Settle And Sue Your Lawyer: The *Muhammad* Doctrine Under Fire

By THOMAS G. WILKINSON,[1] Philadelphia County,
JOSH J.T. BYRNE,[2] Philadelphia County,
and RHONDA M. FULGINITI,[3] Philadelphia County
Members of the Pennsylvania Bar

ABSTRACT

*There is a strong public policy favoring the sanctity and finality of negotiated settlements. A rule that would effectively encourage dissatisfied clients to settle and then sue their lawyers for malpractice would open the door to unwarranted post hoc litigation from clients who later become convinced that they could have secured more favorable settlement terms. For several decades, the general rule in Pennsylvania has been that no such malpractice lawsuits can be filed unless the claimant can prove one of the three exceptions to the "*Muhammad *Doctrine": 1) fraud by the attorney; 2) errors in legal advice regarding the consequences of the settlement; or 3) that the settlement was somehow legally deficient. The concurring opinion in the recent Pennsylvania Supreme Court case of* Khalil v. Williams *threatens that doctrine and reveals that a significant faction of the Court is eager to overturn* Muhammad*. However, before throwing the proverbial baby out with the bathwater, the Court would be well served to bear in mind the important policy purposes served by the rule. Any new or modified rule should discourage malpractice suits arising from "buyer's remorse" over the terms of a fully negotiated settlement. The public policy and embedded court rules favoring mediation and settlement should coincide with the law upholding the finality of settlements and preclude challenges motivated by a client's change of heart after giving informed consent to settle. Doing away entirely with*

1. Thomas G. Wilkinson, TWilkinson@cozen.com, is a member of Cozen O'Connor's Legal Profession Services Practice Group. He is a past president of the Pennsylvania Bar Association and past chair of its Legal Ethics and Professional Responsibility Committee. He co-chairs the Civility in the Profession Committee. He is the co-editor of the Pennsylvania Ethics Handbook (5th ed. 2017).

2. Josh J.T. Byrne, JTByrne@MDWCG.com, is a shareholder at Marshall Dennehey Coleman Warner & Goggin and a member of the Professional Liability Department. He is the chair of the Pennsylvania Bar Association Professional Liability Committee, a co-chair of the Amicus Brief Committee, and a member of the Legal Ethics and Professional Responsibility Committee. He was lead counsel on the Brief For Amici Curiae the Pennsylvania Bar Association, the Philadelphia Bar Association and the Allegheny County Bar Association in Support of Affirmance in Khalil v. Williams in the Pennsylvania Supreme Court.

3. Rhonda M. Fulginiti, RFulginiti@cozen.com, is a member of Cozen O'Connor's Legal Profession Services Practice Group. She also serves as an Adjunct Professor at Widener University Delaware Law School. She is a member of the Professional Responsibility Committee of the Philadelphia Bar Association and the Professional Liability Committee of the Pennsylvania Bar Association.

Pennsylvania's long-standing rule foreclosing most legal malpractice lawsuits by dissatisfied litigants will both undermine the certainty of settlements and encourage speculative claims by former clients who later maintain they should have been paid more or should have paid less in settlement.

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Restricting former clients' remorse style malpractice claims after they have given informed consent to settle by no means provides lawyers with an "unjust holiday."

I. INTRODUCTION

The "*Muhammad* Doctrine" arose out of a 1991 decision, *Muhammad v. Strassburger*, which held that attorneys cannot be sued after a case has been settled, absent some type of alleged fraudulent conduct on the part of the attorney.[4] The *Muhammad* Doctrine supports the laudable public policy of reducing litigation and encouraging finality of settlements.

Pennsylvania courts have long held that a dissatisfied client cannot bring a cause of action for legal malpractice against an attorney when a case or controversy has settled absent proof of fraud or attorney error in providing advice on the legal implications of the settlement. "Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action."[5] *Muhammad* generally foreclosed claims based on dissatisfaction with the terms of a settlement: "[W]e foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies."[6]

In *Muhammad*, the Pennsylvania Supreme Court considered a legal malpractice claim stemming from dissatisfaction with the settlement of prior litigation.[7] The Court decided not to allow lawsuits against lawyers which are premised upon the client's subsequent claim that an agreed settlement was inadequate.[8] The Court reasoned that a cause of action for dissatisfaction with a settlement threatened the long-standing principle of encouraging settlements, since recognizing such a cause

4. Muhammad v. Strassburger, 587 A.2d 1346 (Pa. 1991), *reh. denied*, 598 A.2d 27 (Pa. 1991), *cert. denied*, 112 S.Ct. 196 (1991).
5. *Id*. at 1348.
6. *Id*. at 1351.
7. In *Muhammad*, parents brought suit against a hospital and several physicians after their infant son died in surgery. *Id*. at 1347. Following settlement negotiations, the plaintiffs eventually accepted a settlement offer of $26,500. The plaintiffs later conveyed to their counsel their dissatisfaction with the settlement amount. Their counsel so advised opposing counsel, prompting defendants to file a petition to enforce the settlement. After an evidentiary hearing, the court found that the plaintiffs had agreed to the settlement, ordered defendants to pay the settlement sum, and directed the prothonotary to mark the docket settled and discontinued. *Id*. at 1348. The plaintiffs retained new counsel and filed a malpractice suit against their previous attorneys. *Id*.
8. *Id*.

