

WELCOME TO THE HARMONIE GROUP

ISSUE: Attorney Liability for Negligent Trial Practice

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RISK MANAGEMENT NOTE:

Claims against lawyers for negligent trial practice are increasing in frequency. There is nothing like a bad result to prompt the client to review all aspects of the representation, including the lawyer's performance at trial or missed settlement opportunities. Trial lawyers should be prepared to justify the reasonableness of each decision made before, during and after trial in the event that the client attempts to shift the blame to the lawyer for the bad result.

ARTICLE:

“On Second Thought, You Lost My Case”

A client's evaluation of his or her lawyer's skills may change between the time services are rendered and the result materializes. What may have seemed an effective strategy during trial may be criticized when the client loses the case, especially if a juror expresses dissatisfaction with any of the lawyer's strategic decisions. Lawyers – especially trial lawyers – are used to a client's second-guessing. The question raised in this article is whether client dissatisfaction with a lawyer's professional judgment might support a claim for malpractice.

In Ohio, the elements of legal malpractice are (1) an attorney-client relationship giving rise to a duty; (2) a breach of that duty; and (3) damages proximately caused by the breach.¹ Regarding the scope of the duty owed and whether it was breached, expert testimony is generally required to survive summary judgment.² Thus, it is clear that a client must at least hire an expert to prevail on a claim that the lawyer's strategy compromised the claim. Exactly what the expert must say, however, is less certain. Is it enough for the expert to criticize the defendant's judgment? In other words, may an expert create a jury issue simply by opining that he or she would have prepared or presented the case differently?

In a leading case, *Woodruff v. Tomlin*,³ the Sixth Circuit Court of Appeals announced the “professional judgment rule.” The case arose from the defendants' pursuit of a personal injury claim on behalf of the plaintiffs in a Tennessee state court. The plaintiffs criticized the defendants' failure to consult a traffic reconstruction expert or interview an expert witness or cross-examine him at trial. The trial court granted the defendants' motion for judgment n.o.v. following a mistrial. The Sixth Circuit reversed,⁴ and then granted rehearing en banc. On rehearing, the court held that a lawyer's professional judgment, whether exercised rightly or wrongly, would not support a malpractice claim as a matter of law.

¹ *Krahn v. Kinney*, 43 Ohio St. 3d 103 (1989).

² *Bloom v. Dieckmann*, 11 Ohio App.3d 202 (1983).

³ *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. 1980), 616 F. 2d 924 (6th Cir. 1980).

⁴ *Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979).

Although the Sixth Circuit purported to follow Tennessee precedent, it did not have the benefit of any authority, from Tennessee or another jurisdiction, including a client's criticism of an attorney's trial strategy.⁵ Nevertheless, the court suggested that the result was obvious: Any other rule would prevent finality in litigation. As the court stated: ". . . [T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment." This is a sound rule. Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight.⁶ The professional judgment rule preserved the finality of litigation.

The professional judgment rule also avoids the possibility of a jury (in the malpractice case) being asked to speculate as to what another jury (in the underlying case) would have found, had the attorney adopted a different strategy. In any case, different lawyers would pursue claims differently. Who is to say that given strategy is better than the others?⁷

Since *Woodruff* was decided in 1980, it has been followed by every court that has considered the professional judgment rule.⁸ The *Woodruff* line of cases establish that a lawyer's considered judgments, even if incorrect in hindsight, are not generally subject to malpractice liability. But what about a client's claim that an attorney failed to follow the client's instruction regarding a particular strategy? Often, clients have certain expectations regarding trial activity that are unrealized, and they may blame the lawyers for ignoring their preferences. However, so long as disappointed expectations relate to the conduct of litigation, they too should fall short of malpractice. The reason that a lawyer is hired, and the source of a lawyer's value, is his or her judgment. The client should not be able to substitute his or her own judgment as a basis of liability.⁹

The Ohio Supreme Court has not considered a professional judgment rule for lawyers. A federal district court, applying Ohio law, followed the rule.¹⁰ In an unreported opinion, the Franklin County Court of Appeals also adopted the professional judgment rule in *Murphey, Young & Smith Co., LPA v. Billman*,¹¹ where the

⁵ The *Woodruff* court noted that "there is a dearth of reported decisions from any jurisdiction dealing with charges of negligence and malpractice in the conduct of litigation." 616 F.2d 924, at 928.

⁶ *Id.* at 930.

⁷ Thus, in *Simko v. Blake*, 532 N.W. 2d 842, 848 (Mich. 1995), the Michigan Supreme Court stated: "Perhaps defendant made an error of judgment in deciding not to call particular witnesses, and perhaps another attorney would have made a different decision; however, tactical decisions do not constitute grounds for legal malpractice actions. Plaintiffs' claim that certain witnesses should have been called is nothing but an assertion that another lawyer might have conducted the trial differently, a matter of professional opinion that does not allege violation of the duty to perform as a reasonably competent criminal defense lawyer."

