

# THE WAYNE LAW REVIEW

VOLUME 52

FALL 2006

NUMBER 3

## BENCHING THE MONDAY-MORNING QUARTERBACK: THE “ATTORNEY JUDGMENT” DEFENSE TO LEGAL- MALPRACTICE CLAIMS

J. MARK COONEY<sup>†</sup>

### *Table of Contents*

I. INTRODUCTION . . . . .	1052
II. WHAT IS THE “ATTORNEY JUDGMENT” RULE? . . . . .	1054
A. <i>How Courts Have Defined the Rule</i> . . . . .	1054
1. <i>Unsettled Law</i> . . . . .	1055
2. <i>Trial and Pre-Trial Litigation Tactics</i> . . . . .	1055
3. <i>The Conditions for Applying the Rule</i> . . . . .	1056
B. <i>The California Model</i> . . . . .	1057
C. <i>Which Element Does the Rule Negate?</i> . . . . .	1058
D. <i>A Question for the Judge or Jury?</i> . . . . .	1060
E. <i>Is it Really Immunity?</i> . . . . .	1062
II. THE RULE IN ACTION: A SURVEY OF NATIONAL CASES . . . . .	1064
A. <i>Trial Strategy</i> . . . . .	1064
1. <i>Choice of Witnesses</i> . . . . .	1064
2. <i>Choice and Use of Experts</i> . . . . .	1067
3. <i>Sequence of Witnesses</i> . . . . .	1069
4. <i>Interrogation of Witnesses</i> . . . . .	1070
5. <i>Choice of Evidence to Offer</i> . . . . .	1071
6. <i>Opening and Closing Statements</i> . . . . .	1072
7. <i>Approval of Jury Instructions</i> . . . . .	1072
B. <i>Pretrial Litigation Strategy</i> . . . . .	1073
1. <i>Deciding Whether to Sue</i> . . . . .	1073
2. <i>Deciding Whom to Sue</i> . . . . .	1075
3. <i>Deciding Which Legal Theories to Assert</i> . . . . .	1078
4. <i>Motion Practice</i> . . . . .	1078

<sup>†</sup> Assistant Professor, Thomas M. Cooley Law School. B.A., 1987, Rutgers University; J.D., 1992, summa cum laude, Thomas M. Cooley Law School. The author wants to acknowledge and thank Alice E. Tremont for her invaluable help with the research for this article.

5. <i>Discovery</i> . . . . .	1080
C. <i>Settlement Recommendations</i> . . . . .	1081
D. <i>Appeals</i> . . . . .	1086
E. <i>Nonlitigation Decisions</i> . . . . .	1088
III. THE PROPRIETY OF THE RULE . . . . .	1090
A. <i>Criticism by Courts and Commentators</i> . . . . .	1090
B. <i>Comparison to Rules Protecting Other Professionals</i> . . . . .	1093
1. <i>Medical Judgment</i> . . . . .	1093
2. <i>Business Judgment</i> . . . . .	1094
3. <i>Similarities and Differences</i> . . . . .	1095
C. <i>The Best Approach</i> . . . . .	1097
1. <i>Did the Attorney Make a True Strategy Decision?</i> . . . . .	1097
2. <i>Was the Attorney's Strategy Decision an Informed One?</i> . . . . .	1098
3. <i>Did the Attorney Act in Good Faith?</i> . . . . .	1098
4. <i>Evaluating Dispositive Motions</i> . . . . .	1099
5. <i>The California Model is Flawed</i> . . . . .	1099
IV. CONCLUSION . . . . .	1100

## I. INTRODUCTION

There's an old joke among trial attorneys: The only thing that two trial attorneys can agree on is what a third trial attorney is doing wrong. But attorneys' harshest and most feared critics aren't the water-cooler sages who pick apart a colleague's performance; they're the disappointed clients who question their attorney's competence. Clients on the losing end of jury verdicts, for example, can be quick to second-guess their attorney's trial tactics—with the benefit of hindsight. This second-guessing occasionally manifests itself in a far more palpable form of criticism: a legal-malpractice suit.

Enter the “attorney judgment” defense, also commonly referred to as “judgmental immunity” or the “error of judgment” rule. Whatever the label, at its core, the rule dictates that attorneys do not breach their duty to clients, as a matter of law, when they make informed, good-faith tactical decisions.<sup>1</sup> Most legal professionals who are familiar with this rule likely think of it as a rule protecting trial attorneys from malpractice suits that amount to Monday-morning quarterbacking over trial strategy. And there is truth in that perception. The rule reflects that there is never a single, definitive way to most effectively try a particular case.<sup>2</sup> Given the same witnesses,

1. See Discussion IIA, on page seven of this article.

2. *Fishow v. Simpson*, 462 A.2d 540, 543 (Md. App. 1983); *Cook v. Connolly*, 366

evidence, and law, reasonable and competent trial attorneys might differ on the best strategy for persuading the judge or jury.<sup>3</sup> But the attorney-judgment rule protects more than just trial tactics. Courts have applied the rule to insulate lawyers from liability for pre-trial strategy decisions. And some courts have applied the rule to strategy decisions made outside the litigation context altogether.<sup>4</sup>

Although many jurisdictions have adopted the attorney-judgment rule,<sup>5</sup> it might be a bit premature to call it a well-settled doctrine. Courts often describe the rule in rather rote fashion, without fleshing out its nuances. A closer examination reveals that the rule has some decidedly blurry edges. And the rule has drawn sharp criticism from judges and commentators who view it as a convenient escape hatch created *by lawyers for lawyers*—a luxury, critics say,<sup>6</sup> that other professionals do not enjoy.

Part I of this article defines and clarifies the attorney-judgment rule, taking a national perspective. This analysis addresses courts' inconsistent views on which *prima facie* element of a legal-malpractice claim is negated by the rule. It also examines whether the rule is a true immunity rule.

Part II surveys national cases that have applied—or refused to apply—the rule in a variety of contexts. This includes cases reflecting not only the rule's traditional stronghold in malpractice suits questioning trial or litigation strategy, but also cases extending the rule beyond the realm of trial and litigation strategy. Part III discusses the propriety of the rule, describing criticism that the rule has drawn and comparing the rule to defenses available to other professionals who are scrutinized on matters of professional judgment. At the conclusion of Part III, I offer an analytical framework for applying the rule in future cases.

---

N.W.2d 287, 292 (Minn. 1985); *Meagher v. Kavli*, 97 N.W.2d 370, 372 (Minn. 1959).

3. *See, e.g.*, James W. McElhaney, *The Play is the Thing*, 92 A.B.A. J. 26, (offering alternatives to some of the most common and traditional approaches to trying cases).

4. *See* parts B-E of Discussion II, on pages 47-82 of this article.

5. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 981 P.2d 236, 240 n.1 (Idaho 1999) (noting that as of 1999, “[a]t least thirteen jurisdictions addressing the rule have adopted the rule in some form”).

6. *See, e.g.*, *Woodruff v. Tomlin*, 616 F.2d 924, 938 (6th Cir. 1980) (Weick, J., dissenting in part), *cert. denied*, 449 U.S. 888 (1980).

## II. WHAT IS THE "ATTORNEY JUDGMENT" RULE?

A. *How Courts Have Defined the Rule*

Lawyers owe their clients a duty to exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer."<sup>7</sup> But this duty is not without limits. "An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession."<sup>8</sup> Likewise, an attorney has no duty to insure or guarantee a favorable result for a client.<sup>9</sup>

Courts have been especially protective of lawyers' strategy decisions—so-called "judgment calls." "[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt."<sup>10</sup> Choosing one of "several reasonable courses of action" is not legal malpractice.<sup>11</sup> "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."<sup>12</sup>

Some courts have articulated this sentiment in very broad terms. For instance, one court observed that "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence."<sup>13</sup> If an attorney acts in good faith "and in an honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment."<sup>14</sup> In other words, "the law distinguishes between negligence and mere errors in judgment."<sup>15</sup>

This broad language captures the essence of the attorney-judgment rule, but it only scratches the surface, providing little concrete guidance for courts or lawyers who are unfamiliar with the rule. The easiest way to refine

---

7. *Id.* at 240.

8. *Simko v. Blake*, 532 N.W.2d 842, 846 (Mich. 1995).

9. *Id.*

10. *Bernstein v. Oppenheim & Co.*, 554 N.Y.S.2d 487, 489 (N.Y. App. Div. 1990)(citing *Grago v. Robertson*, 370 N.Y.S.2d 255, 258 (N.Y. App. Div. 1975)).

11. *Id.* (quoting *Rosner v. Paley*, 481 N.E.2d 553, 554 (N.Y. 1985)).

12. *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

13. *Simko*, 532 N.W.2d at 847.

14. *Id.*

15. *Kling v. Landry*, 686 N.E.2d 33, 37 (Ill. App. 2d 1997), *appeal denied*, 690 N.E.2d 1381 (Ill. 1998)(citing *Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc.*, 465 N.E.2d 500, 505 (Ill. App. 2d 1984)).

the rule is to focus on the two broad scenarios that have prompted courts to apply it: (1) a lawyer must make a choice on how to proceed, but the relevant law is unsettled and thus provides no guidance, or (2) a lawyer is faced with a purely tactical decision during trial or litigation, and the law—even if settled—provides no guidance.

### *1. Unsettled Law*

An attorney is only duty-bound to follow a strategy that is consistent with prevailing law.<sup>16</sup> Attorneys “cannot be held liable for failing to correctly anticipate the ultimate resolution of an unsettled legal principal [sic].”<sup>17</sup> As one court observed, the attorney-judgment rule “has found virtually universal acceptance” when the attorney’s alleged error “involves an uncertain, unsettled, or debatable proposition of law.”<sup>18</sup> Although the rule should not apply “where the issue is settled and can be identified through ordinary research and investigative techniques,” it should apply “where the law is unclear, unsettled by case law, and is an issue or issues upon which reasonable doubt may well be entertained by informed counsel.”<sup>19</sup>

So lawyers facing a choice of two or more possible courses of action—but who do not have the benefit of settled law to guide their decision—cannot be held liable for exercising their professional judgment to make the necessary choice. Even testimony by experts who claim “that they would have conducted litigation in an uncertain and unsettled legal area differently, standing alone, cannot, as a matter of law, constitute the basis for a legal malpractice action.”<sup>20</sup>

### *2. Trial and Pre-Trial Litigation Tactics*

While trying cases or litigating cases before trial, lawyers often face choices that are made difficult not because of the unsettled nature of the law, but rather because there is simply no way to predict with certainty how the judge or jury will react to one approach or another. This has prompted courts in many jurisdictions to insulate lawyers from liability for alleged

---

16. *Simko*, 532 N.W.2d at 846.