of action would cause lawyers to be "reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that 'could have been done, but was not.'"[9]

The only exception to the bar on legal malpractice cases following settlement recognized in *Muhammad* was fraud.[10] However, as the majority opinion in *Khalil* noted, over the last thirty years our courts have refined the *Muhammad* Doctrine, and where appropriate have recognized other limited exceptions to the general rule. Our courts have repeatedly recognized that *Muhammad* with its recognized exceptions has an important role to play in our jurisprudence.[11] For example, in 1997, in *Banks v. Jerome Taylor & Assocs*., the Superior Court noted:

> In cases wherein a dissatisfied litigant merely wishes to second guess his or her decision to settle due to speculation that he or she may have been able to secure a larger amount of money, *i.e.* "get a better deal" the Muhammad rule applies so as to bar that litigant from suing his counsel for negligence. If, however, a settlement agreement is legally deficient or if an attorney fails to explain the effect of a legal document, the client may seek redress from counsel by filing a malpractice action sounding in negligence.[12]

In 2020, in the non-precedential decision in *Charles Greenawalt v. Stanley Law Offices, LLP*, Judge Mary Jane Bowes, writing for a unanimous panel, relied on *Muhammad* in affirming the order of the trial court sustaining the preliminary objections of the Stanley Law Offices, LLP ("Stanley") to a legal malpractice claim arising out of a settled personal injury action.[13] As with other recent cases (including *Khalil*) attacking the continued viability of the *Muhammad* Doctrine, Greenawalt relied on the 1997 plurality decision of our Supreme Court, in *McMahon v. Shea*.[14] Those attacking the *Muhammad* Doctrine based on *McMahon* do so because the fractured opinion in *McMahon* is confusing and because of Justice Zappala's unnecessary dicta which stated "that the analysis of *Muhammad* is limited to the facts of that case."[15] However, the actual outcome of *McMahon* did not change the viability or applicability of *Muhammad* and its established exceptions.

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9. *Id*. at 1349.

10. The Court stated in this regard that "[i]n the event a litigant believes he has been fraudulently induced into settling, he has a right to file suit, *alleging with specificity* the acts that he claims are fraudulent. If his allegations meet the standard of specificity required by Pa.R.C.P. 1019(b), then he will be allowed to proceed." *Id*. at 1352.

11. Piluso v. Cohen, 764 A.2d 549 (Pa. Super. 2000), *appeal denied*, 793 A2d 909; Spirer v. Freeland & Kronz, 643 A.2d 673, 676 (Pa. Super. 1994) (Former client could not maintain legal malpractice action against his lawyer based on dissatisfaction with marital property settlement absent fraud by the lawyer to induce client to accept settlement even though settlement was achieved based on incomplete information due to failure of attorney to adequately investigate and perform discovery); Banks v. Jerome Taylor & Associates, 700 A.2d 1329, 1332 (Pa. Super. 1997); Martos v. Concilio, 629 A.2d 1037 (Pa. Super. 1993) (in the absence of fraud, client who was displeased with results of settlement agreement could not sue his attorney for malpractice); Silvagni v. Shorr, 113 A.3d 810, 816 (Pa. Super. 2015) ("Unless Silvagni had specifically pled, and could prove, Defendants fraudulently induced him into signing the Compromise and Release Agreement, or he could prove that Defendants failed to explain the effect of that settlement, or that the settlement was somehow legally deficient, Silvagni is barred from maintaining an action in negligence against Defendants."); McGuire v. Russo, 2016 Pa. Super. Unpub. LEXIS 4281 (Pa. Super. 2016); Kilmer v. Sposito. 146 A.3d 1275, 1280 (Pa. Super. 2016) (malpractice claim allowed where attorney failed to advise client correctly concerning election against her husband's will, effectively reducing her share of the estate).

12. Banks v. Jerome Taylor & Associates, 700 A.2d 1329, 1332 (Pa. Super. 1997).

13. Greenawalt v. Stanley Law Offices, LLP, 237 A.3d 1071 (Pa. Super. 2020) (non-precedential opinion), *see* Superior Court I.O.P. 65.37, petition for allowance of appeal denied, No. 25 WAL 2020 (Pa. 2021).

14. 688 A.2d 1179 (Pa. 1997).

15. *Id*. at 1182.

Greenawalt is only the latest decision from our Superior Court to address the limited applicability of *McMahon*.[16] In 2015, in *Abeln v. Eidelman*, the Superior Court stated:

> Appellant has greatly exaggerated the effect of the *McMahon* decision. While the *McMahon* majority purported to restrict *Muhammad* to its facts, we note that the *McMahon* "majority" was not even a plurality decision. Rather, *McMahon* was the product of an equally divided, six-member supreme court. In point of fact, the three-member "minority" concurred in the result, but specifically objected to limiting *Muhammad* to its facts. *McMahon*, 688 A.2d at 1182-1183. Consequently, *McMahon* did not serve to limit *Muhammad* to its facts, and *Muhammad* remains as controlling precedent until a true majority of the supreme court rules otherwise.[17]

As the majority opinion in *Khalil* recognized, the *Muhammad* Doctrine as it currently stands is not a total ban on legal malpractice cases after a settlement but includes three reasonable and well-accepted exceptions. What the *Muhammad* Doctrine continues to preclude, absent any of those exceptions, is a client settling an underlying dispute and then suing the attorney on the theory that she might have achieved better terms. It should be reasonable to assume that once a client has agreed to settle, a malpractice claim will not lie absent extraordinary circumstances. During the negotiation process, the client would have had the opportunity to review and suggest changes to any settlement agreement. A lawyer should be able to rely on a client's voluntary signature on that settlement agreement as a "stamp of approval" of the outcome. Once a client approves and executes a settlement and release, that should in the normal course be the end of the litigation. That is the security that the *Muhammad* Doctrine has provided to both parties and competent counsel over three decades.

