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POST-SETTLEMENT MALPRACTICE: UNDOING THE DONE DEAL

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Clients voice their approval to mediators and judges as a settlement agreement is reached. A release is signed, the file is closed, and from the lawyer's perspective, another case ends. The settled case joins an overwhelming majority of civil cases that are resolved in pretrial settlement.[1] Buried within this figure, however, is a more troubling statistic: over twenty percent of civil cases will be resurrected in the form of malpractice actions initiated by dissatisfied clients.[2] In those instances, and for various reasons substantiated by expert opinions, the client will charge that they could have received a better result in the settlement even though the client knowingly and willingly agreed to end the case.

In every state except Pennsylvania, a client is permitted to proceed with the theory that his attorney negligently negotiated an agreement despite the fact that the client consented to settlement.[3] In *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*,[4] the Pennsylvania Supreme Court determined that an attorney is immune from malpractice based on negligence where the client consented to settle.[5] Court decisions after *Muhammad*, however, have uniformly rejected immunity for

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1. *See* JOHN S. MURRAY ET AL., NEGOTIATION 147 (1996) (stating that almost 95% of cases filed in court are settled).

2. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1739 (1994). Mr. Ramos conducted a survey which concluded that 21.4% of all malpractice claims involve the activity of settlement and negotiation. Mr. Ramos contrasts his study to an ABA report that claims only 8% of malpractice claims involve settlement and negotiation.

3. *See* Ziegelheim v. Apollo, 607 A.2d 1298, 1304 (N.J. 1992) ("Like most courts, we see no reason to apply a more lenient rule [regarding malpractice] to lawyers who negotiate settlements.").

4. 587 A.2d 1346 (Pa. 1991).

5. *See id.* at 1348.

the attorney, permitting post-settlement malpractice actions to proceed in the same manner as the prototypical malpractice case.[6]

This Article analyzes the Pennsylvania Supreme Court's decision to bar malpractice lawsuits based on settled cases. This Article then contrasts the opinion with the contradictory majority rule in other states. Next, this Article addresses the difference between mainstream malpractice actions and those malpractice actions arising from the negotiation of settled cases. Distinguishing these actions results in a critical analysis which demonstrates that the majority of courts do not reconcile the vast differences among the cases, a failure that threatens to impugn the negotiation process. Finally, this Article offers a practical remedy to attorneys confronting emerging malpractice exposure by advocating that the judiciary recognize the client contributory/comparative fault defense, coupled with a proposal that attorneys alter their pre-settlement procedure to include obtaining a "pre-settlement contract" from the client. By routinely requiring that the client and counsel enter into such a detailed "contract," an attorney can inform the client about the ramifications of settlement while effectively marshaling a defense to a later post-settlement malpractice claim.[7]

I. *MUHAMMAD* AND ITS SUCCESSORS

Conventional wisdom dictates that attorneys settle cases effectively, as an estimated ninety-five percent of civil cases are resolved by settlement.[8] Yet, an emerging trend of post-settlement malpractice claims threatens the integrity of the settlement negotiation process. While malpractice actions are on the rise,[9] most attorneys reasonably believed they were insulated from liability because the client had consented to settlement, and because there was no affirmative wrongdoing by the attorney.[10] Because

6. *See* cases cited *infra* note 28. The Pennsylvania courts, however, have continued to uphold the *Muhammad* decision. *See, e.g.*, Spirer v. Freeland & Kronz, 643 A.2d 673, 676 (Pa. Super. Ct. 1994); Martos v. Concilio, 629 A.2d 1037, 1039 (Pa. Super. Ct. 1993); Miller v. Berschler, 621 A.2d 595, 598 (Pa. Super. Ct. 1993).

7. This Article defines the term "post settlement claim" as a suit initiated by a former client against his counsel directly relating to the outcome obtained in settlement.

8. *See* MURRAY, *supra* note 1, at 147.

9. *See* Ramos, *supra* note 2, at 1659-61 (stating that malpractice lawsuits are becoming increasingly widespread, yet statistical data on malpractice is difficult to gather because insurance companies, lawyers, and the ABA remain reluctant to release information); *see also* Katherine Bishop, *California Lawyers Must Take Refresher Courses*, N.Y. TIMES, Aug. 9, 1991, at B7 (reporting that in California, one in every five lawyers has been sued for malpractice).

10. *See* Joyce K. Baker-Selesky, Commentary, *Negligence in Failing to Settle Lawsuits: Malpractice Actions and Their Defenses*, 20 J. LEGAL PROF. 191, 207 (1996) (stating that

so many factors influence a client's decision to settle,[11] and because so many individuals, such as judges and mediators, are a part of the process, it would appear fundamentally unfair to hold the attorneys solely responsible for such malpractice claims. This is buttressed by a majority viewpoint which looks unfavorably upon malpractice claims that require the judiciary to infiltrate the negotiation process, a process traditionally viewed as immune from judicial scrutiny.

Balancing these competing interests, the Pennsylvania Supreme Court barred such malpractice actions to foster the negotiation and settlement process.[12] In *Muhammad*, the Pennsylvania Supreme Court held that, absent fraud, an attorney is immune from suit by a former client dissatisfied with a settlement that the former client agreed to enter.[13]

Pamela and Abdullah Muhammad sued the firm of Strassburger, McKenna, Messer, Shilobod and Gutnick for malpractice arising from the settlement of an underlying medical malpractice suit.[14] In the underlying action, the Muhammads sued the physicians and hospital that performed a circumcision on their son who died as a consequence of general anesthesia used during the procedure.[15]

The Muhammads retained the Strassburger law firm.[16] The physicians and hospital offered to settle the malpractice claim for $23,000, which was subsequently increased to $26,500 at the suggestion of the trial court.[17] The Muhammads accepted the settlement offer.[18] The Muhammads later grew dissatisfied with the amount received in settlement and in-

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some courts have not held lawyers liable where the lawyers exercised professional judgment).

