could be responsible for the attorney's actions, even if those actions were outside the scope of employment and expressly not authorized, because there was no evidence that the attorney had a purpose to accomplish a personal objective, rather than further the client's business.[66]

C. Modern Approach to Client Liability for Attorney's Torts

Recently, some courts have decided to apply the law differently, emphasizing modern public policy concerns.

In 1994, the Texas Court of Appeals decided differently than it did in *Southwestern Bell* and held that a client is not automatically liable for his attorney's intentional torts just because the attorney is his agent.[67] The court reasoned that the monitoring a client would have to undertake to prevent an attorney's torts would be so great that the client would, in effect, be taking his legal representation into his own hands.[68] The court held, "Unless a client is implicated in some way other than merely being represented by the attorney alleged to have committed the intentional wrongful conduct, the client cannot be liable for the attorney's conduct."[69]

1. Horwitz v. Holabird & Root

In 2004, the Supreme Court of Illinois addressed the issue thoroughly in *Horwitz v. Holabird & Root*.[70] The *Horwitz* court held that the attorney was exercising independent professional judgment and was therefore acting as an independent contractor "whose intentional misconduct may generally not be imputed to the client."[71] The court

66. *Id. See generally* Link v. Wabash R.R., 370 U.S. 626, 633–34 (1962) (stating that a client "cannot . . . avoid the consequences of the acts or omissions of [his] 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.'" (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879))).

67. Bradt v. West, 892 S.W.2d 56, 76–77 (Tex. Ct. App. 1994) ("[C]ontrary to the appellants' argument, the mere fact that an agency relationship existed between the client-appellees and the attorney-appellees does not mean that the client-appellees would automatically be liable for any tortious conduct on the part of the attorney-appellees." (relying on Graham v. McCord, 384 S.W.2d 897, 898 (Tex. Civ. App. 1964))).

68. *Id.*

69. *Id.* at 76 ("The mere existence of an agency relationship is not enough to visit tort liability on a principal.").

70. *See* Horwitz v. Holabird & Root, 816 N.E.2d. 272, 272 (Ill. 2004).

71. *Id.* at 278 ("[W]hen, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she acts presumptively as an independent

stated that the reason that general agency law distinguishes between independent contractors and employees for the purposes of principal liability is due to the lack of control the principal has over the independent contractor.[72] Therefore, the principal is not in a good position to prevent negligent performance of the independent contractor.[73] The *Horwitz* court reasoned that clients hire attorneys "because they are unfamiliar with the law and unable to perform the work themselves."[74] Due to a client's unfamiliarity with the law, "an attorney usually pursues a client's legal rights without specific direction from the client, using independent professional judgement to determine the manner and form of the work."[75] In this court's view, this made attorneys independent contractors.[76]

The *Horwitz* court did clarify the fact that someone is an independent contractor "does not bar the attachment of vicarious liability for her actions if she is also an agent."[77] Attorneys fall into the category of individuals who are both independent contractors and agents with the authority "both to control the details of the work and also 'the power to act for and to bind the principal in business negotiations within the scope of [the] agency.'"[78]

However, the *Horwitz* court distinguished that for the purposes of imposing vicarious liability, attorneys are independent contractors when they act pursuant to the exercise of independent professional judgment.[79] Therefore, in order for a client to be held vicariously liable for an attorney's tort, a plaintiff must demonstrate that the client "directed, controlled, or authorized the attorney's precise method of performing the work" or that the client later ratified the acts.[80] The *Horwitz* court acknowledged that the attorney-client relationship is fiduciary in nature, but in the instance of an attorney committing an intentional tort, the

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contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions.").

72. *Id.* at 277–78.

73. *Id.*

74. *Id.* at 278.

75. *Id.* at 279.

76. *Id.*

77. *Id.*

78. *Id.* (alteration in original) (citations omitted).