II. AN EXISTENTIAL THREAT TO THE *MUHAMMAD* DOCTRINE

Recently, the Supreme Court of Pennsylvania accepted for review yet another challenge to the viability of the *Muhammad* Doctrine. In *Khalil v. Williams*, the Court agreed to consider two issues:

> (1) Should the Court overturn Muhammad v. Strassburger . . . which bars legal malpractice suits following the settlement of a lawsuit absent an allegation of fraud?
>
> (2) Did the Superior Court misconstrue the averments in [Appellant's] complaint and err as a matter of law when it held that [her] legal malpractice claims were barred by Muhammad v. Strassburger?[18]

The plaintiff in *Khalil* sued her former attorneys for malpractice following a settlement with her former condominium association, several upstairs neighbors, and her insurer, arising from water damage to her condo. The condo association later sued Khalil for unpaid fees, and Khalil brought counterclaims which interpleaded the defendants from her original suit. When she settled the first lawsuit, she asked her counsel whether the settlement release would impact her second suit, and allegedly was advised that the release would not impact the second suit. In fact, the release operated to bar Khalil's counterclaims in the second suit.[19]

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16. *See* Moon v. Ignelzi, 990 A.2d 64 (Pa. Super. 2009) (non-precedential opinion) ("With the stroke of the pen that prevented the Supreme Court in *McMahon* from rendering a majority opinion, Justice Zappala then went on to conclude 'that the analysis of *Muhammad* is limited to the facts of that case.'"). *See also*, Silvagni v. Shorr, 113 A.3d 810, 816 (Pa. Super. 2015).
17. 118 A.3d 452 (Pa. Super. 2015) (non-precedential opinion).
18. Khalil v. Williams, 260 A.3d 77 (Pa. 2021) (order), *aff'd in part, rev'd in part*, 278 A.3d 859 (Pa. 2022).
19. *Khalil*, 278 A.3d at 861-862.

Khalil brought suit against her former counsel asserting claims of: legal malpractice based on negligence; legal malpractice based on breach of contract; negligent misrepresentation; breach of contract; and fraudulent misrepresentation.[20] She further alleged that the version of the release she signed in her first case was later altered and that her signature was forged. The defendants moved to dismiss, arguing that the crux of her claims amounted to an effort to revisit the amount of the settlement.[21] The trial court granted the motion to dismiss, finding that the allegations were barred by *Muhammad*.[22]

The Superior Court affirmed in part and reversed in part.[23] The court first reasoned that:

> *Muhammad* applies to bar her claims sounding in negligence and contract against her former attorneys and their law firm. We, thus, find that the trial court did not err in dismissing the first four counts of her complaint.[24]

However, the Superior Court went on to reverse the trial court's dismissal of Khalil's final claim:

> Thus, we agree with Appellant that the issue raised in this matter—her allegations of fraud against her former attorneys—was not actually litigated (below) and, therefore, is not estopped from being raised in this matter. Accordingly, we . . . reverse . . . the trial court's dismissal of Appellant (sic) claim of fraudulent misrepresentation at count five.[25]

On appeal, the Supreme Court noted that the lower courts had focused solely on the allegations of select, fraud-based averments in Khalil's complaint in which she alleged that she did not sign the release at issue. The Court determined that none of her claims were barred by *Muhammad*.[26] The Court explained that the plaintiff was not merely challenging the settlement amount secured by her former counsel, but rather contending that the defendants provided incorrect legal advice regarding the terms of the release and also committed fraud.[27]

The majority opinion stated that addressing and disposing of the *Muhammad* Doctrine was unnecessary because it was not directly implicated in *Khalil*. The plaintiff in *Khalil* raised challenges to both the *Muhammad* Doctrine and the Superior Court's ruling on appeal, and since the high court addressed the latter question, it declined to consider the broader issue of the continued viability of the *Muhammad* Doctrine. One commentator explained:

> The majority ruled that because the plaintiff was alleging that her counsel was negligent in their legal advice and not challenging the value of the settlement, her claims were not precluded by the *Muhammad* Doctrine. The decision reversed in part the Superior Court's ruling—which largely hinged on the applicability of an exception in instances of fraud—and remanded the case to the trial court.[28]

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20. *Id*. at 864.
21. *Id*. at 864.
22. *Id*. at 867.
23. Khalil v. Williams, 244 A.3d 830 (Pa. Super. 2021).
24. *Id*. at 841.
25. *Id*. at 844.
26. *Khalil*, 278 A.3d at 871.
27. *Id*. at 872-73.
28. *See* Aleeza Furman, *'An Unjust Lawyers' Holiday': Pa. Justice Says Court Blew Chance to Rethink Rule in Malpractice Suit Over 'Bad' Settlements*, The Legal Intelligencer (July 20, 2022). *See also* Aleeza Furman, *'Get-Out-of-Jail-Free Card' or Good Public Policy?: Attorneys Divided Over Doctrine Barring Suits Over 'Bad' Settlements*, The Legal Intelligencer (July 22, 2022).