17. *Sun Valley*, at 981 P.2d at 239-40.

18. *Halvorsen v. Ferguson*, 735 P.2d 675, 681 (Wash. Ct. App. 1986), *review denied*, 108 Wash. 2d 1008 (1987).

19. *Bergstrom v. Noah*, 974 P.2d 531, 557 (Kan. 1999). *See also Johnson v. Daggett, Van Dover, Donovan & Perry, PLLC*, 99 F. Supp. 2d 1008, 1012 (E.D. Ark. 2000).

20. *Halvorsen*, 735 P.2d at 681.

shortcomings in purely tactical decisions.

“[I]n the context of litigation, an attorney will not be held liable for a mere error in judgment or trial tactics if the attorney acted in good faith and upon an informed judgment.”<sup>21</sup> A client’s mere “dissatisfaction with strategic choices” cannot serve as the proper basis for a legal malpractice claim.<sup>22</sup> At the heart of this observation is a presumption that lawyers, who are professionals trained and experienced in the often imprecise art of trial advocacy, are better positioned than a lay client to choose the best trial strategy. As the Tenth Circuit noted, “[I]t is the duty of the attorney who is a professional to determine trial strategy.”<sup>23</sup> If the client “had the last word on this,” the court explained, “the client would be his or her own lawyer.”<sup>24</sup>

Even those courts that have taken a relatively narrow view of the attorney-judgment rule have acknowledged that “[i]t is of course true that hindsight, critical of an attorney’s trial strategy, ordinarily is not sufficient to establish that the attorney has committed legal malpractice.”<sup>25</sup> A client’s claim that another lawyer might have made different strategy decisions at trial cannot sustain a legal-malpractice action, that being “a matter of professional opinion.”<sup>26</sup>

### 3. *The Conditions for Applying the Rule*

After examining the national cases and factoring in both of the “triggering” scenarios described above,<sup>27</sup> the attorney-judgment rule can be fairly described as a rule that insulates lawyers from liability for perceived errors in making informed, good-faith decisions while facing several reasonable choices on how to proceed.<sup>28</sup> But as this language suggests, the rule is not without limits.

Most courts condition the rule’s application on “the attorney acting in good faith and upon informed judgment after undertaking reasonable research of the relevant legal principals [sic] and facts of the given case.”<sup>29</sup>

---

21. *Sun Valley*, 981 P.2d at 240 (citing *Simko*, 532 N.W.2d at 847).

22. *Bernstein*, 554 N.Y.S.2d at 490.

23. *Frank v. Bloom*, 634 F.2d 1245, 1256-57 (10th Cir. 1980). *See also* *Simko*, 532 N.W.2d at 848 (quoting from *Frank*, favorably).

24. *Frank*, 634 F.2d at 1257.

25. *Schlossberg v. Epstein*, 534 A.2d 1003, 1014 (Md. Ct. Spec. App. 1988), *appeal after remand*, 570 A.2d 328 (Md. Ct. Spec. App. 1990), *cert. denied*, 577 A.2d 50 (Md. 1990).

26. *Simko*, 532 N.W.2d at 848.

27. *See, supra*, Part II A of this article.

28. *See, e.g., id.* at 847; *Robinson v. Southerland*, 123 P.2d 35, 43 (Okla. Civ. App. 2005) (quoting *Manley v. Brown*, 989 P.2d 448, 452 (Okla. 1999)).

29. *Sun Valley*, 981 P.2d at 240.

This statement reveals a number of conditions. First, to be protected, a lawyer's decision must be an informed one,<sup>30</sup> rather than a stab in the dark resulting from the lawyer's failure to investigate the relevant facts or law. Second, the decision must be made in good faith.<sup>31</sup>

Some courts have downplayed the good-faith factor, instead "stressing that a professional must use reasonable care to obtain the information needed to exercise his or her professional judgment."<sup>32</sup> Failing to do so is negligence, "even if done in good faith."<sup>33</sup> Other courts try to draw the line in the sand by observing that a lawyer can only be held liable for "gross" errors in judgment.<sup>34</sup> But courts uniformly recognize that the attorney-judgment rule should not eviscerate the general rule holding a lawyer liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action."<sup>35</sup>

### *B. The California Model*

California adds a twist to this body of rules, in essence cutting the rule's scope in half. California's appellate courts adhere to a rigid "two-pronged inquiry: (1) whether the state of the law was unsettled at the time the professional advice was rendered; (2) and whether that advice was based upon the exercise of an informed judgment."<sup>36</sup> This model is significant in that it fails to account for situations when the law is settled but lawyers are nevertheless forced to make true strategy choices.

For instance, criminal-defense attorneys may call their clients to testify at trial, or they may recommend to their clients that they not testify.<sup>37</sup> There is nothing unsettled about that. Yet criminal-defense lawyers make a quintessential judgment call whenever they decide whether the potential benefits of letting their clients proclaim their innocence to the jury outweigh

30. *Id.*

31. *Id.*

32. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 113 (Minn. 1992).

33. *Id.*

34. *Mitchell v. Dougherty*, 644 N.W.2d 391, 397 (Mich. App. 2002) (quoting *Basic Food Indus., Inc. v. Grant*, 310 N.W.2d 26, 30 (Mich. App. 1981)).

35. *Bernstein*, 554 N.Y.S.2d at 489-90.

36. *Village Nurseries, L.P. v. Greenbaum*, 123 Cal. Rptr. 2d 555, 562 (Cal. Ct. App. 2002) (quoting *Davis v. Damrell*, 174 Cal. Rptr. 257, 259 (Cal. Ct. App. 1981)).

37. *See, e.g., United States v. Norwood*, 798 F.2d 1094, 1100 (7th Cir. 1983) (noting that criminal-defense attorney's decision not to put client on the stand for fear of impeachment is "a classic example of what might be considered sound trial strategy"); *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987) (recognizing criminal defendant's right to testify and noting that the defendant is "the most important witness for the defense in many criminal cases").

the risks posed by an effective cross-examination. When strictly applied, the California model does not afford this type of decision any protection.

One California appellate panel confirmed this when it declared that “[t]he judgmental immunity doctrine does not shield every ‘judgment call’ made by a lawyer regarding investigation of a case, discovery, pretrial preparation or trial tactics.”<sup>38</sup> Rather, the court emphasized, the doctrine “applies only to the exercise of informed judgment *with respect to an unsettled state of the law that was the subject of professional advice.*”<sup>39</sup> This represents a marked departure from the general view described above, which recognizes that the attorney-judgment defense is viable when there is an unsettled point of law *or* when a litigator is faced with a pure tactical decision.<sup>40</sup> Thus, the California model rejects what other courts have called “a sound rule” that protects lawyers from liability for purely tactical trial or litigation decisions.<sup>41</sup>

### *C. Which Element Does the Rule Negate?*

A review of national cases reveals some disagreement surrounding the question of whether the attorney-judgment rule, when properly applied, negates the duty element or the breach-of-duty element of a legal-malpractice claim.<sup>42</sup> In other words, if the rule applies, does that mean that the attorney fulfilled his or her duty to the client, or does it mean that the lawyer never owed a duty in the first place?

The prevailing national view is that the attorney-judgment rule negates the breach element—not the duty element. For instance, after surveying the national cases, the Idaho Supreme Court observed that the rule “appears to be nothing more than a recognition that if an attorney’s actions could, under no circumstances, be held to be negligent, then a court may rule as a matter of law that there is no liability.”<sup>43</sup> The court cautioned that, “[a]s in any other negligence case,” the case must go to the jury “if there is a genuine issue of material fact about the reasonableness and care exercised by the attorney.”<sup>44</sup> This language defines the attorney-judgment rule as a rule that

---

38. *Schonfeldt v. Knapp, Petersen & Clarke*, 2003 WL 170417, at \*4 (Cal. Ct. App. 2003).

39. *Id.*

40. *Id.*

41. *Woodruff*, 616 F.2d at 930.

42. Like any negligence claim, a claim for legal malpractice requires proof of a duty (arising from the attorney-client relationship), a breach of that duty, causation, and damages. See *Minn-Kota Ag Products, Inc. v. Carlson*, 684 N.W.2d 60, 63 (N.D. 2004).

43. *Sun Valley*, 981 P.2d at 240.

44. *Id.*

will, when applicable, negate the breach element.

Courts in other states have taken the same view, using language reflecting a qualitative reasonableness analysis rather than a threshold duty analysis. For instance, a federal judge applying New York law carefully organized his opinion so that his discussion of the attorney-judgment rule fell under the heading titled “Breach of Duty,” leaving no doubt that the analysis to follow concerned whether the defendant-attorney fulfilled his duty to the client.<sup>45</sup> Likewise, when the Alabama Supreme Court applied the attorney-judgment rule in a case involving trial strategy, it concluded that the plaintiffs did not present sufficient proof that their attorney “failed to use reasonable care and skill,” language relating to the breach element.<sup>46</sup> In Minnesota, the attorney-judgment rule has been invoked by attorneys who have conceded the duty element and then relied on the rule to challenge the plaintiff’s ability to satisfy the breach element.<sup>47</sup>

Commentators have also viewed this as a “breach rule” rather than a “duty rule.” For example, one commentator noted that in cases where reasonable attorneys could have differed in their exercise of professional judgment, the defendant-lawyer “simply has not violated the professional standard.”<sup>48</sup>

Even in states where it seems settled that the attorney-judgment rule relates to the duty element, the courts’ language often betrays an analysis that actually focuses on the breach element. In Michigan, for instance, one appellate panel confidently proclaimed that “the attorney judgment rule concerns the element of duty in the malpractice claim,” meaning that judges may dispose of cases on motion because duty is “a question of law for the court.”<sup>49</sup> Although the panel cited no authority for this specific point,<sup>50</sup> it relied heavily on Michigan’s leading case on the attorney-judgment rule, *Simko v. Blake*.<sup>51</sup>

But a close inspection of *Simko* reveals that the Michigan Supreme Court’s application of the rule actually rested on the absence of a *breach* of duty, not the lack of a duty: “We find, as a matter of law, that the plaintiffs’ allegations could not support a *breach* of duty because they are based on mere errors of professional judgment and not *breaches* of reasonable

---

45. *Hatfield v. Herz*, 109 F. Supp. 2d 174, 180 (S.D.N.Y. 2000).