11. *See* United States v. White, 650 F. Supp. 904, 906 (W.D.N.Y. 1987) (citing a variety of factors leading to settlement, including the following: the amount involved in this particular case, the seriousness of the problem, and the experience of the attorney), *rev'd*, 853 F.2d 107 (2d Cir. 1988); *see also* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 322 (1991) (arguing that relevant factors include: "(1) the nature of the parties and the relationships between them; (2) their arrangements for paying their attorneys; (3) the existence or absence of insurance to pay the damages and the costs of litigation; and (4) the division of settlement authority between defendants and their insurers"). *See generally* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that the financial resources available to the parties is generally the main factor taken into consideration when determining whether to settle).

12. *See* Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1351-52 (Pa. 1991).

13. *See id.* at 1348.

14. *See id.*

15. *See id.* at 1347.

16. *See id.*

17. *See id.*

18. *See id.*

structed the Strassburger law firm to communicate this discontent to defense counsel.[19] An evidentiary hearing ensued where the court upheld the settlement agreement, reasoning that the Muhammads agreed to the settlement amount and, thus, there existed a binding and enforceable contract.[20]

Unable to reopen the medical malpractice proceeding, the Muhammads initiated a claim against the Strassburger law firm alleging legal malpractice, fraudulent misrepresentation, fraudulent concealment, nondisclosure, breach of contract, negligence, emotional distress, and breach of fiduciary duty.[21] The court dismissed the fraud counts because the Muhammads had not pled fraud with specificity.[22] Surprisingly, the court then barred the Muhammads from proceeding with their remaining negligence claim against the Strassburger firm, based on articulated public policy encouraging civil litigation settlement. In granting immunity, the court wrote:

> [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. To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system.[23]

The court emphasized that this immunity extends to specific cases where a plaintiff agreed to settlement in the absence of fraud by the attorney.[24] This is distinguished from the instance when a lawyer knowingly commits malpractice, conceals the wrongdoing, and convinces the client to settle in order to cover-up the malpractice. According to the court, in this instance, the attorney's conduct is fraudulent and actionable.[25]

In a stinging dissent, Justice Larsen lamented that the majority established a "LAWYER'S HOLIDAY" by barring legal malpractice actions for negligence committed in the negotiation of civil case settlements.[26] Contrasting the new declaration of immunity with the liability exposure of other professionals, Justice Larsen reasoned: "If a doctor is negligent

19. *See id.*
20. *See id.* at 1348.
21. *See id.* & n.1.
22. *See id.* at 1348.
23. *Id.* at 1351.
24. *See id.* "It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement." *Id.*
25. *See id.*
26. *Id.* at 1352.

in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client as to settlement, the client pays."[27] *Muhammad* has suffered widespread criticism and is uniformly rejected in every reported opinion reviewing post-settlement legal malpractice litigation.[28]

For example, in *Ziegelheim v. Apollo*,[29] the New Jersey Supreme Court rejected *Muhammad*, permitting a client to sue his attorney even though the client agreed to a settlement amount.[30] Apollo represented Miriam Ziegelheim in a divorce action.[31] The only issues litigated at the trial court level were payment of alimony, identification of marital property, and equitable distribution of that property.[32] After reaching an agreement on these issues, both parties testified in open court "that they understood the agreement, that they thought it was fair, and that they entered into it voluntarily."[33]

After consummation of the agreement, Mrs. Ziegelheim sued Apollo for legal malpractice,[34] contending that he failed to discover information about her husband's assets which would have increased the amount she might have received in settlement.[35] The trial court granted summary judgment for Apollo, holding that Mrs. Ziegelheim entered into the settlement agreement voluntarily with every indication that she clearly understood the terms of the agreement.[36] The appellate division affirmed.[37]

The New Jersey Supreme Court reversed, reasoning that the duty to provide reasonable knowledge, skill, and diligence provides the basis for

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27. *Id.* at 1352-53.

28. *See* Prande v. Bell, 660 A.2d 1055, 1063-64 (Md. Ct. Spec. App. 1995) (preventing attorneys from relying on clients' settlement as a defense to malpractice); Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195, 199-200 (Conn. 1994) (emphasizing a client's right to seek redress after relying on the professional advice of an attorney when accepting settlement); Baldridge v. Lacks, 883 S.W.2d 947, 952 (Mo. Ct. App. 1994) (rejecting the approach established in *Muhammad* because it has the effect of shielding attorneys from civil liability absent a showing of fraud); Malfabon v. Garcia, 898 P.2d 107, 109 (Nev. 1995) (rejecting *Muhammad* and allowing a simple negligence standard for a suit against an attorney); Ziegelheim v. Apollo, 607 A.2d 1298, 1304 (N.J. 1992) (rejecting *Muhammad* and requiring attorneys to render competent advice).

29. 607 A.2d 1298 (N.J. 1992).

30. *See id.* at 1304.

31. *See id.* at 1300.

32. *See id.*

33. *Id.* at 1301.

34. *See id.*

35. *See id.* at 1300.

36. *See id.* at 1302.