79. *Id.*

80. *Id.* ("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.").

attorney is not acting as an agent for the client.[81] The court held that "an attorney can be both an independent contractor and an agent, but regarding particular conduct is either one or the other, not both."[82]

The *Horwitz* court reasoned that to hold otherwise "would in effect compel clients in similar cases to oversee or micromanage every action taken by their attorneys during the course of the attorney-client relationship . . . ."[83] As stated above, people hire attorneys due to their own unfamiliarity with the law, and "most clients are not qualified to undertake that type of monitoring."[84] The Illinois Supreme Court reasoned that the requirement of such monitoring might deter Illinois citizens from bringing suits and could make "defendants hesitant to defend themselves vigorously."[85]

III. ANALYSIS

Horwitz appears to be a departure from the precedent of agency law developed over centuries. In that case, presumably, the attorney committed a tort while representing the client.[86] According to traditional agency law,[87] the client should have been liable for his agent's actions.[88] However, the Supreme Court of Illinois decided against client liability.[89] While there is some opposition to this departure from the traditional approach,[90] the *Horwitz* court's reasoning merits consideration because the historic justifications for tort liability in agency law simply do not apply to the modern attorney-client relationship.

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81. *Id.* at 280 ("As a fiduciary relationship, there are a myriad of circumstances where attorney's act as agents for their clients. The situation at hand is simply not one of them.").

82. *Id.* at 283.

83. *Id.* at 282.

84. *Id.* at 281.

85. *Id.*

86. The issue was never presented to a finder of fact. The trial court granted Holabird & Root's motion for summary judgment and ruled as a matter of law that it could not be held liable for its attorney's actions. *Id.* at 274.

87. *See supra* Section II.B.; *see also* Foster v. Wiley, 27 Mich. 244, 244, 15 Am. Rep. 185 (1873); Sw. Bell Tel. v. Wilson, 768 S.W.2d 755, 755 (Tex. Ct. App. 1988); SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So. 2d. 885, 904–05 (Ala. Civ. App. 2005); RESTATEMENT (SECOND) OF AGENCY § 253 (AM. LAW INST. 1958).

88. *See supra* Section II.B.

89. *Horwitz*, 816 N.E.2d. at 278 ("[W]hen, as here, an attorney acts pursuant to the exercise of independent professional judgment, he or she presumptively acts as an independent contractor whose intentional misconduct may generally not be imputed to the client, subject to factual exceptions.").

90. *See* Giesel, *supra* note 44 (arguing that *Horwitz*'s concern regarding the "innocent client" is misled and courts should instead protect injured third parties).

A. Historical Support for the Modern Approach

The days when a master would have to forfeit his slave to a wronged party for vengeance are long past.[91] Yet, the driving force behind the evolution of agency law has always been "the practical fact of the master's power."[92] The master's power is two-fold: (1) the power of a position of wealth, and (2) the power to actually control the servant's actions.[93]

1. The Power of Wealth

The importance of the power of wealth can be seen in the formation of the principle of *respondeat superior* when Lord Holt reasoned that the master is liable for his servant because the master "undertakes for his [servant's] care to all that make use of him."[94] The implication is that the master "cares" for the tortious servant simply because he is the only one who can "care" for him because the servant is not able to pay for the damages he caused.[95]

This cost-allocating rationale is seen in modern cases, such as *Lisa M. v. Henry Mayo Newhall Memorial Hospital*.[96] There, the California Supreme Court summarized the goals for vicarious liability as (1) the prevention of future injuries; (2) the assurance of compensation to victims; and (3) the equitable spreading of losses caused by an enterprise.[97] The first goal primarily can be achieved through power of control, but the latter two goals are accomplished with wealth.

In 1873, *Foster*'s holding may have accomplished these goals because the only people who could afford lawyers would have been the wealthy landowners of the day.[98] People also expected less from the judicial system than they do today.[99] Therefore, in 1873, holding clients

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91. *See* Holmes, *supra* note 13, at 347.

92. *Id.* at 348.

93. *See infra* Sections III.A.1., III.A.2.

94. Jones v. Hart, 2 Salk. 441, 441, 90 Eng. Rep. (K.B. 1698).

95. *Id.*

96. Lisa M. v. Henry Mayo Newhall Mem'l. Hosp., 907 P.2d 358 (Cal. 1995).

97. *Id.* at 366 ("In reaching our conclusion we have consulted the three identified policy goals of the respondeat superior doctrine—preventing future injuries, assuring compensation to victims, and spreading the losses caused by an enterprise equitably—for additional guidance as to whether the doctrine *should* be applied in these circumstances." (emphasis in original)).