46. *Herring v. Parkman*, 631 So. 2d 996, 1002 (Ala. 1994).

47. *Wartnick*, 490 N.W.2d at 112-16.

48. *See, e.g.*, DAN B. DOBBS, *THE LAW OF TORTS* at 1388 (2000).

49. *Beztak Co. v. Vlasic*, No. 236518, 2003 WL 21978749, at \*10 (Mich. App. Aug. 19, 2003).

50. *Id.*

51. *Simko*, 532 N.W.2d 842 (Mich. 1995).

care.”<sup>52</sup> Later in the opinion, the *Simko* court reaffirmed its conclusion by stating that because the attorney had “fashion[ed] a trial strategy consistent with the governing principles of law and reasonable professional judgment,” his “conduct [was] *legally adequate*” and he “*fulfilled* his duty to his client.”<sup>53</sup> An attorney does not “fulfill” a duty that he or she does not owe in the first place. And courts do not evaluate the “adequacy” of an alleged tortfeasor’s conduct if they are merely deciding whether the alleged tortfeasor owed a legal duty to act with care. Thus, it would be rather dubious to presume that the *Simko* court’s statements concerning the adequacy of the attorney’s conduct and the lack of a breach were mere lapses in precision suffered by a court that had never actually strayed beyond a pure duty analysis.

#### *D. A Question for the Judge or Jury?*

Because a careful reading of the national cases debunks the notion that the attorney-judgment rule is a duty rule, legal professionals might presume that courts may not rule on this issue as a matter of law. After all, as one commentator put it, “to cast an issue in terms of duty is to provide another subliminal suggestion—namely that the decision is to be made by judges rather than juries.”<sup>54</sup> If the attorney-judgment rule negates the duty element, courts invoking the rule can confidently dispose of legal-malpractice cases on motion, the duty question generally being one of law for courts to decide.<sup>55</sup> On the other hand, the breach-of-duty question is generally one that must be left to the jury.<sup>56</sup>

But the fact that the attorney-judgment rule actually goes to the breach-of-duty element has not undermined its vitality as a defense that triggers dispositive rulings, on motion, as a matter of law. Although the breach question in malpractice cases is typically one for the jury,<sup>57</sup> the cases reflect

---

52. *Id.* at 848 (emphasis added).

53. *Id.* (emphasis added).

54. See DOBBS, *supra* note 48, at 584-85.

55. See DOBBS, *supra* note 48, at 578. See also *Simko*, 532 N.W.2d at 846 (recognizing—in the context of a legal-malpractice action implicating the attorney-judgment rule—that the duty question is one of law for the court to decide); *Janik v. Rudy, Exelrod & Zieff*, 14 Cal.3d 751, 755 (Cal. 2004) (recognizing that the duty question is one of law for courts alone); *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001) (stating that “because the existence of a duty is a question of law, the court may appropriately adjudicate that question on a motion for summary judgment); *Kan. Pub. Employee Ret. Sys. v. Kutak Rock*, 44 P.2d 407, 489 (Kan. 2002) (holding that “[t]he existence of a legal duty is a question of law”).

56. See DOBBS, *supra* note 48, at 578.

57. See, e.g., *Bergstrom*, 974 P.2d at 554.

that where a lawyer makes an informed tactical decision or tries in good faith to chart a course in the face of unsettled law, courts are properly positioned to decide the question on motion, as a matter of law.<sup>58</sup> In other words, it presents a unique situation where courts are willing to take the question from the jury and hold, as a matter of law, that the attorney did not breach his or her duty to the client.<sup>59</sup>

The Kansas Supreme Court's decision in *Bergstrom v. Noah*<sup>60</sup> illustrates this. There, the court acknowledged the general rule that "questions of professional negligence should be left to the trier of fact" but nevertheless held that the attorney-judgment rule precluded a finding of malpractice in that case as a matter of law.<sup>61</sup> The court explained that there is a "recognized exception" allowing courts to decide the breach question "[w]hen, under the totality of the circumstances as demonstrated by uncontroverted facts, a conclusion may be reached as a matter of law that negligence has not been established."<sup>62</sup>

Even the Idaho Supreme Court grudgingly acknowledged this, despite striking a tone suggesting that it was not completely sold on the attorney-judgment rule's propriety. The court "[a]ssum[ed] that there may be instances where a court may find no breach of duty."<sup>63</sup> In that court's view, the attorney-judgment rule supports summary judgment when reasonable minds could not differ in concluding that the client is merely second-guessing the attorney for an informed choice that the attorney made in good faith and after conducting reasonable research of the relevant law and facts.<sup>64</sup>

For lawyers sued for malpractice, this is arguably the most important facet of the attorney-judgment rule. When it applies, courts can properly grant dispositive motions by ruling, as a matter of law, that the defendant-attorney did not breach his or her duty. This gives lawyers invoking the rule the chance to avoid costly, messy, and potentially embarrassing trials.

---

58. See, e.g., *First Union Nat'l Bank v. Benham*, 423 F.3d 855, 860-61 (8th Cir. 2005); *Hatfield*, 109 F. Supp. 2d at 180 (S.D. N.Y. 2000)(quoting *Bernstein*, 554 N.Y.S.2d at 490); *Halvorsen*, 735 P.2d at 681; *Martinson Mfg. Co. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) (including cases cited therein). See also the discussion of cases applying the rule in Part II.

59. See discussion of cases applying the rule in Part II of this article.

60. See, *Bergstrom*, 974 P.2d 531.

61. *Id.* at 554-57.

62. *Id.* at 554.

63. *Sun Valley*, 981 P.2d at 240.

64. See, *id.* at 239-40.

*E. Is it Really Immunity?*

England has long granted its trial lawyers—or “barristers”—immunity from suits based on alleged shortcomings in courtroom advocacy.<sup>65</sup> But this immunity has yet to cross the Atlantic.<sup>66</sup> Although many American courts have described the attorney-judgment rule as an immunity rule, often labeling the rule “judgmental immunity,”<sup>67</sup> this is a misnomer. As one court explained, “[r]ather than being a rule which grants some type of ‘immunity’ to attorneys, it appears to be nothing more than a recognition that if an attorney’s actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability.”<sup>68</sup> This observation is well-founded. “The term immunity is commonly used to refer to the special protections sometimes accorded to public entities and officers, to family members, and to charities.”<sup>69</sup> Immunity “is a defense to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortious act.”<sup>70</sup> “[T]he essence of absolute immunity,” for example, “is its possessor’s entitlement not to have to answer for his conduct in a civil damages action.”<sup>71</sup> So being immune from liability does not mean that there was no wrongdoing in the first place; it just means that the wrongdoer will not have to answer for it in court, because the law affords that wrongdoer some special status. In contrast, when the attorney-judgment rule applies, it reflects that there is no way that the plaintiff can establish wrongdoing—meaning legal malpractice—in the first place. The rule negates the essential breach-of-duty element of a prima facie case for legal malpractice.

This distinction becomes even clearer when one considers that

---

65. See *Rondel v. Worsley*, 1 A.C. 191 (1969). See also Melissa Newman, *Note, The Case Against Advocates’ Immunity: A Comparative Study*, 9 GEO. J. LEGAL ETHICS 267 (1995).

66. See Newman, *supra* note 65.

67. See, e.g., *Liberto v. Waddell*, 2003 WL 21277374, at \*1 (Ark. Ct. App. June 4, 2003); *Haisfield v. Fleming, Haile & Shaw, P.A.*, 819 So. 2d 182, 184-185 (Fla. Dist. Ct. App. 2002); *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 209, 210 (Ga. Ct. App. 2004); *McIntire v. Lee*, 816 A.2d 993, 1000 (N.H. 2003); *Roberts v. Chimileski*, 820 A.2d 995, 999-1000 (Vt. 2003).

68. *Sun Valley*, 981 P.2d at 240.

69. DOBBS, *supra* note 48, at 575.

70. EDWARD J. KIONKA, *TORTS IN A NUTSHELL* at 341 (2d ed. 1992).

71. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

immunity, in its various forms, is treated as an affirmative defense.<sup>72</sup> An affirmative defense is one that “accepts the plaintiff’s allegation as true and even admits the establishment of the plaintiff’s prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff’s pleadings.”<sup>73</sup> This definition captures the essence of immunity defenses. Even if a plaintiff establishes all of the elements of a prima facie case, a valid immunity defense will defeat the plaintiff’s claim.<sup>74</sup> Again, an immunity defense protects wrongdoers who have indeed committed a tort.<sup>75</sup>

Unlike an immunity-based affirmative defense, the attorney-judgment rule does not defeat otherwise viable legal-malpractice claims. An attorney sued for malpractice cannot admit that the plaintiff has established all of the elements of a prima facie case yet still avoid liability based on the rule.<sup>76</sup> Instead, and in sharp contrast to a true affirmative defense like immunity, the attorney-judgment rule precludes plaintiffs from establishing the elements of a prima facie legal-malpractice case in the first place. Although some courts have differed on whether the rule negates the duty element or the breach element, either way it is clear that the rule negates one of the essential elements of a prima facie case. Therefore, the correct conclusion is that the rule is not a true immunity rule. Nor, for that matter, is it an affirmative defense.