37. *See id.* at 1303. The appellate court affirmed the trial court's grant of summary judgment on all counts but one. *See id.* It found a dispute of material fact did exist over whether the attorney was negligent in advising Ms. Zegelheim to accept the settlement offer. *See id.*

a legal malpractice action even when the client consents to settlement of the underlying civil action.[38] In addition to Zeigelheim's consent, the family court judge's proclamation that the settlement was "fair and equitable" did not preclude the legal malpractice action.[39] The Supreme Court added:

> The fact that a party received a settlement that was "fair and equitable" does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent. Thus, in this case, notwithstanding the family court's decision, Mrs. Ziegelheim still may proceed against Apollo in her negligence action.[40]

The New Jersey Supreme Court tempered its decision by qualifying that it did not intend to "open the door" to legal malpractice suits by every former client who had previously agreed to civil suit settlement.[41] The court cautioned that in order to state this genre of legal malpractice, a former dissatisfied client must specify, with particularity, the alleged malpractice.[42] Hence, a general plea by dissatisfied clients who later decide they should have obtained more money in settlement will not be successful.[43] The court also reiterated that an attorney will not be held to an unrealistically infallible standard of securing the maximum outcome in settlement:[44] an attorney's duty remains one of reasonable skill and knowledge.[45]

While most courts are expeditious in determining that an attorney is not absolutely immune from legal malpractice actions when the client consents to settlement, they are also uniform in expressing a desire to foster protection over the negotiation process. In *Prande v. Bell*,[46] plaintiff Luisa Prande sued her former attorneys, John T. Bell and Elbert Shore (the Bell firm), alleging they negligently settled claims arising from her motor vehicle personal injury action.[47] The Bell firm represented the

38. *See id.* at 1303-04, 1306.

39. *Id.* at 1305.

40. *Id.*

41. *Id.* at 1306.

42. *See id.*

43. *See id.*

44. *See id.* "[W]e acknowledge that attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice . . . cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice." *Id.*

45. *See id.*

46. 660 A.2d 1055 (Md. Ct. Spec. App. 1995).

47. *See id.* at 1056-57.

plaintiff in two automobile accidents.[48] In the first lawsuit, Prande accepted $7,500 to settle her personal injury suit in which she signed a release.[49] According to the Bell firm, she verbally agreed to settle the second lawsuit for $3,000, but refused to sign the release.[50]

Defendant Wishart then filed a motion to enforce the settlement.[51] The plaintiff's attorney informed Ms. Prande that she should attend the hearing "'in the event that you seek or wish to contest the matter of whether we had your authorization to accept a settlement.'"[52] Prande failed to appear, and the court granted Wishart's motion, dismissing with prejudice the personal injury lawsuit.[53] Prande then initiated a legal malpractice action against the Bell firm, claiming that it "negligently advised [her] to accept unreasonable and inadequate settlements of her claims."[54] The lower court granted summary judgment for the Bell firm, ruling that the plaintiff merely wished "to relitigate the matters that have already been decided and resolved" by settlement, and concluding that permitting the legal malpractice action to proceed to trial would result in never-ending litigation.[55]

The appellate court reversed, reasoning that when the client voluntarily accepts a settlement, she does not absolve her attorney from liability for negligence committed during settlement negotiation.[56] Rejecting *Muhammad*'s hard and fast rule, the court determined that the important public policy of encouraging settlements was outweighed by an attorney's responsibility to advise his client with the same skill, knowledge, and diligence in the negotiation of civil suit settlement as that which an attorney must employ in all other litigation tasks.[57] The court also cautioned, however, that post-settlement malpractice actions involving an attorney's judgment and recommendation whether to settle is not malpractice simply because another attorney would not have recommended settlement.[58] Thus, the court held that to recover, a plaintiff must allege specifically

48. *See id.* at 1057.

49. *See id.* at 1058 & n.3.

50. *See id.* at 1059.

51. *See id.*

52. *Id.*

53. *See id.* at 1059.

54. *Id.*

55. *Id.* at 1060.

56. *See id.* at 1064.

57. *See id.*

58. *See id.* at 1064-65. The court noted that plaintiffs must allege their claims with specificity and that no bright-line rule exists regarding this type of malpractice. *See id.*

that the attorney's recommendation to settle is one that no reasonable attorney would have made.[59]

Though *Prande* requires a higher standard for alleging malpractice, it focuses solely on the conduct of the attorney. Both *Prande* and *Apollo* ignore the client's role in negotiating civil case settlements, failing to examine the client's reasons for consenting to settlement. While ignoring these important factors, both cases establish guidelines for post-settlement legal malpractice which allow the cause to proceed only if the client alleges specific acts of negligence; typically such allegations are supported by expert testimony.[60] Both courts seek to address the importance of safeguarding the negotiation process in an effort to encourage settlements and discourage clients from seeking redress based on bald assumptions that they should have received more money. Yet, because these post-settlement legal malpractice suits are difficult to define, courts apply pleading requirements differently. Illustrative of this intellectual debate is the Nevada Supreme Court's decision, relaxing the *Apollo/Prande* specificity standards of pleading.[61]

The Nevada Supreme Court also joined the mounting criticism against *Muhammad*. In *Malfabon v. Garcia*,[62] Malfabon sued her attorney for legal malpractice after settling an underlying product liability claim against Toyota.[63] The lawsuit was premised on allegations that the Malfabon automobile contained a design defect that sparked a fire that killed Malfabon's daughter.[64]

Garcia investigated Malfabon's complaint and hired a private investigator to assist in the investigation;[65] the investigator also sent a demand letter to Toyota.[66] In turn, Toyota offered to settle the case for $200,000.[67] After further investigation, and following consultation with another attorney, Garcia advised Malfabon to accept the settlement figure, which she did.[68] Malfabon subsequently initiated a legal malpractice action claiming that Garcia did not conduct adequate investigation into the product liability claim and that, therefore, her recommendation to settle the case for such an amount was negligent.[69]

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59. *See id.* at 1065.
60. *See id.*; Ziegelheim v. Apollo, 607 A.2d 1298, 1303-04, 1306 (N.J. 1992).
61. *See* Malfabon v. Garcia, 898 P.2d 107, 109 (Nev. 1995).
62. 898 P.2d 107 (Nev. 1995).
63. *See id.*
64. *See id.*
65. *See id.* at 108.
66. *See id.*
67. *See id.*
68. *See id.*
69. *See id.*

The district court dismissed the suit for failing to state a claim upon which relief could be granted.[70] The supreme court reversed, holding that there existed a genuine issue of material fact as to whether Garcia committed malpractice.[71] Refusing to follow *Muhammad*, the court echoed prior contrary court opinions which focused solely on whether an attorney's conduct fell below the requisite standard of care.[72]