⁸ *Hudson v. Windholtz*, 416 S.E. 2d 120, 124 (Ga. App. 1991) (noting that *Woodruff's* doctrine of "judgmental immunity" has been accepted in virtually every jurisdiction). See also *Simko v. Blake*, 532 N.W. 2d 842 (Mich. 1995); *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F.Supp. 300 (Del. 1995); *Blecher v. Collins v. Northwest Airlines, Inc.*, 858 F. Supp. 1442 (C.D. Cal. 1994); *Allen Decorating, Inc. v. Oxendine*, Georgia No. S97C1002 (Ga. 1997); *Glenna v. Sullivan*, 245 N.W. 2d 869 (Minn. 1976); *Fidler v. Sullivan*, 463 N.Y.S. 2d 279 (N.Y. App. 1983).

⁹ In *Frank v. Bloom*, 634 F.2d 1245, 1256-1257, the Tenth Circuit held that a lawyer's failure to assert a crossclaim on behalf of a client was immune from attack, stating as follows: "The fact, if it be a fact, that the attorney in the heat of the trial disregards the directions of the client as to trial strategy or activity does not give the client a right of action against the attorney. After all, it is the duty of the attorney who is a professional to determine trial strategy. If the client had the last word on this, the client could be his or her own lawyer."

¹⁰ *Applegate v. Dobrovir, Oaks & Jebhardt*, 628 F.Supp. 378 (D.D.C. 1985).

¹¹ Franklin App. No. 84-AP-198, unreported, Ohio App. LEXIS 11643 (Nov. 20, 1984).

client alleged that his former lawyers committed malpractice by failing to interview witnesses, deciding not to call certain witnesses, not asking certain questions and not making certain objections during a disciplinary hearing. The court held that the malpractice claim was barred as a matter of law.¹²

Recently, a related issue has arisen concerning whether a client's settlement of a case bars a subsequent malpractice claim against his or her attorney. The courts have held that the malpractice claim is not barred, but only if the lawyer's error was a per se mistake as opposed to a discretionary judgment. In *DePugh v. Sladoje*,¹³ the Miami County Court of Appeals stated:

In many cases, an attorney will be faced with strategic choices, any one of which may lead to a favorable result for his client. An attorney must make an educated guess as to which course of action is most likely to succeed. The practice of law is not an exact science, however, and generally, when a client settles a claim, an attorney should not be subject to a client's malpractice claim in an effort to obtain additional monies as long as the attorney has made reasonable decisions in handling the case and represented his client competently.¹⁴

Thus, although not stated as such, the position advanced in *DePugh* approached a professional judgment standard. *DePugh* has been followed by the Cuyahoga County Court of Appeals.¹⁵

Based on the recent decisions of the Ohio appellate courts in the context of settlement, as well as the consensus of other jurisdictions favoring the professional judgment rule, it appears that Ohio would adopt a rule insulating a lawyer's judgment from malpractice liability. Protection for attorneys would be especially welcome in Ohio, since the Ohio Supreme Court has abandoned the trial-within-the-trial doctrine formerly enjoyed by Ohio lawyers. In *Vahila v. Hall*,¹⁶ the Ohio Supreme Court established that a client no longer must prove that he or she would have been successful in the underlying case as an element of the client's malpractice claim. The result is sound, as long as the client proves that the alleged malpractice proximately caused the damages by some other method. As the Supreme Court noted, the trial-within-the-trial doctrine arbitrarily insulated from liability those attorneys who happened to have committed malpractice in the context of bad cases.

For similar reasons as those advanced in *Vahila*, the Supreme Court should recognize the professional judgment rule. It stands to reason that most clients become unhappy with their lawyers after having lost their cases. It is also apparent that most of these clients will have lost because they had bad cases. If the professional judgment rule is not recognized, the result will be the reverse of the situation that *Vahila* sought to avoid. In other words, the lawyers who accept bad cases will be most at risk of malpractice liability.

¹² "[W]here there is a good faith selection of a particular trial strategy, there can be no claim for malpractice, even if the strategy be unsuccessful. In most instances, it is mere speculation as to whether a different strategy would have been successful . . . Although understandably, defendant is not satisfied with the result of disciplinary proceedings . . . client satisfaction is not the test to be employed in determining whether or not the representation meets the accepted standard."

¹³ 111 Ohio App.3d 675 (1996).

¹⁴ 111 Ohio App. 3d at 686-687.

¹⁵ *E.B.P., Inc. v. Cozza & Steuer*, 119 Ohio App.3d 177 (1997); and *Monastra v. DiAmore*, 111 Ohio App.3d 296 (1996). See also *Slavens v. Spetnagel*, Jackson App. No. 95CA769, unreported (July 1996).

¹⁶ 77 Ohio St.3d 421 (1997).

More important, the dispositive issue in these professional liability cases should not be whether the client won or lost; lawyers do not guarantee results. The issue is whether the lawyer can justify his or her decision as the result of reasoned judgment rather than a per se error. To hold otherwise would invite every unhappy litigant – and there is at least one loser in every case – to second-guess, with 20-20 hindsight, the professional judgment of the lawyer. The client should not be permitted to relitigate his or her original case under the guise of a malpractice claim.

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