98. *See generally* Peter Charles Hoffer, *Honor and the Roots of American Litigiousness*, 33 AM. J. LEGAL HIST. 295 (1989).

99. Hoffer, *supra* note 98, at 296 ("[I]ncreased litigation is neither unclear in meaning nor unwelcome in consequences. A segment of society long used to accepting its fate has

responsible for their attorney's torts most likely would have assured that victims were compensated, and presumably would have spread the cost to wealthy individuals who were operating local estates or businesses. However, these cost-allocating goals are not met by holding clients liable for their attorney's torts today.

The number of federal lawsuits filed between 1960 and 1980 rose 185 percent, while the population grew only 25 percent.[100] Though many new litigants are corporations with plenty of resources to compensate victims, many are not.[101] Many clients are just average people seeking justice.[102] In instances where a lawyer is representing formerly "alienated and subordinated groups"[103] who finally have access to the judicial system, the lawyer will most likely be wealthier than the client.[104]

Holding underprivileged clients liable for their attorneys' tortious conduct seems vastly unjust.[105] It would defeat the noble objective of modern plaintiffs fighting the "heedless or vicious government agency, and the indifferent or negligent corporate giant" by adding more risk to the adjudication process.[106] While not all the increasing number of lawsuits have such noble goals, most "new" plaintiffs entering the

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now come to believe that the legal system should and will aid them. The rise in caseload measures the progressive empowerment of hitherto alienated and subordinated groups.").

100. Stuart Taylor Jr., *Ideas & Trends in Summary; ON THE EVIDENCE, AMERICANS WOULD RATHER SUE THAN SETTLE*, N.Y. TIMES, July 5, 1981, § 4, at 8 ("An indication of the growth of litigiousness in America is the dramatic increase over two decades in the number of civil lawsuits filed annually in the Federal courts - from 59,284 in 1960 to 168,789 in 1980, according to the Administrative Office of the United States Courts. This surge of almost 185 percent occurred while the population increased only 25 percent. The number of lawsuits in state courts, where the majority of all suits are brought, has also increased, but less dramatically."). *See generally* Hoffer, *supra* note 98.

101. Hoffer, *supra* note 98, at 296 ("The new litigation vindicates the rights of the weak against the power of the heedless or vicious government agency, and the indifferent or negligent corporate giant.").

102. *Id.*

103. *Id.*

104. *See, e.g.*, *How Much Does a Lawyer Make?* U.S. NEWS., https://money.usnews.com/careers/best-jobs/lawyer/salary [http://web.archive.org/web/20200307215023/https://money.usnews.com/careers/best-jobs/lawyer/salary] (last visited Feb. 2, 2019) ("Lawyers made a median salary of $119,250 in 2017. The best-paid 25 percent made $178,480 that year, while the lowest-paid 25 percent made $78,130.").

105. Median household income in the United States was $56,516 in 2015. Bernadette D. Proctor, Jessica L. Semega & Melissa A. Killar, *Income and Poverty in the United States: 2015*, U.S. CENSUS BUREAU (Sept. 13, 2016), https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf [http://web.archive.org/web/20200307215743/https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf].

106. Hoffer, *supra* note 98, at 269.

courtroom are not extremely wealthy.[107] Holding these clients liable for their attorney's torts does not align with the cost-allocating goals because these clients are not running an "enterprise," they are less likely to be able to pay damages to the victim, and the risk of the added cost might prevent or deter a plaintiff from bringing a case.