“Judgmental immunity” may be a convenient label for the attorney-judgment rule, but the rule should not be mistaken for true immunity for lawyers.

---

72. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)(qualified immunity); *Desilva v. Baker*, 96 P.2d 1084, 1088 (Ariz. 2004)(absolute judicial immunity); *Davis v. City of San Antonio*, 752 S.W.2d 518, 519-29 (Tex. 1988)(sovereign immunity).

73. *Stanke v. State Farm Mut. Auto. Ins. Co.*, 503 N.W.2d 758, 760 (Mich. App. 1993). In federal courts, a defense that negates an element of the plaintiff’s prima facie case is “excluded from the definition of affirmative defense.” *In re Rawson Food Service, Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988). State courts have likewise recognized that “[a]n affirmative defense is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff.” *Chmielewski v. Xermac, Inc.*, 580 N.W.2d 817, 827 (Mich. 1998) (quoting *Stanke*, 503 N.W.2d at 760). See, e.g., *Sterrett v. Milk River Prod. Credit Ass’n.*, 764 P.2d 467, 469-70 (Mont. 1988).

74. See *Foster v. McGrail*, 844 F. Supp. 16, 21, 24-25 (D. Mass. 1994).

75. *DOBBS*, *supra* note 48, at 575.

76. *Id.*

## II. THE RULE IN ACTION: A SURVEY OF NATIONAL CASES

A. *Trial Strategy*

The attorney-judgment rule's undeniable stronghold is in cases where disappointed clients second-guess their attorneys' trial strategy. But the rule is not always a complete bar to malpractice suits in that scenario. Here is a survey of national cases applying the rule, or declining to apply the rule, in that context.

1. *Choice of Witnesses*

A number of courts have applied the attorney-judgment rule in cases where clients claimed that their trial attorney was negligent for calling or failing to call certain witnesses.

One of the leading cases on this point is Michigan's *Simko v. Blake*.<sup>77</sup> In *Simko*, the client was convicted for possession of cocaine and a firearm, but the conviction was later reversed on appeal. The client sued his trial attorney for malpractice, alleging that he would have avoided the initial guilty verdict if his attorney had called a number of important witnesses. For instance, the client claimed that his treating physician could have linked his unusual symptoms at the time of arrest to his prescription medication.<sup>78</sup> The client also alleged that his wife should have been put on the stand to, among other things, confirm that none of the luggage in the couple's car at the time of arrest belonged to the client or anyone in his family<sup>79</sup>. Instead, the attorney called only the client to testify.

The Michigan Supreme Court held that the attorney's alleged omissions amounted to protected strategy decisions, concluding that as long as an attorney "acts with full knowledge of the law and in good faith," a supposed error in that attorney's tactical decision to call or not call certain witnesses cannot establish a breach of duty.<sup>80</sup> The court reasoned that the client's allegations were "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

---

77. 532 N.W.2d at 842.

78. *Id.* at 845.

79. *Id.*

80. *Id.* at 848.

defense lawyer.”<sup>81</sup> Even if there was an error in judgment, and another lawyer would have tried the case differently, the disputed decisions were still tactical in nature, and tactical decisions “do not constitute grounds for a legal malpractice action.”<sup>82</sup> The *Simko* court emphasized that courts “may not question” tactical decisions.<sup>83</sup>

A Michigan Court of Appeals panel later applied *Simko* in holding that a trial attorney’s alleged failure to call certain witnesses could not support a legal-malpractice claim, this being a matter of trial strategy.<sup>84</sup>

Michigan is not alone in recognizing that alleged shortcomings in a trial attorney’s decision to use or not to use certain witnesses generally cannot support a legal-malpractice claim. For instance, in the Alabama Supreme Court case *Herring v. Parkman*,<sup>85</sup> an attorney recommended that his clients and other witnesses not take the stand in a criminal case concerning illegal satellite-dish “descramblers.” After the attorney’s clients were convicted, they sued him for malpractice, alleging that their testimony would have proved that they were not involved in selling the descramblers.

The court rejected this claim, holding that the attorney’s recommendation that his clients, and others, not testify “was based on a decision within the province of [his] exercise of judgment as to trial strategy.”<sup>86</sup> The court reaffirmed Alabama precedent recognizing that “‘the decision not to call a particular witness is usually a tactical decision’ for the attorney.”<sup>87</sup> The court found it sufficient, as a matter of law, that the attorney did not want to give the prosecutor a chance to cross-examine and impeach his clients. Although this strategy did not prevent the convictions, it could “not support a malpractice claim.”<sup>88</sup>

The United States District Court for the Southern District of New York construed New York law in the same fashion, rejecting as a matter of law a legal-malpractice claim based on an alleged failure to call important witnesses. In *Hatfield v. Herz*,<sup>89</sup> an apartment co-op board member was

---

81. *Id.*

82. *Id.*

83. *Simko*, 532 N.W.2d at 848.

84. *McAdoo v. Satawa*, No. 234628, 2002 WL 31955124, at \*2 (Mich. App. Dec. 17, 2002).

85. 631 So. 2d 996 (Ala. 1994).

86. *Id.* at 1002.

87. *Id.* (quoting *Luke v. State*, 484 So. 2d 531, 533 (Ala. App. 1985)).

88. *Id.*

89. 109 F. Supp. 2d 174 (S.D.N.Y. 2000).

found liable for unlawfully trying to prevent a unit sublease. He complained that during the bench trial in the underlying case, his attorney should have called the co-op's attorney to testify that the board member was simply relying on the advice of counsel when he committed the disputed acts.<sup>90</sup> The board member also alleged that it was malpractice not to call a second board member, who was also accused of misconduct, to testify.<sup>91</sup>

The court rejected these claims as a matter of law, holding that the attorney's decision not to call these witnesses was a strategic one that could not support a malpractice claim.<sup>92</sup> As for the decision not to call the co-op's attorney to testify in support of the advice-of-counsel defense, the court noted that the defendant-attorney had asserted this defense throughout the trial, using other witnesses and documents from the co-op attorney's files.<sup>93</sup> Thus, whether to call the co-op's attorney as a witness "to bolster" what was already before the court was a "strategic decision."<sup>94</sup> The court explained that where "reasonable minds might differ as to the optimal trial strategy for trial," the defendant-attorney's decision "was not negligent."<sup>95</sup> "[T]he same legal standard applie[d]" to the defendant-attorney's "strategic choice" not to call as a witness the second board member accused of misconduct.<sup>96</sup> The court reasoned that virtually everyone associated with the underlying case conceded that this board member would not have made a credible or sympathetic witness, and the defendant-attorney feared that "his questionable conduct . . . would have led to extremely damaging testimony on cross-examination."<sup>97</sup>

The result may be different if a lawyer fails to interview potential witnesses to determine if their testimony would be relevant and fruitful at trial. For instance, in *Woodruff v. Tomlin*,<sup>98</sup> the client told his attorney that two witnesses had valuable information about an auto accident, but his attorney allegedly ignored this information. One witness had walked off skid marks and calculated their length. Another witness heard the accident and could estimate how long one car's tires were screeching. The client

---

90. *Id.* at 182.

91. *Id.*

92. *Id.* at 183-84.

93. *Id.* at 183.

94. *Id.*

95. 109 F. Supp. 2d 174, 183 (S.D.N.Y. 2000)

96. *Id.*

97. *Id.*

98. 616 F.2d 924, 930 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

believed that this testimony would have refuted opposing testimony.

The Sixth Circuit, applying Tennessee law, held that the attorney-judgment rule did not protect the attorney's decision not to interview these witnesses.<sup>99</sup> The court distinguished an attorney's tactical decision not to call a witness after determining the nature of the witness's testimony, from a decision not to call a witness without first ascertaining whether the witness's testimony would be helpful.<sup>100</sup> "While the determination of whether to call a particular person as a witness at trial is a tactical decision involving the exercise of professional judgment," the court explained, "the same cannot be said concerning the failure to interview a potential witness brought to the attention of the attorney by his [or her] client."<sup>101</sup> Thus, the reasonableness of the attorney's actions was a jury question.<sup>102</sup>

## 2. *Choice and Use of Experts*

A closely related question is whether the attorney-judgment rule protects trial attorneys' decisions to use or not to use experts, or their assessments of whether an expert is qualified to testify. There are occasions when courts will apply the rule to those decisions, but this will depend on whether there was indeed room for judgment. Many states, for example, have statutes imposing rigid expert-witness requirements in medical-malpractice cases.<sup>103</sup> If the governing statute requires an expert or requires certain minimum qualifications for experts, there is no room for a "strategy" decision not to use an expert or to use one falling short of the required qualifications. But where the law does not require an expert or does not require certain minimum requirements for experts, courts have applied the attorney-judgment rule. Thus, the rule's application in this context depends on each state's specific laws concerning the use and qualifications of experts.

The Sixth Circuit's *Woodruff* opinion gives one example of when a decision concerning the best type of expert to use was considered a

---

99. *Id.* at 934.

100. *Id.*

101. *Id.*

102. *Id.*

103. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2169 (West 2000); FLA. STAT. ANN. § 766.102(5), § 766.202(6) (West 2005); TENN. CODE ANN. § 29-26-115(b) (LexisNexis 2000 & Supp. 2005); *see also* N.C. R. EVID. § 702(b), (c), (d).

protected strategy decision. In *Woodruff*, the client alleged that his trial attorney should have called an accident-reconstruction expert to testify.<sup>104</sup> Instead, the attorney hired an engineer, who prepared a plat of the accident scene based on measurements he took at the scene.<sup>105</sup> The court held that the attorney's choice of experts was a protected tactical decision on how to best present the evidence to the jury: "The decision to establish the physical facts of the case by use of an engineer's plat rather than the testimony of an expert appears to be one of trial tactics or judgment as to the most effective presentation of a client's case."<sup>106</sup>

In a rather cursory opinion, New York's Appellate Division also found that a trial attorney's choice of experts can be protected by the attorney-judgment rule. In *Dimond v. Kazmierczuk & McGrath*,<sup>107</sup> the client alleged that her trial attorneys in the underlying case committed malpractice by selecting an expert witness who was later declared unqualified. The court rejected this claim, saying only that the attorneys "demonstrated that their choice of expert was a reasonable exercise of their judgment regarding how to proceed at trial in the underlying action."<sup>108</sup> The court reasoned that an attorney's "selection of one among several reasonable courses of action does not constitute malpractice."<sup>109</sup> The *Dimond* court's failure to report the details concerning the defendant-attorney's choice of experts robs that case of much of its instructive value, but the case is nevertheless an example of some courts' willingness to invoke the attorney-judgment rule to protect decisions concerning experts.