Although *Malfabon* may appear to mimic the *Prande* and *Apollo* opinions, it is distressingly different in two important respects. First, while the *Prande* and *Apollo* courts carefully safeguarded against precedential abuse in future legal malpractice claims by requiring the aggrieved client to state with particularity the specific instances of malpractice and causation,[73] *Prande* and *Apollo* also required those allegations to be supported by expert testimony.[74] *Malfabon* imposes no such requirement.[75] Indeed, to support her claim, Malfabon relied on a result obtained in *another* Toyota product liability case which had reached trial, resulting in a jury award exceeding $5,000,000.[76] In that comparison case, the jury ruled in favor of the plaintiff's allegation that a defective fuel system caused personal injury.[77] Although the cases were drastically dissimilar, mere citation and reliance on the comparison case sufficed to permit Malfabon to state her cause of action, contrary to the initial trial court order.[78] The Nevada Supreme Court permitted comparison of the settlement amount Malfabon received to the other Toyota jury verdict to sustain the plaintiff's initial pleading.[79]

Second, even though Malfabon signed a settlement and release agreement, she proceeded to support her malpractice claim by citing a medical report issued four months after she executed the release.[80] The report concluded that Malfabon had been depressed and had had difficulties with cognitive tests requiring concentration.[81] Malfabon contended she had been incompetent when she executed the agreement and, since Gar-

70. *See id.*

71. *See id.* at 110.

72. *See id.* at 109.

73. *See* Prande v. Bell, 660 A.2d 1055, 1065 (Md. Ct. Spec. App. 1995); Ziegelheim v. Apollo, 607 A.2d 1298, 1306 (N.J. 1992).

74. *See Prande*, 660 A.2d at 1065; *Apollo*, 607 A.2d at 1303-04, 1306.

75. *See Malfabon*, 898 P.2d at 109.

76. *See id.* (citing Toyota Motor Co. v. Moll, 438 So. 2d 192 (Fla. Dist. Ct. App. 1983)).

77. *See id.*

78. *See id.* at 110.

79. *See id.*

80. *See id.* at 110 n.2.

81. *See id.*

cia should have known about her incompetence, she was negligent in allowing her to execute the settlement.[82]

In review, while other dissatisfied clients alleged they had been unable to comprehend or understand a settlement agreement, it is logical to infer that clients who claim to believe they are entitled to receive more money would have no difficulty "comprehending" the amount of money they did receive. Requiring an attorney to determine whether a client is competent to enter into a settlement agreement when there is no indication otherwise would be tantamount to imposing an unrealistic standard upon the attorney. To anticipate such an unrealistic defense, a properly diligent lawyer would be required to obtain an independent medical evaluation for a client before entering into a settlement agreement or, for that matter, prior to any agreement substantially affecting the course of ongoing litigation. Absent any prior patent evidence of incompetence, a lawyer should not be held to such an unwieldy standard.

Malfabon's impact cannot be ignored when contrasted with the post-settlement legal malpractice rubric. Indeed, the case is more of a judicial "knee-jerk reaction" to *Muhammad* than a reasoned attempt to provide helpful precedent to the practitioner. *Malfabon*'s legacy permits minimal proof of legal malpractice allegations even when the former client voluntarily settled the underlying action. The *Muhammad* "lawyer's holiday" has, quite radically, metamorphosed to become the client's holiday. Courts that do attempt to lump post-settlement malpractice claims in the same category as the prototypical legal malpractice action leave an attorney exposed to malpractice solely based on the resultant settlement sum. Yet, in hypocritical fashion, aside from identifying the recovery amount, these courts avoid delving into the negotiation process, claiming it protects the sanctity of the "settlement process." This reasoning is circular because it requires an attorney to prove he did not commit malpractice without dissecting the negotiation process or the client's voluntary consent. Thus, courts are forced to treat these varying suits differently.

II. Post-Settlement Malpractice Versus Mainstream Malpractice: The Need for a Different Approach

The traditional elements for recovery in a legal malpractice action are 1) the existence of an attorney-client relationship; 2) proof that the attorney acted negligently or in breach of contract; 3) that such acts were the proximate cause of the client's damages; and 4) but for the attorney's

82. *See id.* at 110. The court pointed out, however, that because Toyota was not a party to the lawsuit, this alleged incompetence would not vitiate the settlement agreement. *See id.*

conduct, the client would have been successful in the prosecution of the underlying claim.[83]

The most difficult element to prove in any legal malpractice action is that the client would have been successful in the underlying action "but for" the attorney's negligence.[84] This "case within a case" element requires the former client to prove both the legal malpractice claim and the underlying claim to the same jury.[85] The aggrieved client must show the initial success of the underlying case and then demonstrate that "but for" the negligence of his former attorney, the result would have been more favorable to the client.[86] While this method proves difficult when evaluating legal malpractice in a non-settled case, numerous problems of proof arise in the post-settlement legal malpractice claim.

Courts that apply the "trial within a trial" method to post-settlement malpractice claims typically ignore the fact that the client voluntarily agreed to settle the case, and instead focus on the result that would have occurred had the case gone to the jury.[87] Courts that use this method rely on prevailing expert testimony to determine whether an attorney's conduct fell below the standard of care.[88] Using a negligence standard, courts scrutinize and compare the attorney's conduct to reasonable and objective conduct.[89] This "trial within a trial" method may be the most effective in proving malpractice because a jury's determination should constitute an objective standard based on evidence adduced in the confines of a courtroom. By definition, however, every aspect of a negotiated settlement, particularly its conclusion, is a subjective evaluation premised on the client's needs and desires, coupled with the various influences that affect that client's ultimate decision to settle.[90] Yet courts refrain from examining the negotiation process that leads to settlement for two main reasons: first, a professed commitment to protect the negotia-

83. *See* Suelthaus & Kaplan, P.C. v. Byron Oil Indus., 847 S.W.2d 873, 876 (Mo. Ct. App. 1992).