The majority's decision not to use *Khalil* as the vehicle to eliminate the *Muhammad* Doctrine was reasonable and justifiable. At first glance, it would appear that the *Khalil* Court merely relied on the fraud exception to the *Muhammad* Doctrine to revive the malpractice claim. But, although the outcome of *Khalil* was appropriate given the facts of that case, the concurring opinions of Justices David Wecht and Sallie Mundy conveyed a sentiment to discard the *Muhammad* Doctrine altogether. In fact, in his scathing 20-page concurring opinion, Justice Wecht went so far as to borrow from Justice Larsen's colorful dissent in *Muhammad*, which characterized the doctrine as a "deeply unjust Lawyers' holiday."[29] (Concurring Op. p. 4.)

Limiting a client's right to sue its lawyer after that client has given informed consent to a settlement by no means provides lawyers with an "unjust holiday." Nor does the *Muhammad* Doctrine, with its recognized exceptions, remotely amount to a "get out of jail free card" for lawyers. Rather, it promotes and preserves a well-founded principle that provides finality to sound settlements and helps to avoid burdensome, time-consuming and expensive "tail wagging the dog" litigation challenging the fairness of settlements made in good faith. The doctrine supports compromise and closure for litigants and operates to conserve finite judicial resources. Without the doctrine, competent and careful lawyers in the Commonwealth will be at risk of malpractice claims arising from former clients who decide, either on a whim or on the advice of a family member, friend or advisor, that the settlement was deficient in some respect.

There must be some reasonable and effective filter in classic "buyer's remorse" cases that avoids protracted and time-consuming litigation over the question whether a particular settlement was "fair" or adequate under the circumstances. Disregarding the *Muhammad* Doctrine out of hand would create a system where fully negotiated and well documented settlement agreements could be unraveled months or years later simply because the client comes to subjectively believe she should have held out for more (or less) money. The legal system is not a retail operation—the Supreme Court should not condone the "Amazoning" of the legal services industry where clients believe they can make a return of sale merchandise and get a store credit for the current retail price of their purchase. Thoroughly negotiated settlements must be given due deference and enforced absent strong countervailing circumstances.

In *Khalil*, the concurring opinion's eagerness to discard the *Muhammad* Doctrine entirely is also inconsistent with the principle of *stare decisis*. In the recent high profile U.S. Supreme Court decision of *Dobbs v. Jackson Women's Health Organization*, Justices Breyer, Sotomayor and Kagan noted in their dissenting opinion that:

> *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. It "contributes to the actual and perceived integrity of the judicial process." And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." N. Gorsuch, A Republic, If You Can Keep It 217 (2019).[30]

29. *Khalil*, 278 A.3d at 875 (*citing Muhammad*, 587 A.2d at 1352-53 (Larsen, J., dissenting)).
30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261-2 (2022) (internal citations omitted)..

The *Khalil* majority avoided undermining the *Muhammad* Doctrine and its exceptions by drawing a distinction between a challenge to an attorney's judgment in the value of the settlement as opposed to an attorney's failure to advise a client on the governing law. The majority favorably quoted from the concurring opinion in *McMahon v. Shea* by Justice Cappy joined by Justices Castille and Newman. Justice Cappy explained that:

> [W]hen counsel fails to advise a client as to the controlling law applicable to a settlement contract may be subject to a malpractice theory grounded in negligence. "In doing so, the court properly draws the legally relevant distinction between a challenge to an attorney's professional judgment regarding an amount to be accepted or paid in settlement, and a challenge to an attorney's failure to correctly advise his client about well-established principles of law in settling a case. This is a reasonable and justifiable distinction."[31]

The distinction highlighted by Justice Cappy remains reasonable and well justified. The majority correctly identified the *Khalil* fact scenario as one that fell outside the scope of the protection afforded by the *Muhammad* Doctrine, such that reversal of summary judgment on counts one through four and remand to the trial court were warranted. The fact that the Superior Court failed to properly characterize the nature of Khalil's claims does not justify doing away with appropriate respect for the sanctity of fully negotiated settlements bearing the client's approval.

Those eager to do away with the *Muhammad* Doctrine should carefully consider how parties, courts, mediators, professional liability insurers, and attorneys will be impacted by a new rule that would permit a party to undermine negotiated settlements based on a subjective, *post hoc* dissatisfaction with the agreed outcome. Parties settle to buy certainty, the peace of mind that an acrimonious dispute is finally over, that legal fees and costs will no longer be incurred, and that they may go on with their business and personal lives without the distraction, time and resources arising from tagalong litigation where they may be called to respond to burdensome document discovery or to appear as deposition or trial witnesses in a malpractice setting where the underlying case will be revisited under the "case within a case" context.[32]

Because the issues raised by the *Khalil* challenge to the *Muhammad* Doctrine were of general importance to all Pennsylvania lawyers—plaintiff and defense alike—the Pennsylvania Bar Association, the Philadelphia Bar Association, and the Allegheny County Bar Association filed a joint amicus brief in the Supreme Court. That brief (which was cited by the Supreme Court in its majority opinion[33]), stressed that *Muhammad* "serves an important public policy."[34] The amici contended that, because the Superior Court concluded that Khalil's action sounded in fraud, which is an exception to the *Muhammad* Doctrine, *Muhammad* did not apply to the facts of the *Khalil* case, and that there was no "compelling need" for the Supreme Court to reassess *Muhammad*.[35]

The Bar amici further argued that, "[t]he Superior Court correctly determined that the present action [*Khalil*] sounds in fraud rather than legal malpractice and re-

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31. *Khalil*, 278 A.3d at 866, *quoting McMahon*, 688 A.2d at 1183 (Cappy, J. concurring).