*Dimond* echoed the New York Appellate Division's holding in its earlier—and equally cursory—opinion in *Geller v. Harris*.<sup>110</sup> In *Geller*, the court held that a trial attorney's decision not to use a board-certified physician as an expert in a medical malpractice case "was, at most, a mere error in professional judgment not rising to the level of legal malpractice."<sup>111</sup>

A recent Texas decision reveals that a trial attorney's decision to not offer any expert testimony at all can also be protected by the attorney-

---

104. *Woodruff*, 616 F.2d at 932.

105. *Id.*

106. *Id.*

107. 790 N.Y.S.2d 219 (2005), *appeal denied*, 807 N.Y.S.2d 16 (2005).

108. *Id.* at 220.

109. *Id.* (quoting *Rosner v. Paley*, 492 N.Y.S.2d 13, 14 (1985)).

110. 685 N.Y.S.2d 734 (1999).

111. *Id.* at 421.

judgment rule. In *Mora v. Villalobos*,<sup>112</sup> the jury in the underlying case found that the client was the victim of malicious prosecution but concluded that she had suffered no damages. The client claimed that her attorney committed legal malpractice by failing to offer expert testimony by her treating physician and psychologist to establish that she suffered mental anguish.<sup>113</sup> The attorney testified that he considered many factors before opting not to offer those experts. He feared that offering expert testimony might backfire because on cross-examination, these experts would have been forced to disclose that the client incurred only a meager amount of medical expenses.<sup>114</sup> Given that he was seeking two-million dollars in the case, the attorney feared that this evidence might have eroded the experts' credibility. So he instead relied on the client's testimony—and testimony by the client's grandmother—to establish mental anguish.

The court held that the attorney's decision not to offer these experts at trial was protected by the attorney-judgment rule.<sup>115</sup> It reasoned that this decision was "a matter of professional judgment that was carried out in good faith and in the best interest of his client."<sup>116</sup> The court also noted that expert testimony is not required when the issue is one that falls within the experience of lay jurors, and the court concluded that the existence of mental anguish fell within this category.<sup>117</sup> For these reasons, the court likewise rejected the client's claim that the attorney should have located and used more credible experts.<sup>118</sup>

### 3. *Sequence of Witnesses*

At least one court has applied the attorney-judgment rule to a claim concerning a trial attorney's decision on *when* to call a witness. In *Bott v. Hedine*,<sup>119</sup> the client second-guessed his attorney's decision to call a witness in rebuttal instead of during the case-in-chief.<sup>120</sup> The client alleged that this witness could have supported his underlying wrongful-discharge claim by testifying that his former employer had a pattern of retaliating against whistleblowers. The client's trial attorney explained that his strategy was to save this witness for rebuttal, after the employer offered evidence

---

112. No. 13-02-2000759, 2005 WL 2000759 (Tex. App. Aug. 22, 2005).

113. *Id.* at \*3.

114. *Id.*

115. *Id.* at \*4.

116. *Id.*

117. *Id.*

118. *Mora*, 2005 WL 2000759 at \*4.

119. 2001 WL 200354 (Wash. Ct. App. March 1, 2001), *review denied*, 31 P.3d 1185 (Wash. 2001).

120. *Id.* at \*4.

suggesting that it did not retaliate against its employees.<sup>121</sup> The Washington Court of Appeals held that this supposed error in trial tactics could not support a malpractice claim, noting that the trial attorney offered “a reasonable explanation” for why he waited to call the witness during rebuttal.<sup>122</sup>

#### 4. *Interrogation of Witnesses*

There is also precedent applying the attorney-judgment rule to decisions concerning whether or how to question a witness at trial. One example is the Sixth Circuit’s decision in *Woodruff*,<sup>123</sup> where a disappointed client complained that his trial attorney failed to interview or cross-examine an opponent’s accident-reconstruction expert.<sup>124</sup> The expert was a Tennessee State Trooper who testified, based on his measurements of skid marks, that the client’s car was speeding at the time of the accident. The attorney knew this expert well and did not believe that he could undercut his testimony through cross-examination.<sup>125</sup> So instead of attempting to cross-examine him, the attorney called the passenger in the client’s car and the driver of the car that was following the client’s car, who both testified that the client’s car was traveling well below the speed limit.<sup>126</sup> The Sixth Circuit held that “[t]his was clearly a tactical decision” that could not support a legal-malpractice claim.<sup>127</sup>

The North Dakota Supreme Court appeared to take a different view in *Klem v. Greenwood*,<sup>128</sup> where an in pro per litigant claimed that his former attorney failed to adequately cross-examine a witness during his criminal trial. The court concluded that there were disputed issues of fact and that expert testimony “is generally necessary” to determine whether an attorney conformed to the standard of care.<sup>129</sup> But *Klem*’s value is limited. The court did not mention the attorney-judgment rule (by name or in substance), and there is no indication that it was raised by the defendant-attorney. The opinion also contained no description of the disputed cross-examination or its supposed shortcomings. At most, *Klem* illustrates that some courts might be reluctant to rule as a matter of law on the breach issue.

---

121. *Id.*

122. *Id.*

123. *Woodruff*, 616 F.2d at 924.

124. *Id.* at 932-33.

125. *Id.*

126. *Id.* at 933.

127. *Id.*

128. 450 N.W.2d 738 (N.D. 1990).

129. *Id.* at 744, n.5.

### 5. *Choice of Evidence to Offer*

The attorney-judgment rule may also protect decisions concerning what evidence to introduce at trial. For example, in *Hatfield*,<sup>130</sup> an apartment co-op board member sued his trial lawyer after receiving an adverse verdict in a bench trial, alleging that, among other things, his trial lawyer should have offered two additional pieces of documentary evidence showing that the board relied on the advice of counsel on a disputed sublease issue.<sup>131</sup>

The court rejected this claim as a matter of law, holding that the attorney's decision not to offer the disputed documents "was a reasonable strategic choice, not subject to [the client's] second-guessing after the fact."<sup>132</sup> The court reasoned that both documents would have amounted to "cumulative" evidence because the co-op board's reliance on the advice of its counsel was "presented to [the trial judge] by other means."<sup>133</sup> Moreover, one of the two documents was admittedly missing.<sup>134</sup> Regardless of the documents' availability, the court believed that the trial attorney "clearly acted within his discretion in selecting the evidence to be introduced at trial."<sup>135</sup>

But another court was unwilling to apply the rule where the record was devoid of factual evidence explaining why the attorney opted not to introduce certain evidence. In *Sun Valley*,<sup>136</sup> the client, a potato-processing company, complained that its trial attorney ignored valuable evidence undermining its opponent's damages calculation. The client had been accused of wrongfully rejecting a shipment of potatoes. It told its attorney that, among other things, the storage cellar holding the potatoes in question was not large enough to hold the quantity of potatoes that its opponent claimed to have lost. In the legal-malpractice case, the trial attorney explained, by way of affidavit, that he declined to use the evidence because it was nothing more than the client's designated officer's educated guess and might have undermined his credibility when he testified.

The Idaho Supreme Court rejected the attorney-judgment argument, concluding that the record was devoid of evidence countering the client's claims.<sup>137</sup> This decision rested on the court's refusal to consider the affidavit explaining the attorney's rationale for not offering the disputed evidence.

---

130. 109 F. Supp. 2d 174 (S.D.N.Y. 2000).

131. *Id.* at 184.

132. *Id.* at 185.

133. *Id.*

134. *Id.* at 184.

135. *Id.* at 184-85.

136. 981 P.2d at 236.

137. *Id.* at 242.

The court concluded that the affidavit should have been excluded from the trial-court record based on tardiness.<sup>138</sup> The court gave no hint of how it might have viewed the issue had it considered the attorney's affidavit, although a fair reading of the case reveals that the court took a relatively narrow view of the attorney-judgment rule.

*Sun Valley* underscores that the attorney-judgment doctrine is, at its core, a factual defense. Attorneys wishing to avoid liability by claiming that disputed acts or omissions were informed, good-faith judgment calls must come forward with some explanation of what their judgment call was and why they chose that strategy. Where the record lacks an affidavit or testimony explaining the attorney's strategy—as in *Sun Valley*—courts will be reluctant to apply the rule.

#### 6. *Opening and Closing Statements*

At least one court has declined to apply the attorney-judgment rule to protect an attorney for his alleged misstep during an opening statement. In *Wartnick v. Moss & Barnett*,<sup>139</sup> the jury in the underlying wrongful-death suit found that the client was responsible for his former business partner's murder. The client later claimed that his trial attorney committed malpractice by disclosing during his opening statement that the client had, on the attorney's advice, refused police requests to take a polygraph test. During the malpractice trial, the client's experts testified that this disclosure breached the standard of care by injecting prejudicial and inadmissible evidence into the underlying wrongful-death trial. The attorney countered with his own experts and argued that this was protected trial strategy. The court held that the conflicting expert testimony created a jury question on whether the attorney's disclosure was an unreasonable lapse in judgment, thus precluding summary judgment.<sup>140</sup> The court commented that "a failure to meet the minimum standard of care required is not a 'mere error in judgment.'"<sup>141</sup>

#### 7. *Approval of Jury Instructions*

Whether the attorney-judgment rule protects an attorney's decision to approve or disapprove of a proffered jury instruction depends on whether

---

138. *Id.* at 241- 42.

139. 490 N.W.2d 108 (Minn. 1992).

140. *Id.* at 116.

