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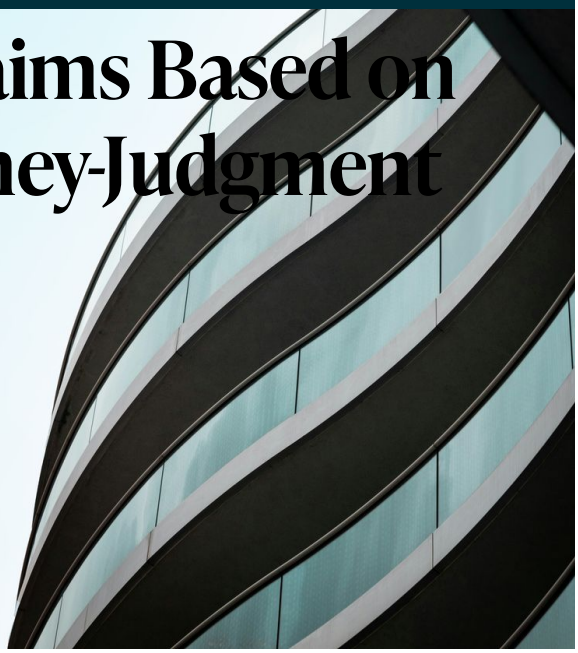
Defending Malpractice Claims Based on Trial Decisions - the Attorney-Judgment Rule



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Perhaps more than any other area of legal practice, trial work often involves instantaneous decisions. When a trial outcome is less than favorable, those on-the-spot judgment calls may be second-guessed by an unhappy client, sometimes leading to a legal malpractice claim. One potentially available defense is the Attorney-Judgment Rule. While its formulation may vary among states, this rule generally provides that the standard of care is not breached if a lawyer chooses one of several reasonable options—even if the path chosen does not prove to be the best one. *See, e.g.*, *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (stating that an "error of judgment or a selection of one among several reasonable courses of action" does not establish a malpractice claim); *accord Joseph DelGreco & Co. v. DLA Piper L.L.P. (U.S.)*, 899 F. Supp. 2d 268, 280 (S.D.N.Y. 2012) ("[W]here a claim of legal malpractice is based upon . . . a defendant-attorney's selection of one among several reasonable strategic options, summary judgment should be granted in defendant's favor." (internal citations omitted)), *aff'd sub nom. In re Joseph DelGreco & Co., Inc.*, 535 F. App'x 31 (2d Cir. 2013).

It may be especially difficult to marshal corroborating evidence showing the consideration of alternatives when the trial lawyer decided *not* to do something: e.g., calling a witness, conducting cross-examination, or making an objection. Where the decision was made during trial, there probably won't be a memo articulating the reasoning for that decision. But there should be evidence showing that alternatives had been considered. And that consideration of reasonable alternatives is the key to the Attorney-Judgment Rule defense.

Contemporaneous Communications

In some instances, the trial lawyer may have had a conversation with the client at the time the decision was made. For example, you might surprise a client at trial when the judge asks if you have cross, and you reply: "No cross." While you might not have been able to consult with your client before that response, you would likely have done so at the next break. Then you could explain that your adversary's expert witness had failed to convey his points to the jury in clear and plain language and that his manner was beyond haughty. Cross would have given him a second chance to make his points more effectively. If subsequently sued for malpractice, there would be testimonial evidence, presumably from both the lawyer and the client, of that contemporaneous discussion, supporting application of the Attorney-Judgment Rule. *See Hatfield v. Herz,* 109 F. Supp. 2d 174, 184–85 (S.D.N.Y. 2000) (holding, where the lawyer was sued for malpractice for failing to introduce certain documents into evidence, that the decision not to introduce those documents was a reasoned choice, noting a contemporaneous conversation between the lawyer and his client).

Pretrial Notes And Work Product

Even in a situation where the trial lawyer may not have documents showing his or her reasons for not taking an action, there should be documentation showing that reasonable alternatives had been considered and rejected. Although the decision not to cross might be made during trial, there would be evidence of draft examination outlines and selected exhibits prepared in anticipation of cross. In other words, there is evidence showing that the "failure" not to call a witness or introduce a document was not an oversight; it was a strategic *choice* not to take that planned course of action.

Saved By The Bill

Although the legal bill is often the ultimate target of the malpractice plaintiff, the bill can provide strong documentary evidence of the issues considered, discussed, and researched in advance of trial. Of course, the absence of such evidence may create an inference that no such planning occurred. In *Rhee-Karn v. Lask*, the court dismissed one malpractice claim on summary judgment where evidence showed the lawyer had conducted legal research, but came out differently on another claim where the record showed no research was done until after the underlying action had been voluntarily dismissed. No. 15-CV-9946 (DLC), 2020 WL 1046595, at *6 (S.D.N.Y. Mar. 4, 2020), *aff'd*, No. 20-1577-CV, 2022 WL 619695 (2d Cir. Mar. 3, 2022); *see also Prout v. Vladeck*, 316 F. Supp. 3d 784, 796 (S.D.N.Y. 2018) (noting the defendants' failure to produce any billing invoices showing work performed on the underlying case, and allowing the malpractice claims to survive a motion to dismiss).

The key to invoking the Attorney-Judgment Rule as a defense is to show that the lawyer considered reasonable alternatives, and affirmatively selected one reasonable alternative by strategic choice. Even if the decision turns out not have been the best alternative, if it was not

the result of a failure to prepare or a mistake, the Attorney-Judgment Rule should apply to defeat a claim of malpractice.

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