32. A legal malpractice claimant must prove that, but for the attorney's negligence, the plaintiff would have prevailed in the underlying action and that the attorney she retained was negligent in prosecuting or defending that underlying case. The plaintiff must prove actual loss as a result of the negligence. *See* Poole v. W.C.A.B. Warehouse Club, Inc., 810 A.2d 1182, 1184 (Pa. 2002); Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1030 (1998).

33. *Khalil*, 278 A.3d at 870, n.12.

34. Bar Amicus Brief, 2021 WL 6133712 (PDF) at 4.

35. *Id*.

manded the action to the trial court on that basis."[36] They went on to discuss the long-standing principle of *stare decisis* and urged the Supreme Court not to overturn the established precedent of *Muhammad*. "Here there is no need to overturn established precedent because the underlying matter was properly decided on a basis other than *Muhammad* and even if *Muhammad* were applied, it would not serve to bar the underlying action."[37]

III. IS THERE A FAIR MIDDLE GROUND BETWEEN ENCOURAGING SETTLEMENTS AND ALLOWING MALPRACTICE CLAIMS CHALLENGING SETTLEMENTS?

Judges routinely urge parties to settle. Federal judges often refer cases to court annexed mediation by U.S. magistrates.[38] Lawyers are encouraged by the courts to serve as settlement masters. The Philadelphia Court of Common Pleas, for example, trains attorneys to serve as judge *pro tems* in the Civil Division and in the Commerce Court Program. Many counties have mandatory mediation programs.[39] Judges also occasionally direct the parties to retain and pay for private mediators, often retired judges from the same judicial district, who charge the parties on an hourly basis to conduct mediations. This practice sometimes materially increases the cost of litigation and can render a lower value case unprofitable for the law firm. This article does not challenge that practice; rather it simply points out the reality that the courts (and certain judges) strongly encourage settlement to reduce caseloads. Increased settlements also reduce the costs associated with assembling and paying jurors. The law governing the pursuit of claims arising from settlements that are the product of mediation with a distinguished neutral should reflect a corresponding respect for the process and the finality of the settlements generated with the court's blessing.[40]

The *Muhammad* Doctrine is also crucial to our legal system because statistics show that 98 percent of federal cases resolve prior to trial.[41] State court cases also resolve by motion or settlement in well over 90 percent of cases.[42] A rule that would impose no material obstacle to the pursuit of malpractice cases following settlement will encourage "settle and sue" legal malpractice actions.

In a recent article, professional liability attorney Charlene S. Seibert addressed the lack of fairness in these "second bite" cases. In discussing Judge Wecht's concurrence in the *Khalil* decision, Ms. Seibert noted that:

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36. *Id*. at 15.
37. *Id*. at 17.
38. *See*, 28 U.S.C. § 636(c), Fed. R. Civ. P. 72, and Local Rule 72.1 of the United States District Court for the Eastern District of Pennsylvania.
39. *E.g*., Allegheny Cty., Local Rule 212.7. Mandatory Mediation.
40. Abraham Lincoln wisely counseled lawyers to "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." Lincoln Notes for a Law Lecture (July 1, 1850).
41. *See*, https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2021/03/31.
42. *See*, The Unified Judicial System of Pennsylvania, https://www.pacourts.us/news-and-statistics/research-and-statistics. Indeed, as Justice Wecht observed in his concurring opinion in *Khalil*, nearly 30,000 cases settled in Pennsylvania in the year 2020. (Concurring Op. p. 3, n.4.) He further noted that there were far more settlements than default judgments, arbitration board decisions, jury trials and non-jury trials combined. These figures were employed to buttress the contention that there is "no reason to believe that special rules preemptively encouraging settlements are needed, especially when they come at the cost of denying some litigants redress for their injuries." *Khalil*, 278 A.3d at 874, n.4. The flip side of that argument is that the large number of settlements provides ample fodder for a large number of malpractice claims contending that the settlements should have produced a more favorable outcome.

> It is true, as Wecht points out, that the lawyer-tortfeasor is a distinct party against whom an independent breach must be proved, but this just adds a different layer of litigation. More often than not, these cases come down to the merits of the underlying litigation, requiring the lawyer to essentially "stand in the shoes" of the underlying defendant. And, as our jurisprudence in Pennsylvania makes clear, the plaintiff must prove that "but for" the conduct of the lawyer, the plaintiff would have received a judgment in the underlying litigation, with the measure of damages constituting the amount of the "lost judgment." (citations omitted). This is indeed the precise injury in the underlying action, and thus requires re-litigation of the case, but this time with a different lawyer, judge and jury. The circumstances of re-trying the case within a case naturally lends itself to disgruntled litigants attempting to take a second bite. . . . The risk of allowing these cases to slide into discovery is evident—it encourages a follow-on legal malpractice lawsuit for the disgruntled litigant who loses their case, giving that litigant a second bite at an entirely new (and often lengthy) discovery process.[43]

There is a real danger in allowing legal malpractice actions to proceed on the basis that plaintiff and/or plaintiff's counsel believes the underlying action was not properly evaluated by the attorney defendant.