141. *Id.* (citing *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 646, 693 (Minn. 1980)).

the relevant law is settled. For example, in *Woodruff*,<sup>142</sup> the Sixth Circuit affirmed the dismissal of a malpractice claim alleging that the defendant-attorney negligently failed to object to an erroneous instruction on the “last clear chance” doctrine.<sup>143</sup> The court reasoned that when the underlying case was tried, there was “confusion surrounding the proper application of last clear chance in Tennessee.”<sup>144</sup> The court—using rather colorful language—was careful to distinguish this scenario from one in which the trial attorney’s conduct betrays ignorance of well-established rules:

[A]n attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law. He must keep pace, so far as reasonable diligence and a fair amount of common sense will enable him to do so, with the literature of his profession, and what the courts have decided. But the law does not require and never has required of a member of the profession that he should be a true Sir Oracle of what the courts have decided or will decide as the law applicable to every given state of facts.<sup>145</sup>

### *B. Pretrial Litigation Strategy*

The attorney-judgment rule has also been raised as a defense to malpractice suits criticizing an attorney’s pretrial litigation strategy. Although the results in these cases are not uniform, the cases illustrate that the entire litigation process is rife with strategy decisions; protected judgment calls are by no means limited to actual trial work.

#### *1. Deciding Whether to Sue*

Civil-litigation attorneys who represent plaintiffs always face one inevitable decision: whether to sue. A number of courts have held that this decision falls squarely within the attorney-judgment rule if it is an informed decision.

For instance, in *Mitchell v. Dougherty*,<sup>146</sup> the client told her attorneys that a hospital gave her an excessive dose of the wrong drug. Although a hospital nursing chart did indeed list the wrong drug, the attorneys’ investigation also revealed pharmacy records showing that the correct drug was dispensed. Moreover, the client’s treating physician believed that she

---

142. 616 F.2d at 924.

143. *Id.* at 932.

144. *Id.*

145. *Id.*

146. 644 N.W.2d 391 (Mich. App. 2002).

had received the correct drug. The expert hired to support the client's drug-mix-up claim against the hospital balked, telling the attorneys that he could not support it. The attorneys sued a medical clinic for unrelated reasons, but opted not to sue the hospital for the supposed drug mix-up. After settling with the clinic, the client sued her attorneys for failing to timely file what she claimed was a valid malpractice claim against the hospital.

The Michigan Court of Appeals held that attorneys do not breach their duty by declining to sue after investigating a claim and deciding that, in their professional judgment, the claim is not worth pursuing because of a lack of expert support or conflicts in the evidence.<sup>147</sup> The *Mitchell* court rejected the client's argument that her new attorneys' ability to find expert support for her drug-mix-up claim was proof that her former attorneys committed malpractice. The court emphasized that the relevant question was *not* whether the client's underlying malpractice claim against the hospital would have ultimately succeeded. Rather, the critical question was whether her attorneys "exercised reasonable skill, care, discretion, and judgment when they determined that the [client's] claim was not worth pursuing."<sup>148</sup> Given Michigan's statute requiring expert support for all medical-malpractice claims, the court "could not fault" the attorneys for declining to sue after receiving an unfavorable expert opinion.<sup>149</sup> The court did not want to "create precedent whereby an attorney is obligated to file suit whenever there is some scintilla of evidence supporting the client's claim."<sup>150</sup>

The outcome was the same in a Kansas case where clients complained that their attorney should *not* have sued. In *Bergstrom*,<sup>151</sup> an attorney advised his clients to pursue an antitrust claim under Kansas antitrust statutes. Those statutes included broad language requiring a "'trust'" and defined "trust" as "a combination of 'two or more persons.'"<sup>152</sup> The courts in the underlying antitrust case read this language to create a formidable conspiracy-to-monopolize requirement that the clients could not surmount.<sup>153</sup> The clients later claimed that their attorney committed legal malpractice by pursuing an expensive lawsuit that he should have known was doomed to failure.<sup>154</sup>

The Kansas Supreme Court relied on the attorney-judgment rule in

---

147. *Id.* at 397-98.

148. *Id.* at 397 (citing *Simko*, 532 N.W.2d at 846).

149. *Id.*

150. *Id.* at 398.

151. 974 P.2d at 531.

152. *Id.* at 556 (quoting KAN. STAT. ANN. § 50-101 (1994)).

153. *Id.*

154. *Id.* at 552-53.

rejecting the malpractice claim. The court described the attorney-judgment rule as a “narrow” exception that “should not be employed where the issue is settled and can be identified through ordinary research and investigative techniques.”<sup>155</sup> Nevertheless, it concluded that this case fell squarely within the rule, observing that “the exception applies in a case such as this, where the law is unclear, unsettled by case law, and is an issue or issues upon which reasonable doubt may well be entertained by informed counsel.”<sup>156</sup> The court emphasized that the proper interpretation of the Kansas antitrust statutes was unsettled at the time the attorney filed suit because the state’s appellate courts had not yet interpreted them.<sup>157</sup>

## 2. *Deciding Whom to Sue*

In a line of cases overlapping the whether-to-sue cases somewhat, a number of courts have applied the attorney-judgment rule where clients questioned their attorneys’ decisions not to name certain parties to lawsuits. The Third Circuit, applying Pennsylvania law, enforced the attorney-judgment rule under those circumstances in *Gans v. Mundy*.<sup>158</sup> In *Gans*, the client was a railroad worker who had been injured while a passenger in his employer’s bus. The client’s attorney sued the employer under the liberal liability provisions of the Federal Employers Liability Act (FELA), which trigger liability if the employer’s negligence played any part, however slight, in producing the injury.<sup>159</sup> But the attorney opted against suing the owner of a second bus that was involved in the accident because the employer’s bus rear-ended that second bus, the employer’s driver knew that the road was wet, and the employer’s driver knew that the brake lights on the other bus were not working. The attorney also opted not to sue the employer for a second workplace injury because that appeared to be a mere aggravation of the first injury and was caused by routine, on-the-job lifting—not the employer’s negligence. After settling the FELA claim, the client sued his attorney, alleging that his decisions to forego additional claims constituted legal malpractice.

The court held that an attorney’s “informed, strategic” decision not to assert certain claims does not, as a matter of law, breach the standard of care.<sup>160</sup> The court reasoned that the attorney’s decision not to sue the owner of the second bus reflected FELA’s relatively low threshold for employer

---

155. *Id.* at 557.

156. *Id.*

157. *Bergstrom*, 974 P.2d at 548, 555-57.

158. 762 F.2d 338 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1010 (1985).

159. *Id.* at 343.

160. *Id.* at 343-44.

liability, not to mention undisputed evidence showing that this was a rear-end accident caused by the employer's driver.<sup>161</sup> Likewise, the attorney's decision not to sue the employer for the client's second injury reflected reasonable professional judgment, given the evidence that it was only an aggravation of the earlier injury, and given the lack of proof on the negligence and causation elements.<sup>162</sup>

The District of Columbia Court of Appeals has also recognized that where reasonable attorneys could differ on whether to sue certain parties, hindsight second-guessing of an attorney's professional judgment cannot support a malpractice claim. In *Mills v. Cooter*,<sup>163</sup> an unscrupulous buyer misrepresented his wealth to convince the clients to sell him valuable real estate. The buyer eventually defaulted. The clients sued the buyer (and a few other parties) for fraud, but their attorney declined to sue the listing agent or the buyer's realtor because he found no evidence that they made fraudulent statements.<sup>164</sup> He also concluded that they had no contractual or fiduciary relationship with the clients that could give rise to liability on other theories. It was undisputed that the attorney communicated this decision to the clients early on in the representation.<sup>165</sup> The clients later sued the attorney for legal malpractice, claiming that his failure to sue the realtors was negligent and prevented them from securing a more favorable result. The parties presented conflicting expert testimony on this point.<sup>166</sup>

The court held that a malpractice claim cannot rest on an attorney's informed judgment not to sue a party if reasonable attorneys could differ on whether there was a sufficient basis to sue and the attorney tells the client of this decision in a timely fashion.<sup>167</sup> The court emphasized that "[t]he conduct of litigation generally rests within the discretion of the attorney" if the attorney acts ethically and in good faith.<sup>168</sup> Attorneys are not obligated to take positions that they do not believe are "legal and just," and attorneys are not "required or even permitted to disregard [their] own professional judgment" to appease their clients.<sup>169</sup> Thus, once the attorney in *Mills* told his clients of his decision not to sue the realtors, "he could not be held liable for malpractice even if a court or jury were to conclude, after the fact, that his decision was an erroneous one."<sup>170</sup>

---

161. *Id.* at 344.

162. *Id.*

163. 647 A.2d 1118 (D.C. 1994).

164. *Id.* at 1119.

165. *Id.* at 1120.

166. *Id.* at 1121.

167. *Id.*

168. *Id.* at 1122.

169. *Mills*, 647 A.2d at 1121-22.

170. *Id.* at 1122.

An Illinois appellate panel extended this analysis to decisions concerning the joinder of parties. In *O'Brien & Associates, P.C. v. Tim Thompson, Inc.*,<sup>171</sup> the client complained that its attorney failed to immediately join two subcontractors as third-party defendants and that this forced it to contribute more than its fair share to a settlement. The court rejected this claim, concluding that the client was attempting to hold the attorney liable “for an error in judgment.”<sup>172</sup> The court noted, in rather broad, blanket terms, that “[d]eciding when to join parties is left to the attorney’s judgment.”<sup>173</sup>

On the other hand, where expert testimony creates a genuine issue of material fact concerning the adequacy of an attorney’s factual investigation or legal research, the attorney-judgment rule will not foreclose a malpractice claim. For example, in *Johnson v. Daggett, Van Dover, Donovan & Perry, PLLC*,<sup>174</sup> an attorney representing an injured seaman sued the United States, alleging that the Army Corps of Engineers’ lock operator caused the disputed accident. But the attorney elected not to sue the client’s employer. After receiving an adverse verdict in the case against the United States, the client sued the attorney for malpractice because of his decision not to sue the employer. In the malpractice case, the client’s expert opined that the attorney failed to adequately investigate a claim against the employer and failed to advise the client of the employer’s potential liability under maritime law.<sup>175</sup>

The court held that the expert’s opinion created a genuine issue of fact on whether the attorney’s decision not to sue the employer “was made after an adequate factual investigation and reasonable legal research.”<sup>176</sup> The court reasoned that although attorneys are not liable for mere errors in judgment if they act in good faith, this case was distinguishable from cases like *Gans* and *Mills* because the client presented expert testimony calling into question how informed the attorney’s decision actually was.<sup>177</sup> The court also noted the expert’s criticism of the attorney’s claim that his decision was justified, in part, by the client’s initial instructions not to sue the employer.<sup>178</sup>

---

171. 653 N.E.2d 956 (Ill. App. Ct. 1995).