2. The Power to Control

As noted earlier, agency and *respondeat superior* are based on separate principles of tort liability, and clients are generally only liable for their attorney's torts under agency principles because of the lack of control they exert over their attorneys.[108] The *Horwitz* majority correctly emphasized the concerns of control that apply in the attorney-client relationship.[109] It reasoned that most clients hire attorneys because they are "unfamiliar with the law and are unable to perform the work themselves."[110] This logically means that they are unable to perform the adequate monitoring to prevent negligence and accomplish the first goal of vicarious liability: to prevent future injuries.[111]

Due to their lack of legal knowledge, clients are not well-situated to prevent negligent performance by their attorneys.[112] However, with the knowledge that they could be held liable for their attorney's torts, clients might try to "micromanage every action taken by their attorneys during the course of the attorney-client relationship."[113] This would defeat the very purpose of hiring an attorney, because if clients are required to teach themselves enough about the law so they can effectively oversee their attorneys and monitoring their attorney's actions, then clients might as well represent themselves.

B. Authority Concerns

The actions of the agent can bind the principal if the agent has actual or apparent authority.[114] Clients could be directly liable if they authorize

107. Taylor, *supra* note 100 ("Efforts to make competent legal representation available to people who could not otherwise afford it have also churned up lawsuits. Where once it was virtually impossible for poor people to afford a lawyer or initiate a lawsuit, today there are contingent fee arrangements and statutes allowing lawyers for victorious civil rights plaintiffs to collect fees from the losing parties.").

108. *See supra* Section II.A.3.

109. *See* Horwitz v. Holabird & Root, 816 N.E.2d. 272, 277 (Ill. 2004).

110. *Id.* at 278.

111. *See supra* Section III.A.1.

112. *See supra* Section II.C.1.

113. *Horwitz*, 816 N.E.2d. at 281.

114. *See supra* note 35.

their attorney's actions, which would give the attorneys actual authority.[115] This direct liability is justified because in a situation where a client authorizes an attorney's tort, the client has control over the attorney's action. However, there are questions about the validity of relying on apparent authority as a basis for client liability for the intentional torts of their attorneys.

1. Apparent Authority

According to the Restatement (Third) of Agency, a principal can be vicariously liable to a third party who an agent's conduct harms (1) when the agent is an employee who commits a tort while acting within the scope of employment, or (2) when the agent commits a tort when acting with apparent authority in dealing with a third party on, or purportedly on, behalf of the principal.[116] As noted before, attorneys are not the employees of their clients, so the first situation is irrelevant.[117] Therefore, clients only can be vicariously liable for their attorneys' torts if the attorneys were acting with apparent authority. However, there are questions as to whether intentional torts against a third party can ever be perceived as within the apparent authority of a licensed attorney.

The ABA Model Rules of Professional Conduct (MRPC or "Rules") actively directs lawyers not to assist clients in criminal or fraudulent conduct.[118] Regarding a lawyer's duty to act with diligence, the Rules direct lawyers to "take whatever *lawful* and ethical measures are required to vindicate a client's cause or endeavor."[119]

Additionally, the Restatement (Third) of the Law Governing Lawyers reserves the lawyer's right "to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer

115. RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. LAW INST. 2007) ("(1) A principal is subject to direct liability to a third party harmed by an agent's conduct when (a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and (i) the agent's conduct is tortious, or (ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or (b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or (c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.").

116. *Id.*

117. *See supra* Section II.A.3.

118. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2015) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

119. *Id.* at r. 1.3 (emphasis added).

reasonably believes to be unlawful."[120] Based on this authority, clients could argue that when they hire attorneys, they reasonably expect the attorneys to adhere to the rules of their profession, which includes only taking *lawful* measures to vindicate their cause.[121] Therefore, clients could argue that other people should only expect attorneys to act lawfully on their behalf because unlawful acts would violate the rules of their profession, which necessarily would be outside what the client has authorized. This reasoning would eliminate the perception that the lawyer was acting with apparent authority when he was committing the tort.

Of course, a counterargument is that the very existence and creation of the MRPC is evidence that lawyers need these rules because of the legal profession's well-known history of unethical (and unlawful) conduct.[122] It follows that the public may expect attorneys to partake in unlawful conduct and the ethics rules merely exist as society's remedy to that expectation. Accordingly, the validity of the lack of apparent authority argument is dependent on a societal perception of the legal profession that is beyond the scope of this Note.

While *Horwitz* did not address it, this question of apparent authority is something many clients may argue in an attempt to avoid liability.[123] When courts are deciding whether to hold a client liable for her attorney's tort, they should consider whether a third party can reasonably perceive an attorney as acting with apparent authority when the attorney commits an intentional tort.