As Ms. Seibert explained in her article, every case is prepared and tried differently. Any experienced lawyer knows that trial outcomes in tort cases can vary substantially depending on, among other factors, the composition of the jury, the jurisdiction and the advocacy. Some clients are more eager to settle for personal or financial reasons, some are more risk averse, and some are more interested in having their day in court or securing some form of apology than settling on terms recommended by their lawyer. Experienced lawyers may evaluate the likelihood of a favorable verdict or judgment and the anticipated award in a case much differently. Even after a thorough and thoughtful evaluation, an experienced trial lawyer may well be very favorably or unfavorably surprised by the jury's verdict. There is seldom a major jury case where liability and damages are disputed where the outcome and verdict value can be estimated with any level of certainty. The lawyer provides his or her best calculus to the client so that the client is well positioned to make an informed judgment whether to settle and, if so, for how much. "The courts have espoused concern about exposing an attorney to hindsight reflections by a disappointed client about the amount of a settlement. Rarely does litigation produce a result that is satisfactory to both sides. Hindsight may show the wisdom of a settlement that was rejected or not pursued."[44]

Two trial lawyers may weigh the factors leading to a recommendation to settle differently, but reach the same conclusion concerning a reasonable range for settlement. Virtually any trial lawyer could argue that a more effective or better credentialed medical expert, scientific expert or damage expert could have been retained and thereby boosted the settlement or verdict value of a plaintiff's case.

> There are practical concerns whether an attorney should be liable for an allegedly inadequate settlement. Often, the amount of a compromise is an educated guess of the amount that should be recovered at trial, and what the opponent was willing or able to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a 'reasonable settlement,' a concept that involves a wide spectrum of consideration and broad discretion.[45]

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43. Charlene S. Seibert, *The Jaundiced Eye and the Fight to Prevent Inherent Speculation in Legal Malpractice Cases*, The Legal Intelligencer (Oct. 6, 2022).

44. Ronald E. Mallen, *Legal Malpractice*, Vol. 4, §33.84 (2020 Ed.).

45. *Id.*, §33.89, *citing* Filbin v. Fitzgerald, 211 Cal.App. 4th 154, 149 Cal. Rptr. 3d 422 (1st Dist. 2012), *review denied* (Mar. 13, 2013); Barnard v. Langer, 109 Cal. App. 4th 1453, 1 Cal. Rptr.3d 175 (2d Dist. 2003).

Additionally, Pennsylvania is quite liberal in allowing lawyer "experts" to testify in the legal malpractice context. Virtually any experienced lawyer with an opinion is free to issue a certificate of merit or an expert report in support of a malpractice claimant. There is no vetting process for certificates of merit in legal malpractice cases. Pennsylvania does not have a court endorsed trial lawyer certification similar to the civil and criminal trial law certifications recognized in neighboring New Jersey and other states. There is a dearth of reported cases disallowing purported experts on the standard of care in legal malpractice cases. Indeed, it is not uncommon for such expert witnesses to have had no experience either handling legal malpractice cases or in serving on any Disciplinary Board hearing committee or bar association committee that renders ethics guidance to lawyers with professional responsibility inquiries.

In the medical professional liability context, there is a requirement that the expert specialize or be certified in the particular practice area at issue. The certificate of merit requirement in the medical malpractice context provides some assurance that the claim is supported by a qualified medical expert in the same specialty as the claim of malpractice. No such requirement exists in the context of legal malpractice claims. The Supreme Court has recognized the significance of this prerequisite in the medical malpractice context under Pa.R.C.P. 1042.3. Because no such requirement exists for legal malpractice actions, the certificate of merit requirement serves as an ineffective and inadequate filter to weed out meritless claims in legal malpractice cases.

Notably, there is no mandate that the attorney expert in a case arising over a failed litigation outcome ever have graced a courtroom or litigated a similar dispute. There is no requirement that malpractice in the corporate setting be supported by an experienced corporate lawyer's certificate of merit. Moreover, it is not uncommon for attorneys retained as experts to quote extensively from the Rules of Professional Conduct and conclude that the defendant lawyer committed a rule violation and *ipso facto* violated the governing standard of care, without recognizing that the Rules do not express the standard of care for purposes of a malpractice suit in Pennsylvania.[46] Indeed, the Preamble to the Rules expressly disclaims that the Rules serve as the standard of care. Specifically, the "Scope" section states:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, a violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. . . . They are not designed to be a basis for civil liability. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transactions has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such a duty.

Second, trial judges do not always serve as effective gatekeepers of lawyer "expert" opinions in this context. Some will allow experts to opine on the standard of care as applied to the facts, and some will allow experts to testify concerning the law notwithstanding the recognized rules that the judges instruct the jury on matters of law.[47]

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46. David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, St. Mary's J. on Legal Malpractice & Ethics Vo. 2, No. 1 (2012).

47. *See* Storm v. Golden, 538 A.2d 61 (Pa. Super. 1988), Hoyer v. Frazee, 470 A.2d 990 (Pa. Super. 1984); *see also* Annot., 14 A.L.R. 4th 170 (1982).