172. *Id.* at 961.

173. *Id.* at 962.

174. 99 F. Supp. 2d 1008 (E.D. Ark. 2000).

175. *Id.* at 1013.

176. *Id.* at 1014.

177. *Id.*

178. *Id.*

### 3. *Deciding Which Legal Theories to Assert*

An unsettled state of the law can also force attorneys to make tactical decisions concerning what legal theories to assert, and courts have applied the attorney-judgment rule to protect those decisions. For instance, in *Halvorsen v. Ferguson*,<sup>179</sup> the client complained that her attorney failed to secure an adequate property settlement in her divorce case. The specific issue in the divorce case was whether the client could claim a community interest in profitable corporations, which were her husband's separate property before the marriage, based on the work she had done for those corporations during the marriage.<sup>180</sup> The client's experts testified that the attorney committed malpractice by asserting a "salary" theory rather than an "apportionment" theory.<sup>181</sup>

The Washington Court of Appeals rejected the malpractice claim based on the attorney-judgment rule, concluding that "the subject of 'apportionment' as framed by the [client] involved an uncertain and unsettled legal proposition."<sup>182</sup> The court observed that the attorney had advanced a variety of theories in the underlying case and that the client's experts themselves had trouble articulating a single, preferable "apportionment" theory under Washington law.<sup>183</sup> The court was satisfied that the attorney's choice of theories was an informed one because his trial brief in the divorce case cited cases that the client's malpractice experts relied on for their opinions.<sup>184</sup>

### 4. *Motion Practice*

An attorney's decision to file or not file a motion may also be protected by the attorney-judgment rule. In *Bernstein v. Oppenheim & Co.*,<sup>185</sup> the client was dissatisfied with the outcome of litigation concerning a partnership dissolution. He complained that, among other things, his attorney negligently failed to file a motion for summary judgment on his claim for an accounting.<sup>186</sup> The court held that the client's malpractice claim

---

179. 735 P.2d 675 (Wash. App. 1986), *review denied*, 108 Wash. 2d 1008 (1987).

180. *Id.* at 677.

181. *Id.* at 679.

182. *Id.* at 681.

183. *Id.*

184. *Id.* at 681-82.

185. 554 N.Y.S.2d 487 (App. Div. 1990).

186. *Id.* at 489.

was defective because it amounted to nothing more than “dissatisfaction with strategic choices” and therefore could “not support a malpractice claim as a matter of law.”<sup>187</sup> The court concluded that a motion for summary judgment to compel an accounting “would have been redundant” because both parties had requested an accounting in the underlying case.<sup>188</sup>

In *Woodruff*, the Sixth Circuit also applied the attorney-judgment rule in rejecting a client’s claim that his attorney committed malpractice by opting not to file a motion to change venue.<sup>189</sup> During the underlying auto-accident case, the client made a vague claim that he and his minor daughters could not get a fair trial in their home county.<sup>190</sup> The client also claimed that they had moved from Tennessee to Arizona after the accident and that the attorney could have sued in federal court based on diversity of citizenship.<sup>191</sup> The attorney testified “without contradiction that there was no perceptible pattern of higher verdicts for plaintiffs in the federal courts of West Tennessee than in the local courts of the region.”<sup>192</sup> The court held that on this record, there was no basis for finding negligence.<sup>193</sup>

The Southern District of New York reached the same conclusion in *Hatfield v. Herz*.<sup>194</sup> There, the client was found liable in the underlying case after a bench trial. He later claimed that his attorney committed malpractice by failing to file dispositive motions before trial. The attorney countered that he properly decided not to file dispositive motions because neither a motion to dismiss nor a motion for summary judgment would have succeeded.<sup>195</sup>

The court held that the attorney “acted ethically and reasonably in deciding not to file [the motions].”<sup>196</sup> The court reasoned that a motion to dismiss would have required the court in the underlying case to assume the truth of all of the plaintiff’s allegations, and the attorney “properly concluded” that the plaintiff’s allegations in the underlying case, “if proven true, would state a claim.”<sup>197</sup> A motion for summary judgment would have

---

187. *Id.* at 490.

188. *Id.*

189. *Woodruff v. Tomlin*, 616 F.2d 924, 930-31 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

190. *Id.*

191. *Id.* at 931.

192. *Id.*

193. *Id.*

194. 109 F. Supp. 2d 174 (S.D.N.Y. 2000).

195. *Id.* at 185.

196. *Id.* at 186.

197. *Id.* at 185-86 (italics omitted).

been equally futile, the court said, because the plaintiff's claims in the underlying case rested on his own testimony—which satisfied the trial judge during the bench trial.<sup>198</sup> Thus, when offered in affidavit form to oppose a motion, this testimony surely would have satisfied “the lesser burden required to defeat [a] motion for summary judgment.”<sup>199</sup> And even if the court had not had the benefit of knowing the outcome in the underlying case, the underlying plaintiff's version of events clearly conflicted with the client's version and would have, at the very least, “raised a triable issue of fact” requiring denial of a motion for summary judgment.<sup>200</sup> Given the motions' futility, and because “[a]ttorneys are entitled to significant discretion in determining which positions to advance on the behalf of their clients, and in determining how best to advance those positions,” the attorney could “not be held liable for his decision not to make these pretrial motions.”<sup>201</sup>

### 5. *Discovery*

There is caselaw suggesting that attorneys' decisions on how or whether to conduct discovery in civil suits are strategy decisions protected by the attorney-judgment rule, but this is far from settled. For instance, in *American Int'l Adjustment Co. v. Galvin*,<sup>202</sup> the Seventh Circuit was unwilling to say that a failure to conduct pretrial discovery would “never constitute legal malpractice,” but it observed that the case in which such a claim could survive would “be the rare exception.”<sup>203</sup> The court was “extremely wary of holding that pre-trial discovery is required as a matter of law,” fearing that such a rule would give rise to the “practice of ‘defensive law’” and “buck th[e] trend” toward “prevent[ing] the overuse of pre-trial discovery.”<sup>204</sup>

But other courts have rejected this view. In *Basic Food Industries, Inc. v. Grant*,<sup>205</sup> the defendant-attorney took no depositions or other discovery

---

198. *Id.* at 186.

199. *Id.*

200. 109 F. Supp. 2d at 185-86.

201. *Id.* at 186 (quoting 675 Chelsea Corp. v. Lebensfeld, No. 95 Civ. 6239(SS), 1997 WL 576089, at \*2 (S.D.N.Y. Sept. 17, 1997)).

202. 86 F.3d 1455 (7th Cir. 1996).

203. *Id.* at 1461.

204. *Id.* It is noteworthy that the majority's decision in *American Int'l* drew the judicial ire of Judge Posner, whose dissent is characteristically well written and colorful.

205. 310 N.W.2d 26 (Mich. App. 1981).

despite the client's requests to do so.<sup>206</sup> This included failing to depose the opponent's expert.<sup>207</sup> Using broad language that seemed to question the propriety of the attorney-judgment rule, the Michigan Court of Appeals rejected the attorney's argument that this was a mere error in judgment.<sup>208</sup> The court did not believe that an attorney can "act with impunity and avoid malpractice liability merely because professional judgment . . . is at issue."<sup>209</sup> "Since everything an attorney does is based on his professional judgment," the court observed, "a contrary holding would seriously undercut the tort of legal malpractice."<sup>210</sup>

It is debatable whether this strong policy statement can be reconciled with the Michigan Supreme Court's later opinion in *Simko v. Blake*,<sup>211</sup> which, in sharp contrast to *Basic Food*, fully embraced the policies underlying the attorney-judgment rule. But *Basic Food* nevertheless illustrates that some courts may not share the Seventh Circuit's reluctance to impose liability for alleged discovery failures.

### *C. Settlement Recommendations*

Another judgment call ripe for second-guessing is an attorney's recommendation to settle or not settle for a certain amount. Some courts have concluded that settlement recommendations are protected by the attorney-judgment rule unless prompted by an insufficient investigation of the case or a weakness in the case that is attributable to the attorney's own negligence. But the greater weight of authority refuses to accept the attorney-judgment rule as a bright-line bar to malpractice suits complaining of insufficient settlements. Courts have been sensitive to the argument that lawyers should not be able to wipe the malpractice slate clean simply by settling a case.

As alluded to above, courts have identified two broad categories of "inadequate settlement" claims that will not be defeated by the attorney-judgment defense: (1) where the lawyer allegedly recommended a settlement less than the case's original settlement value because the lawyer's mishandling of the case compromised the likelihood of success and reduced its actual settlement value, and (2) where the lawyer allegedly

---

206. *Id.* at 27, 28.

207. *Id.* at 27-28.

208. *Id.* at 30.

209. *Id.* at 30.