C. Public Policy Concerns

With the rising number of litigants from formerly "alienated and subordinated groups,"[124] the *Horwitz* majority's concerns about clients'

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120. The public may presume that the lawyer may always refuse to perform an unlawful act when directed to do so by the client because despite the fiduciary nature of the attorney-client relationship, lawyers are allowed to refuse to perform unlawful acts. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23 (AM. LAW INST. 2000) ("As between client and lawyer, a lawyer retains authority that may not be overridden by a contract with or an instruction from the client: (1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the lawyer reasonably believes to be unlawful . . . .").

121. *Id.*

122. For more information on how the Watergate scandal sparked the creation of legal ethics rules, see Laurel A. Rigertas, *Post-Watergate: The Legal Profession and Respect for the Interests of Third Parties*, 16 CHAP. L. REV. 111 (2012).

123. *See generally* Horwitz v. Holabird & Root, 816 N.E.2d. 272 (Ill. 2004).

124. Hoffer, *supra* note 98, at 296.

lack of control[125] over their attorneys seems appropriate, despite the fact that the "control test" only applies to *respondeat superior* and not to general agency law.[126] For instance, it would seem unjust to hold a working-class, construction-worker-client afflicted with asbestos poisoning liable if his attorney defamed the asbestos company while defending him.[127] That client has neither the power of wealth to assure compensation to victims nor the control over his attorney's actions to prevent future injuries.[128] Holding him liable also does not equitably spread the loss over an enterprise.[129] Yet, under agency law, the attorney's tort could be perceived as acting with apparent authority because the statement about the asbestos company was committed "for the purpose of accomplishing the mission entrusted to him by his principal,"[130] and the client could be held liable. However, given the totality of the economic status of the parties and the client's lack of control, a better policy would be to not hold the client liable.

The *Horwitz* majority analyzed the issue under the framework that attorneys are both independent contractors and agents, but, regarding tort liability, their actions are broken down to be either one or the other.[131] The court held that if the attorney uses his professional judgment in deciding a course of action, then he is an independent contractor, and the client is not held vicariously liable for his torts.[132] This was a point of contention among the justices as seen in the dialogue between the majority and dissenting opinions.[133] Justice McMorrow's dissent is similar to the majority opinion, except she distinguishes attorneys from all other agents and uses that as a basis for an exception for vicarious

125. In order for the client to be held vicariously liable for the attorney's tort, a plaintiff must demonstrate that the client "directed, controlled, or authorized the attorney's precise method of performing the work" or that the client later ratified the acts. *Horwitz*, 816 N.E.2d at 278–79.

126. *See supra* Section II.A.3.

127. Part of the reason for the rise in litigation rates was the increase in class action cases, such as the asbestos poisoning suits. *See* Hoffer, *supra* note 98, at 296. Holding class action clients liable for their attorney's torts seems even more illogical due to the lack of control they have over their attorneys. If a court held class action clients liable for their attorney's torts, it may prove to have a chilling effect on class action cases, but that analysis is outside the scope of this Note.

128. *See supra* Section III.A.1 (discussing the goals of vicarious liability).

129. *See supra* Section III.A.1.

130. Sw. Bell Tel. v. Wilson, 768 S.W.2d 755, 759 (Tex. Ct. App. 1988) (affirming a client's liability for his attorney's tort).

131. Horwitz v. Holabird & Root, 816 N.E.2d. 272, 283 (Ill. 2004) (holding that "an attorney can be both an independent contractor and an agent, but regarding particular conduct is either one or the other, not both").

132. *Id.* at 278.

133. *See generally id.* at 273.

liability.[134] Justice Freeman's dissent argued that attorneys are at all times both independent contractors and agents.[135]

The sheer confusion between these opinions (and this issue generally) emphasizes Holmes' point regarding the origins of agency law: *the principle of agency is merely a fiction*—"a convenient way of expressing rules" that were developed on other grounds.[136] It would behoove courts to remember this and to follow the *Horwitz* majority's lead in developing legal solutions that fit within a modern context, especially when the law is muddled and antiquated. Regarding the point at issue in this Note, it is clear that holding clients liable for their attorneys' torts does not achieve the goals of vicarious liability, and therefore, the modern approach should prevail.