Third, lawyer experts do not need to be admitted to practice in this jurisdiction to opine concerning the lawyer's compliance with the governing standard of care. Although there appears to be no precedential law in Pennsylvania on the subject, the certificate of merit rule is broad enough that a lawyer with no Pennsylvania credentials at all could conceivably be accepted as an expert in a Pennsylvania legal malpractice case. Indeed, there is no requirement that the expert ever have practiced law in the Commonwealth.

Therefore, in the event the *Muhammad* Doctrine is dismantled, Pennsylvania's lax expert witness standards, combined with the ill-considered precedent allowing malpractice cases to also proceed on separate implied "breach of contact" theories,[48] raise the specter of frequent challenges to settlements reached in good faith by competent counsel with the client's informed consent.

IV. THE UNDERLYING PRINCIPLES OF *MUHAMMAD* ARE BEING FOLLOWED IN OTHER JURISDICTIONS

Nor is Pennsylvania as much of an outlier in deference to settlements as the concurring opinion in *Khalil* suggests. Other jurisdictions also uniformly encourage settlements and have judicially created doctrines supporting the finality of settlements and discouraging most "settle and sue" malpractice claims.

For example, in New Jersey, malpractice claims against lawyers are precluded when it can be established that the client was informed of the terms and implications of a settlement and there was a record created of that discussion. *See, Guido v. Duane Morris, LLP*.[49] In some cases, this can be done in open court with the client testifying that (1) counsel explained the settlement's terms and the client understands them; (2) the client understands any potentially problematic terms; and (3) the client considers the terms of the agreement fair, adequate and satisfactory.[50]

Additionally, in California, the courts have refused to engage in "speculation" regarding the adequacy of settlements. The so-called "settle and sue" cases require a certain standard of proof in order to find that a lawyer committed malpractice in negotiating a settlement on behalf of a client. Like any negligence claim filed in that state, a claim of malpractice against an attorney requires proof of four elements: (1) a duty by the lawyer "to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the [lawyer's] negligence."[51] Although there is some confusion over the specific standard of proof ("preponder-

48. *See* P. Troy and P. Rogers, *'When Good Settlements Become Bad Lawsuits – Part I'*, Pa. Bar News (July 27, 2020).

49. 995 A.2d 844, 852-853 (N.J. 2010). The plaintiff's trial bar in New Jersey expressed a similar sentiment in an amicus brief presenting a similar issue. In Guido v. Duane Morris, LLP, 995 A.2d 844 (N.J. 2010), the Trial Attorneys of New Jersey contended that the Appellate Decision in *Guido* "significantly erodes the finality both litigants and attorneys expect from the settlement of litigated matters. Further, the attorneys of this State are unduly prejudiced when, despite assurances of a client's understanding of a settlement, they face exposure to subsequent legal malpractice claims when a client subsequently claims to have misunderstood the settlement's terms and/or its effect." (Trial Attorneys *Amicus* Brief at 5) They further argued that "attorneys . . . are put in the difficult position of having to disprove subjective allegations. In most circumstances it is difficult to prove what another person did or did not understand." *Id*. at 12.

50. Puder v. Buechel, 874 A. 2d 534, 549 (N.J. 2005).

51. Osornio v. Weingarten, 124 Cal.App.4th 304, 319 (Ct. App. 2004).

ance of the evidence"or "legal certainty"), it is clear that the alleged errors of a lawyer must be specifically proven in order for a client to recover additional monies.[52]

The refusal to permit legal malpractice actions based on speculation concerning settlement is consistent with the state of Pennsylvania law even preceding *Muhammad*. Our courts have repeatedly refused to permit legal malpractice cases based on speculation regarding settlement. *See, e.g., McCartney v. Dunn & Conner, Inc.*, "In any event, this Court has not allowed legal malpractice actions based upon speculations regarding settlement negotiations."[53] Similarly, in *Mariscotti v. Tinari*, the Superior Court wrote:

> Her only contention is that she would have been in a better bargaining position if she had known the value of his stock. With this knowledge, she suggests, she *may* have been able to achieve a better settlement. Her claim, it seems obvious, is based on pure speculation. Whether she could have obtained a better settlement is anyone's guess. How much better, of course, is even more speculative. These issues cannot properly be left to the surmise of a jury. Because these issues are entirely speculative, they defeat any cause of action for malpractice of the attorney negotiating the settlement.[54]

The reality in most jurisdictions is that public policy dictates that the sanctity of settlements is respected absent extraordinary circumstances, and that the competent attorneys who negotiate them should be protected from contrived malpractice claims that challenge the lawyers' sound judgment concerning appropriate settlement terms and dollar amounts. Sound public policy and legal precedent dictate that a doctrine evincing respect for negotiated settlements, along with recognized exceptions, should be maintained, and legal malpractice actions following settlement of an underlying action should be precluded except where: (1) the settlement agreement was legally deficient; (2) there was fraud in the inducement of the settlement; and/or (3) the consequences of the legal agreement were not fully explained to the client.[55] Indeed, the Supreme Court in *Khalil* has done everyone a favor concerning these issues by clearly articulating the current state of the doctrine and reviewing its recognized exceptions. The authors recognize that some compelling fact pattern may later emerge for one or more additional exceptions to the general rule, but our courts have proved adept at recognizing where the limited exceptions to the rule should lie.