84. *Cf.* Recent Development, 107 HARV. L. REV. 1547, 1568 (1994) ("[I]n other words the plaintiff must prove that [the] injury would not have occurred but for the defendant's negligence.") [hereinafter Recent Development].

85. *See generally id.*, at 1557-81 (presenting a thorough analysis of the proper treatment of a client).

86. *See id.* at 1567-70.

87. *See* Baldridge v. Lacks, 883 S.W.2d 947, 954 (Mo. Ct. App. 1994) (holding that it is not necessary for a plaintiff to prove the unreasonableness of the settlement, but "what she would have received had the underlying action been tried").

88. *See id.* (describing how to prove causation and damages).

89. *See id.* (concluding that expert testimony on the attorney's standard of care is normally required).

90. *See infra* Part II.B. (discussing reasons why clients settle rather than go to a jury trial).

tion process from disclosure in open court;[91] and second, a belief that focusing on the subjective reasons a client settles is inimical to the objective standard that ultimately must govern legal malpractice actions.[92]

A. Protecting the Negotiation Process

The American judicial system harbors a long-standing policy that encourages settlement by keeping the negotiation process confidential and promoting the effective and efficient settlement of cases.[93] By maintaining secrecy, parties and their counsel are more apt to discuss and resolve disputes freely.[94] To facilitate the resolution of disputes, various code drafters have followed the judiciary's lead by refraining from creating rules that might, in any manner, compromise the negotiation process.[95] In fact, rules that address negotiation actually promote, rather than invade, its sanctity.

The *Federal Rules of Evidence* and the *Model Rules of Professional Conduct* are two examples of governing codes that protect the negotiation process. Federal Rule of Evidence 408 prohibits the introduction of statements or conduct made during settlement negotiations.[96] The Advi-

91. *See* Wassall v. DeCaro, 91 F.3d 443, 446-47 (3d Cir. 1996) (describing the lower court's commitment to facilitating settlements); *see also* Muhammad v. Strassburger, McKenna, Messer, Shilobad & Gutnick, 587 A.2d 1346, 1350-51 (Pa. 1991) (discussing the benefits of settlements).

92. *See* Perez v. Espinoza, 484 N.E.2d 1232, 1235 (Ill. App. Ct. 1985) (providing an objective standard in legal malpractice, and frowning upon subjective criteria).

93. *See* William L. Adams, Comment, *Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 OR. L. REV. 427, 448 (1993) ("The most important aspect of the judge's role in the settlement conference is to create and maintain trust in the negotiation process . . . ."); *see also* Neary v. Regents of Univ., 834 P.2d 119, 121 (Cal. 1992) ("This court recognized a century ago that settlement agreements 'are highly favored as productive of peace and good will in the community,' as well as 'reducing the expense and persistency of litigation.'") (quoting McClure v. McClure, 34 P. 822, 824 (Cal. 1893)).

94. *See* Adams, *supra* note 93, at 448-49 (describing the tension between exchanging information to reach an equitable agreement and exchanging information to determine the opponent's weakness).

95. *See Senate Comm. on Judiciary, Federal Rules of Evidence*, S. REP. NO. 93-1277, at 10 (1974) (stating that the purpose of the rule is to encourage settlements), *reprinted in* FED. R. EVID. 408 advisory committee's note.

96. Federal Rule of Evidence 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is

sory Committee articulated two reasons for this exclusion: 1) "The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position," and; 2) public policy favoring settlements.[97] Although the rule has some limited exceptions,[98] it possesses a strong evidentiary protection for parties in the negotiation process.

Parties to litigation find protection in the negotiation process under Federal Rule 408, while attorneys are provided similar protection under the *Model Rules of Professional Conduct*.[99] There is no specific rule or rules governing an attorney's conduct during negotiation. While there are several rules which reinforce the necessity of dealing honestly and fairly with opposing parties, only Model Rule 4.1 attempts indirectly to safeguard the negotiation process from abuse. The rule states:

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[100]

The comment to Model Rule 4.1 states: "This Rule refers to statements of fact."[101] In the only Model Rule reference to negotiations, the comment to Model Rule 4.1 permits the use of negotiation tactics, such as statements concerning the price or value of a transaction, or statements concerning a party's assessment of an acceptable settlement proposition.[102]

Additionally, Model Rule 4.1 restricts an attorney only from making false statements of *material* fact.[103] The comment to Model Rule 4.1 recognizes that, in negotiations, certain statements may not be material.[104] Although the comment does not define the term "material," it is gener-

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offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

97. *See* FED. R. EVID. 408 advisory committee's note.

98. *See* FED. R. EVID. 408 (listing the exceptions to the Rule's exclusionary requirement).

99. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1996) (stating that it is professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); *id.* Rule 4.4 (stating that an attorney should "not use means that have no substantial purpose other than to embarrass, delay, or burden a third person").

100. *Id.* Rule 4.1.

101. *Id.* Rule 4.1 cmt.

102. *See id.*

103. *See id.* Rule 4.1.

104. *See id.* Rule 4.1 cmt.

ally recognized that a "material" fact is one that has a direct effect on the outcome of a case.[105] Hence, the Model Rule provides support for finding that peripheral bargaining statements, such as a client's willingness to accept a certain settlement, are not material to the outcome of the case.[106]

The Model Rules also place the decision to settle squarely on the client. Model Rule 1.2 states: "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."[107] Thus, the client may ultimately accept or reject any settlement offer based on whether he believes it is reasonable. Under the majority rule,[108] however, a client who accepts a settlement may pursue a post-settlement legal malpractice claim arising out of an attorney's negligent conduct if there is causation.