Additionally, the *Horwitz* court's prediction that the traditional approach may cause "defendants [to be] hesitant to defend themselves vigorously" is concerning.[137] When a client hires an attorney, she is relying on the attorney's "superior knowledge of the law."[138] It may very well seem unjust to a lay-person that she is held liable for the unlawful conduct of her attorney. If awareness of client liability for an attorney's torts spreads, it may have the chilling effect on litigation the *Horwitz* court predicted.[139]

If this prediction comes to pass, it may cause the legislature to impose regulations on the legal profession in an attempt to protect the rights of citizens.[140] This would be concerning because of the importance of the self-regulation of lawyers in preventing government domination, as stated in the preamble to the ABA Code of Professional

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134. *Id.* at 286 (McMorrow, J., dissenting).

135. *Id.* at 292 (Freeman, J., dissenting).

136. Holmes, *supra* note 13, at 347 ("Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. The Roman praetor did not make innkeepers answerable for their servants because 'the act of the servant was the act of the master,' any more than because they had been negligent in choosing them. He did so on substantive grounds of policy – because of the special confidence necessarily reposed in innkeepers. So when it was held that a slave's possession was his owner's possession, the practical fact of the master's power was at the bottom of the decision.").

137. *See Horwitz*, 816 N.E.2d at 282.

138. Foster v. Wiley, 27 Mich. 244, 249, 15 Am. Rep. 185 (1873). However, in *Foster*, the Michigan Supreme Court reasoned that because the client hired the attorney for her "superior knowledge of the law," the client implicitly authorized that attorney's tort because the client hired the attorney to be his agent in legal matters. *Id.*

139. *Horwitz*, 816 N.E.2d at 282.

140. For example, many state legislatures have tried to protect citizens by regulating attorney advertising. *See* Mark L. Tuft, *Rethinking Lawyer Advertising Rules*, 23 PROF. LAW. 1 (2016) ("Regulators attempt to prohibit legal advertising that is considered false or misleading with an expanding array of complex and inconsistent rules.").

Responsibility.[141] "[A]buse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[142] Imposing vicarious liability on clients for their attorneys' torts may encourage the legislature to infringe on the ABA's goal of self-regulation of lawyers.[143]

IV. CONCLUSION

Fortunately, clients' liability for their attorney's torts is an issue that courts do not have to address frequently. However, because this issue is rarely addressed in practice, it is a legal topic surrounded in confusion,[144] and state courts have adopted different approaches.[145] While many states have not addressed the issue, most of those who have addressed it have applied traditional agency law.[146] These decisions are entrenched in agency principles established in ancient Rome.[147]

A few states have applied a more contemporary approach, which considers the reality of the modern attorney-client relationship.[148] This Note proposes that more courts consider the viability of the modern approach, in light of the inapplicability of the historic rationales for agency law to this issue and the public policy concerns that follow.[149]

Due to the concerns of the modern client's lack of power and wealth, and the possible danger to the self-regulation of the legal profession,[150] courts should follow the *Horwitz* court's example and make decisions based on public policy concerns regarding the modern attorney-client

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141. MODEL RULES OF PROF'L CONDUCT, Preamble & Scope (AM. BAR ASS'N 2015) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice").

142. *Id.* Beyond concerns of government domination, the legislature also may be ineffective at regulating attorneys. For further discussion on how the legislature has been ineffective in regulating attorneys regarding legal advertising, see Tuft, *supra* note 140.

143. *See supra* note 141.

144. *See supra* Section II.A.3 (explaining the confusion between *respondeat superior* and agency liability principles).

145. *See supra* Sections II.B., II.C.

146. *See supra* Section II.B.

147. *See supra* Section II.B.

148. *See supra* Section II.C.

149. *See supra* Part III.

150. *See supra* Section III.A.

relationship, rather than addressing the concerns that once afflicted the master-slave relationship of ancient Rome.[151]

151. *See supra* Section II.A.1.