V. POINTERS FOR PRACTITIONERS

For those who would wish to avoid "buyer's remorse" claims by clients seeking the proverbial "second bite at the apple" in the guise of a malpractice suit, there are some recognized practice pointers. First, the settlement (and all of its material elements) should be documented, including offers and demands, and confirmation that the material provisions of the agreement and effect of the releases have been reviewed with the client.[56] Second, treat clients with courtesy and respect, even

52. Masellis v. Law Office of Leslie F. Jensen, 2020 Cal. App. LEXIS 564. *See also*, Orrick Herrington & Sutcliffe, LLC. v. The Super. Ct. of the City and Cty. Of San Francisco, 107 Cal.App.4th 1052, 1058 (Superior Court 2003) (plaintiff "produced no evidence showing his ex-wife would have settled for less than she did, or that following a trial, he would have obtained a judgment more favorable than the settlement"); Marshak v. Ballesteros, 72 Cal.App. 4th 1514, 1519 (1999).

53. 563 A.2d 525, 530 (Pa. Super. 1989).

54. 485 A.2d 56, 58 (Pa. Super. 1984).

55. McGuire v. Russo, 159 A.3d 595 (Pa. Super. 2016).

56. P. Troy and P. Rogers, *When Good Settlements Become Bad Lawsuits – Part 2*, Pa. Bar News (Aug. 17, 2020).

when the lawyer fundamentally disagrees with the client or the client is exceptionally difficult. Of course, those clients who are difficult, change their minds and moods frequently, and have taken issue with the lawyer's advice during the course of the representation are most often the same former clients who will later claim that they were "coerced" into accepting unfavorable settlement terms. Third, when there is an opportunity, make a record in court (or in an ADR setting, if possible) confirming that the settlement and its terms are satisfactory and fully understood by the client. Sending a letter to the client confirming the settlement, and having the client execute that letter, is a good practice to help ward off settle and sue claims. However, if it is not practical for the client to execute the letter, at least the lawyer will have recounted the material events and considerations leading to the settlement and the client's agreement that the settlement is fair, adequate and satisfactory.

Unfortunately, what the concurring opinion in *Khalil* offers in lieu of any limiting principle, is to invite every legal malpractice claimant to "convinc[e] the jury that a non-negligent attorney would have achieved a different result, perhaps by negotiating a better settlement or perhaps by proceeding to trial and securing a verdict more favorable than the settlement was."[57] In other words, no deference at all would be accorded to negotiated settlements, whether or not secured with the aid of the presiding judge or a seasoned mediator.[58] At the outset, lawyer and law firm defendants would seldom be in a position to move to dismiss (or file preliminary objections in state court) to a malpractice complaint so long as the complaint pled that the settlement was insufficient by reason of the lawyer's failure to satisfy the governing standard of care. At trial, all factors and considerations would be on the table for the jury to assess in deciding whether the "true" settlement number should have been "X" instead of "Y" as agreed in compromise of the dispute. "Experts" on case evaluation would be called to testify that "Y" was clearly too much or too little because a similar case in a neighboring county generated a larger or smaller verdict and thereafter settled on appeal for a figure closer to "X" than "Y." In the end, no one will be surprised by the talismanic precision of the jury's verdict awarding the claimant the difference between "X" and "Y" in malpractice damages.

VI. CONCLUSION

The adage "be careful what you wish for" is apt in any discussion of adopting a new rule in Pennsylvania that would permit legal malpractice claims arising from a wide array of agreed settlements. Eradicating all vestiges of the *Muhammad* doctrine will make some cases harder to settle or discourage lawyers from urging their clients to settle in certain cases. It will present more difficult and subjective case evaluation issues for courts and juries charged with assessing whether a client should have been counseled to press for more favorable settlement terms. It will make it quite difficult to secure the dismissal of contrived "buyer's remorse" cases, which are routinely dismissed now, either on preliminary objections in state courts

57. *Khalil*, 278 A.3d at 881 (Wecht, J., concurring).

58. Under Pennsylvania law, the parties are precluded by confidentiality rules from calling the mediator (or the judge) who presided over settlement discussions leading to a settlement. "Mediation communications," verbal or nonverbal, are privileged, and disclosure "may not be required or compelled through discovery or any other process," and may not be admitted as evidence in any action or proceeding. 42 Pa.C.S. §5949. As a result, the one arguably neutral participant in the mediation in a position to confirm that the client conveyed fully informed consent to the settlement terms is effectively sidelined from confirming what she witnessed in a subsequent malpractice action.

or on motions to dismiss in federal courts applying Pennsylvania state law. It will run up the cost of the defense of malpractice cases predicated upon agreed settlements. It will place a target on the backs of many competent and careful lawyers who routinely settle cases with the client's informed consent. The bigger the case, the more willing clients and counsel will be to challenge the reasonableness of the settlement amount or other material terms as inconsistent with the governing standard of care, since even the prospect of a modest settlement of the malpractice claim may be material enough from a financial standpoint to justify pursuit of a claim. To the extent enforcement of the *Muhammad* Doctrine does not in every case ensure a fair and just opportunity for clients to pursue meritorious malpractice claims against their counsel, serious consideration should be given to appropriate modification of the doctrine rather than its outright abandonment.