Ethical rules are meant to monitor an attorney's conduct. Model Rules 1.2 and 4.1 are touchstones for gauging the role of both the attorney and the client during the negotiation and settlement process. The flexibility of Model Rule 4.1 permits an attorney to maximize client satisfaction by creating personal scripts in each negotiation.[109] For example, a client may wish an attorney to play "hardball" and reject an early offer in an attempt to maximize a settlement. Conversely, a client may wish to make concessions in order to secure any settlement to achieve closure. Model Rule 1.2 recognizes that, ultimately, the client decides when negotiation is complete.[110]

Because these rules support the type of gamesmanship that may fulfill the client's desire, it appears contradictory to foster the settlement process by permitting post-settlement legal malpractice claims to proceed. Furthermore, allowing a client to proceed with a legal malpractice action based on an objective standard ignores the subjectivity which underlies the client's decision to settle. Thus, it is paramount in a post-settlement malpractice claim to explore the reason why a client chooses to settle.

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105. *See* Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 108 (1982); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 935-36.

106. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. (stating that a party's willingness to accept a settlement or the value he places on a case is not a material statement).

107. *Id.* Rule 1.2(a).

108. *See* Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1345, 1352 (Pa. 1991).

109. *Cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1996).

110. *See id.* Rule 1.2.

B. Why Clients Settle

Parties attempting to negotiate a settlement typically possess needs and objectives beyond compensation which are often overlooked by attorneys.[111] Attorneys gauge the amount of compensation on which to settle by examining various legal standards to determine what a jury might award if the case were to proceed to trial.[112] Yet, negotiation is compromise; an alternative to trial. If the guiding light is the amount a jury would award, then there really is no purpose to negotiation, unless the settling party can be assured that the amount received is equal to the amount a jury would award.

Most commentators believe that an effective negotiator "bargain[s] in the shadow of the law."[113] While a good negotiator must look to legal standards as a framework for negotiation, the law should be one of many factors involved in negotiating a dispute.[114] A client's own sense of what is fair and equitable, both of which constitute highly subjective factors, must play a major role in determining whether a case will settle. Certainly, according to Model Rule 1.2, the settlement is ultimately the client's decision.[115]

To determine what a client perceives to be fair, an effective attorney must begin by determining the needs and objectives of the client. Then, an attorney must work with the opposing party to achieve the client's goals. The result should be obtained on common ground,[116] with compensation as one factor of many in the negotiation mix. Ultimately, client satisfaction is best achieved by seeking out alternatives and commonality.[117]

Negotiation experts often criticize attorneys for focusing on winning the greatest amount of money in negotiation.[118] In reality, an effective negotiator may achieve the optimum result, which may not always equate to obtaining maximum direct compensation.[119]

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111. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991).

112. *See* Recent Development, *supra* note 84, at 1568.

113. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 193 (1996) (quoting Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979)).

114. *See id.* at 194.

115. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1996).

116. *See* FISHER & URY, *supra* note 111, at 42.

117. *See id.* at 42, 70-73.

118. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 764-65 (1984).

119. *See id.* at 755-59.

For example, suppose a client reports he was injured by hot coffee at a fast food restaurant.[120] Following the initial interview, the attorney learns that his client wants to recover payment for medical expenses and a lifetime meal pass to the restaurant. Both conditions are agreed to by defense counsel. The case is settled on terms which the client approved. Subsequent to settlement, the client learns about a similar case where a person injured by hot coffee successfully obtained an $8,000,000 jury verdict. Upon learning of this "comparative" case result, the client sues his former lawyer for malpractice, complaining his attorney should have secured a higher settlement sum. At trial, it is expected that the former client's expert will testify that the lawyer's conduct fell below that of a reasonably competent attorney.

A jury, employing the "trial within a trial" method, could determine that the settlement had been inadequate simply by accepting the expert's opinion that a jury impaneled in the underlying case would have returned a verdict akin to the $8,000,000 award, even though the former attorney followed his former client's instructions in securing settlement. Under the majority rule, however, the differing results (comparative versus the underlying case settlement) would be evidence of the former attorney's negligence. The former attorney, though, would be precluded from introducing evidence of his former client's subjective reasoning for agreeing to the original settlement.[121] The inequitable result suggested by this hypothetical mandates that the judiciary adopt an analysis of the post-settlement malpractice claim which includes consideration of the former client's subjective reasons for consenting to settle, along with consideration of the former attorney's conduct.

III. Courses of Action for Attorneys Confronting Post-Settlement Malpractice Claims

A. The Contributory/Comparative Negligence Defense

In a post-settlement malpractice action, an attorney should defend the action by claiming client contributory/comparative negligence.[122] The defense should be presented by introducing evidence of the client's subjective reasons for settling the case.[123]

120. Any factual similarities between this example and a well known McDonalds case is purely coincidental.

121. *See* Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195, 199-200 (Conn. 1994).

122. Depending on the jurisdiction, the court may apply contributory or comparative negligence.

123. Attorneys have tried to present evidence of the underlying settlement to argue that the plaintiff was collaterally estopped from pursuing a malpractice claim. It is now

The client contributory/comparative negligence defense is generally recognized in legal malpractice actions; however, some courts do not permit the issue to reach a jury.[124] This reluctance is supported by the *Restatement (Third) of Law Governing Lawyers*,[125] which asserts that the client contributory negligence defense is available in jurisdictions that recognize the same defense to general negligence actions.[126] The *Restatement* cautions, however, that the lawyer/client relationship imposes fiduciary duties by which "clients are entitled to rely on their lawyers to act with competence, diligence, honesty, and loyalty."[127] The lawyer/client relationship imposes numerous duties on the lawyer, while imposing few on the client.[128] Yet, this cannot relieve clients from accepting responsibility for their own acts or omissions which result in unfavorable settlements.

For example, in *Hacker v. Holland*,[129] the seller in a real estate transaction initiated a legal malpractice claim against his transactional/closing attorney.[130] In response, the defendant raised the defense of the plaintiff's comparative fault, alleging that the plaintiff, prior to signing the property deed, failed to discover certain omissions within the plaintiff's knowledge.[131] The court held that the plaintiff could have recognized these omissions.[132] Thus, the court permitted the jury to consider the plaintiff's comparative fault.[133] Similarly, in *Nika v. Danz*,[134] the court ruled that the former client's failure to provide certain information to his former attorney may constitute negligence.[135]

Courts that permit the client comparative negligence defense, however, proceed with caution, premised on the view that attorneys should not be permitted to circumvent responsibility to former clients under the guise that the client should have known how to respond or act. Thus, even

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settled, however, that collateral estoppel will not bar a post-settlement malpractice action. *See* Prande v. Bell, 660 A.2d 1055, 1063 (Md. Ct. Spec. App. 1995); Baldridge v. Lacks, 883 S.W.2d 947, 950-51 (Mo. Ct. App. 1994).

124. *See* Nika v. Danz, 556 N.E.2d 873, 884 (Ill. App. Ct. 1990); Hacker v. Holland, 570 N.E.2d 951, 958 (Ind. Ct. App. 1991).

125. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tentative Draft No. 7, 1994).

126. *See id.* § 76 cmt. d.

127. *Id.*

128. *See* Recent Development, *supra* note 84, at 1552-53.

129. 570 N.E.2d 951 (Ind. Ct. App. 1991).

130. *See id.* at 953.

131. *See id.* at 958.

132. *See id.* at 959.

133. *See id.*

134. 556 N.E.2d 873 (Ill. App. Ct. 1990).

135. *See id.* at 884.

when a legal document contains simple English that needs no interpretation by a lawyer, the defense of client contributory negligence has been barred in certain jurisdictions. For example, in *Sommerfeldt v. Trammell*,[136] the attorney moved to dismiss the client's malpractice claim, alleging that a contractual provision about which the attorney had misadvised "was so understandable and straightforward that defendants had 'no duty to advise what it legally meant.'"[137] The trial court granted the motion to dismiss, and the appellate court reversed,[138] ruling that although there may be instances where language is so simple that there may be an issue of client comparative fault, as a general rule "it would make no sense to say that a lawyer has no duty to a client when analyzing simple language in a legal document."[139] The court, pointing to the unequal relationship between the attorney and client, cautioned that it is the attorney's duty to explain legal documents whether simple or difficult.[140]

Courts should, however, permit the comparative negligence defense to proceed to the fact finder where the client settled a claim and now seeks to hold an attorney liable for malpractice committed in the negotiation of that settlement. In a majority of post-settlement malpractice claims, the former clients do not claim they did not understand the settlement agreement. Instead, this majority group freely admits they voluntarily entered into settlement, conceding they understood the agreement and abandoned their right to a trial.[141] Only after settlement did these former clients contend there was "something else" their former lawyer should have done to secure a better result.

Although there will be cases where the client is genuinely aggrieved by a negligent attorney,[142] the majority of post-settlement malpractice litigation arises from the client's own conduct. In those cases, the comparative fault defense should be considered by the fact finder.

While the comparative fault defense is available in the typical legal malpractice action, its use has been limited in post-settlement malpractice litigation. *Collins v. Perrine*[143] is an example of an effective application of the comparative fault defense. Perrine settled a medical malpractice claim for Annie and Curtis Collins for $46,000.[144] The former plaintiffs

136. 702 P.2d 430 (Or. Ct. App. 1985).
137. *Id.* at 432.
138. *See id.* at 431.
139. *Id.* at 432.
140. *See id.*
141. *See* Ziegelheim v. Apollo, 607 A.2d 1298, 1302 (N.J. 1992).
142. *See* Wassall v. DeCaro, 91 F.3d 443, 445 (3d Cir. 1996) (allowing suit to continue where plaintiff's facts, if true, would support a finding of malpractice).
143. 778 P.2d 912 (N.M. Ct. App. 1989).
144. *See id.* at 914.

sued Perrine for legal malpractice, alleging the settlement Perrine secured was inadequate.[145] Perrine admitted he conducted no discovery prior to settlement, but defended by claiming the plaintiffs could not afford to finance the discovery.[146] Additionally, Perrine relied on an argument presented to a medical legal panel, which voted four-to-two against finding any negligence on the part of the defendants, a hospital, or a physician.[147] Based on the panel's determination, Perrine recommended the settlement which the former client ultimately accepted.[148]

In the malpractice action, the court determined Perrine's conduct fell below the standard of care of an ordinarily prudent attorney, premised on expert testimony that Perrine should not have accepted the case if there were insufficient resources to finance discovery.[149] The jury entered judgment for the plaintiffs in the amount of nearly $3 million[150] and assessed seven percent comparative negligence against the plaintiff,[151] assigning some responsibility to the former client.

The *Collins* jury's low comparative negligence apportionment produces little precedential value by which an attorney can effectively evaluate use of the client comparative negligence defense against a charge of post-settlement malpractice. The *Prande* court, however, does provide minimum guidelines to which an attorney should adhere in advising a client regarding settlement.[152] *Prande* provides that the lawyer should hold an appreciation of 1) the relevant facts; 2) the present and future potential strengths and weaknesses of his case; 3) the likely costs, both objectively (monetarily) and subjectively (psychological disruption of business and family life) associated with proceeding further in the litigation; and 4) the likely outcome if the case were to proceed further.[153]

Many cases of legal malpractice occur from "perceived" negligence by attorneys who fail to adhere to the *Prande* criteria.[154] Common practice dictates that attorneys review the four factors in detail with their client

145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.*
149. *See id.* at 915. The expert also testified regarding the highly complicated nature of the case. *See id.*
150. *See id.* at 914 (noting that the exact amount awarded to the plaintiffs was $2,958,789).
151. *See id.*
152. *See* Prande v. Bell, 660 A.2d at 1055, 1065 (Md. Ct. Spec. App. 1995) (listing four criteria an attorney should consider prior to recommending settlement).
153. *See id.*
154. *See, e.g.*, Collins v. Perrine, 778 P.2d 912, 915 (N.M. Ct. App. 1989) (finding that an attorney failed to gather relevant facts); White v. Kreithen, 644 A.2d 1262, 1263 (Pa. Super. Ct. 1994) (indicating that the attorneys failed to appreciate the relevant facts and likely

prior to settlement. In post-settlement malpractice litigation analysis, courts tend to focus only on the result obtained (the settlement sum) to gauge the lawyer's liability exposure, ignoring the traditional factors preceding settlement. Hence, an attorney wishing to marshal an effective defense must take pre-settlement steps aimed to protect his client's interest. This will safeguard against subsequent malpractice claims within the framework developed by the courts.

B. The "Release and Settlement Agreement": Solidifying the Deal

The "release and settlement agreement" is the final written document ending the litigation and, in many instances, the lawyer-client relationship.[155] An historical review of related lawyer-client concern over apparent complications arising from contingency fee arrangements creates an additional post-settlement malpractice defense. To assure a client's comprehension of contingency fee contracts, many state bar associations require clients and attorneys to review and execute a "statement of client rights" which thoroughly explains the contingency fee agreement.[156] This statement obligates the attorney to adhere to specific reporting and accounting requirements concerning fees throughout the client's case.[157] It also provides the client with a remedy against unscrupulous attorneys.[158]

Similar to the "statement of client rights," an attorney should be required to provide a client with a statement of the case before settlement.[159] This statement would precisely articulate the ramifications of settlement and act as written confirmation of the attorney's work on the case. The *Prande* factors serve as effective guidelines to use in the creation of this model statement. This author proposes adoption of a statement as follows:

* * *

PRE-SETTLEMENT STATEMENT OF CLIENT'S CASE

Before you, the client, decide to enter into a settlement agreement, you should understand your rights concerning this settle-

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outcome of the case); Martos v. Concilio, 629 A.2d 1037, 1038 (Pa. Super. Ct. 1993) (indicating that an attorney failed to understand the likely outcome of the case).

155. *Compare* Collas v. Garnick, 624 A.2d 117, 121 (Pa. Super. Ct. 1993) (holding that collateral effects prevented a settlement agreement from being final), *with Martos*, 629 A.2d at 1039 (holding that a settlement agreement finalized action).

156. *See* FLA. R. CT. ch. 4-1.5.

157. *See id.*

158. *See id.*

159. Even if a bar association does not require this statement, an attorney should still have such a statement prepared.

ment. The purpose of this statement is to provide you with information concerning your case so that you may make an informed decision to settle your case. This statement is not part of the settlement agreement.

A. Status of Your Case.

1. The relevant facts of your case are ————.
2. The following discovery has been conducted ————.
3. The strengths of your case are ————.
4. The weaknesses of your case are ————.
5. The fees and costs of your case to date: —— until trial —— through trial ——.
6. The likely verdict of your case at trial is ————.
7. This figure has been based on ————.[160]
8. You have offered/been offered ———— to settle your case.
9. This settlement amount is/is not in the range of settlement figures for cases of your type.[161] This range of settlement figures is based on ————.

B. Your Rights Concerning Settlement.

You, the client, have the sole decision whether to accept or reject this settlement. While your attorney may offer you advice as to whether to accept or settle your case, you are not obligated or required to follow your attorney's advice.

DO NOT SIGN THIS AGREEMENT if you do not understand any of the information provided to you in this statement.

Your attorney is required to answer any questions you may have concerning the settlement of your case. If you have any questions which your attorney cannot answer to your satisfaction, you have the right to seek the advice from another attorney of your choice or you may contact the bar association at ——. Signing this document does not waive your right to subsequently file a malpractice action against your attorney unless prohibited by state law.[162] However, your attorney may use this

160. Much of this information is commonly found in status reports to clients.

161. If this settlement is not in the range of cases of this type, further explanation is probably required.

162. For example, under Pennsylvania law, a client would not be able to sue for malpractice based on negligence if he has signed a settlement agreement. *See* Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, 1349 (Pa. 1991). Additionally, under Rule 1.8 of the MODEL RULES OF PROFESSIONAL CONDUCT, an attorney cannot make an agreement limiting his liability for malpractice. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1996).

document as a defense in a malpractice action if permitted by law.[163]

Date: Signature of Client ———

Date: Signature of Attorney ———

* * *

Requiring an attorney and a client to sign such a document adequately outlines the respective duties and responsibilities of both attorney and client. The document details the heightened responsibility an attorney owes his client to thoroughly investigate every aspect of the client's case and to offer advice. The document also explains the ramifications of signing a settlement agreement and places responsibility on the client for making the decision to accept or reject the settlement. Additionally, if an attorney diligently prepares this form, and if the client signs it, the lawyer would be entitled to utilize the agreement in a subsequent post-settlement malpractice action within the context of a client contributory negligence defense.[164] Introduction of the document into evidence would require the reviewing court to look beyond the settlement figure and examine the particular circumstances surrounding the settlement agreement; the document inextricably intertwines the conclusion (settlement sum) with the process (settlement negotiation process and the client's view of the litigation leading to settlement).

IV. Conclusion

Post-settlement malpractice actions are quite unique. While the Pennsylvania Supreme Court effectively banned these lawsuits, providing former counsel immunity rather than engaging in the arduous analysis inherent to malpractice litigation, the better course of action is to permit attorneys to present the client comparative fault defense. This will allow an attorney to present evidence of the client's subjective reasons for settling the litigation. Additionally, through the use of a pre-settlement statement of the case form, attorneys will provide their clients sufficient information to adequately prepare for a successful negotiation and settlement process.

163. It is possible that a court may disallow this form for a variety of evidentiary reasons.

164. *See* Lowry v. Lowry, 393 S.E.2d 141, 145 (N.C. Ct. App. 1990) (allowing the admission of a separation agreement to show that client did not take the opportunity to evaluate the agreement).