210. *Id.*

211. 532 N.W.2d 842 (Mich. 1995); *see also* discussion at II.A.1, *supra*.

undervalued the case because the attorney failed to appreciate the case's real settlement value, often because of an inadequate investigation.<sup>212</sup> The cases discussed below capture courts' divergent views on this issue and their struggle to reconcile competing policy considerations.<sup>213</sup>

The Minnesota Supreme Court's decision in *Glenna v. Sullivan*<sup>214</sup> shows that some courts view informed recommendations to settle as matters of professional judgment that cannot support malpractice claims. In *Glenna*, the client injured her neck in an automobile accident.<sup>215</sup> Based on x-rays showing calcification in a neck ligament, a treating orthopedic surgeon from the Mayo Clinic testified that the client suffered damage to that ligament in the accident.<sup>216</sup> But his opinion assumed that the calcification was not present at the time of the accident.<sup>217</sup> The doctor explained that his opinion would change if he learned that the calcification was present at or near the time of the accident because that would evidence pre-existing damage to the ligament.<sup>218</sup>

On the day of trial, the client's trial attorney learned that x-rays taken just nine days after the accident revealed calcification in the neck ligament.<sup>219</sup> This x-ray was not included in the medical records that the attorney received from the client's treating physician.<sup>220</sup> The insurer for the negligent driver was aware of this x-ray and made settlement offers of \$10,000, \$15,000, and, finally, \$21,110.<sup>221</sup> The attorney recommended that the client accept the \$21,110 offer.<sup>222</sup> The client agreed, but she later had second thoughts and refused to cash the settlement check.<sup>223</sup> She sued her attorney, alleging that his negligence in preparing the case resulted in an inadequate settlement.<sup>224</sup>

The court held that the attorney's decision concerning the reasonableness of the \$21,110 settlement offer "called for a professional

---

212. *Thomas v. Bethea*, 718 A.2d 1187, 1191-92 (Md. 1998).

213. This discussion is not intended to encompass the body of caselaw considering whether an attorney sued for malpractice can assert other defenses—such as collateral estoppel or judicial estoppel—when the underlying case ended in a settlement.

214. 245 N.W.2d 869 (Minn. 1976).

215. *Id.* at 869.

216. *Id.* at 870.

217. *Id.* at 871.

218. *Id.*

219. *Id.* at 872.

220. 245 N.W.2d at 872.

221. *Id.* at 871.

222. *Id.*

223. *Id.*

224. *Id.*

judgment” and could not support a malpractice claim without proof that it was “based on insufficient or inaccurate information.”<sup>225</sup> The court reasoned that the attorney made a tactical decision to recommend settlement instead of trying the case.<sup>226</sup> If the attorney went to trial, he knew the jury would hear the orthopedic surgeon testify that the presence of calcification near the time of the accident showed that the claimed ligament damage was not caused by the accident.<sup>227</sup> And although the attorney was prepared to call a treating physician to express a different opinion, it was possible that the jury would put more stock in the testimony of the prominent orthopedic surgeon from the Mayo Clinic.<sup>228</sup> Although the attorney learned of the x-ray late in the game, he nevertheless was aware of all the pertinent evidence when he recommended settling, and the client presented no evidence of how he could have neutralized the orthopedic surgeon’s damaging testimony had he gone to trial.<sup>229</sup> The client was simply disappointed with the amount of the settlement, and the court explained that “[t]o allow a client who becomes dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded them more than the settlement is unprecedented.”<sup>230</sup>

But the tide appears to be shifting from this view. Pennsylvania’s appellate courts have taken the most notable roller-coaster ride on the issue. In the frequently maligned case of *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*,<sup>231</sup> the Pennsylvania Supreme Court established a broad, black-and-white safeguard for settlement recommendations. Citing overburdened courts and Pennsylvania’s longstanding public policy favoring settlements, the Court “foreclose[d] 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.”<sup>232</sup> Under *Muhammad*, a suit challenging a settlement would survive only on a showing that the attorney fraudulently induced the client to agree to it.<sup>233</sup> The court minced no words in criticizing these so-called “second bite” or “Monday-morning quarterback” suits, which merely

---

225. *Id.* at 872.

226. 245 N.W.2d at 872.

227. *Id.* at 873.

228. *Id.* at 872.

229. *Id.*

230. *Id.* at 873.

231. 587 A.2d 1346 (Pa. 1991), *cert. denied*, 502 U.S. 867 (1991).

232. *Id.* at 1351.

233. *Id.* at 1348.

“‘second guess’ the original attorney’s strategy.”<sup>234</sup>

A few years later, the Pennsylvania Supreme Court reined in this rule and limited *Muhammad* to its facts, explaining that the *Muhammad* rule does not apply “where the attorneys’ alleged negligence does not lie in the judgment regarding the amount to be accepted or paid in a settlement, but rather lies in the failure to advise a client of well-established principles of law and the impact of a written agreement.”<sup>235</sup> A later Pennsylvania appellate panel further clarified this distinction, first explaining that there is no viable malpractice claim if 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.”<sup>236</sup> On the other hand, a malpractice claim may lie where the attorney drafts a settlement agreement that is “legally deficient” or the attorney “fails to explain the effect of a legal document.”<sup>237</sup>

Most courts—as well as the leading commentators—have rejected the broad *Muhammad* rule,<sup>238</sup> and it has been described as “a distinct minority view.”<sup>239</sup> *Thomas v. Bethea*<sup>240</sup> is perhaps the most forceful expression of the trend against applying the attorney-judgment rule in malpractice suits concerning allegedly inadequate settlements. There, Maryland’s highest court rejected the notion that lawyers should be protected by a special rule simply because settlement recommendations involve an attorney’s judgment and reasonable attorneys might differ on the value of a given case. Having surveyed the national cases, the court said that “nearly every court that has faced the issue” has decided that lawyers can be held liable for malpractice committed in cases that settled, regardless of whether the claim is that the lawyer negligently evaluated the case or that the lawyer’s mishandling of the case forced a distress settlement.<sup>241</sup> The court saw “no reason to adopt any heightened standard of negligence” for lawyers accused of exercising poor judgment: “Lawyers, like doctors and other professionals, are often

---

234. *Id.* at 1350, 1352 n13.

235. *McMahon v. Shea*, 688 A.2d 1179, 1181 (Pa. 1997) (citing *McMahon v. Shea*, 657 A.2d 938 (Pa. Super. 1995)).

236. *Banks v. Jerome Taylor & Assoc.*, 700 A.2d 1329, 1332 (Pa. App. 1997), *app. denied*, 723 A.2d 668 (Pa. 1998).

237. *Id.*

238. *White v. Jungbauer*, 128 P.3d 263, 265 (Colo. Ct. App. 2005), *cert. denied*, 2006 WL 381672 (Colo. Feb 6, 2006) (quoting 4 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE §30.41 (5th Ed. 2000)).

239. *Thomas v. Bethea*, 718 A.2d 1187, 1193 (Md. 1998).

240. *Id.*

241. *Id.* at 1194; *see also* cases cited therein.

called upon to make judgment calls with which their colleagues may disagree. Those calls, if challenged, can be examined in the light of the traditional standard applicable to professional negligence actions.<sup>242</sup> There is “nothing extraordinary,” the court said, in applying general malpractice rules to a case concerning a lawyer’s settlement recommendation.<sup>243</sup>

The list of national courts echoing these sentiments continues to grow, as noted by the Massachusetts Supreme Court in *Meyer v. Wagner*.<sup>244</sup> Taking its lead from the Connecticut Supreme Court, the *Meyer* court declared that malpractice claims concerning settlements cannot be thwarted simply because the court in the underlying case approved the settlement.<sup>245</sup> The court insisted that under this rule, lawyers would not be held liable for “pursuing reasonable strategies that ultimately fail” or for recommending a settlement that other lawyers might have rejected.<sup>246</sup> But the court’s overriding message was that malpractice claims concerning purportedly inadequate settlements get no special treatment.<sup>247</sup>

There is also caselaw refusing to apply the attorney-judgment rule to claims concerning “an attorney’s failure to inform a client of unsettled legal issues relevant to a settlement.”<sup>248</sup> In *Wood v. McGrath, North, Mullin & Kratz, P.C.*,<sup>249</sup> the client alleged that she would not have signed her divorce settlement had her attorney told her that the trial court might include unvested stock options in the marital estate or might not allow her husband to deduct potential capital-gains tax when valuing the stock.<sup>250</sup> It was undisputed that Nebraska law was unsettled on these two points, but had the client’s attorney raised these arguments during a divorce trial, he could have cited favorable caselaw from other jurisdictions.<sup>251</sup> The Nebraska Supreme Court held that failing to inform a client of unsettled law relevant to a settlement is not protected by the attorney-judgment rule, even though that attorney’s “ultimate recommendation in an area of unsettled law is immune

---

242. *Id.* at 1195.

243. *Id.*

244. 709 N.E.2d 784, 790-91 *and* n.12 (Mass. 1999).

245. *Id.* at 791 (relying on *Grayson v. Wofsey, Rosen, Kweskin & Kurinasky*, 646 A.2d 195, 199-200 (Conn. 1994)).

246. *Id.*

247. *Id.*

248. *Wood v. McGrath, North, Mullin & Kratz, P.C.*, 589 N.W.2d 103, 108 (Neb. 1999).

249. *Id.*

250. *Id.* at 105.

251. *Id.* at 105, 106.

from suit.”<sup>252</sup> The court reasoned that because clients bear the risk of unfavorable settlements, they should be made aware of potential arguments so that they can “assess whether the risk is acceptable.”<sup>253</sup>

*Wood* is at odds with other decisions unequivocally enforcing the attorney-judgment rule where clients complained that their attorneys should have informed them of unsettled law relevant to their settlements.<sup>254</sup> And leading commentators have also questioned whether *Wood* will undermine the finality of settlements by opening the door to more “hindsight revelations of alternatives.”<sup>255</sup> What can safely be said is that *Meyer* and *Wood* illustrate the heightened potential for malpractice liability when drafting or evaluating settlement agreements in the divorce arena. When the underlying case was a divorce case, disappointed clients can attack alleged shortcomings in a variety of arguably “less strategic” legal tasks that produced the disputed settlement, such as perceived errors in investigating and calculating marital assets.<sup>256</sup> And if courts follow the *Wood* court’s reasoning, informed-consent issues will further muddy the waters. This ups the ante for divorce attorneys, who may find the going tough when asserting the attorney-judgment defense against claims of mishandling divorce settlements.

The caselaw discussed above reveals a trend that may seem counterintuitive to some. In the personal-injury arena, in particular, an attorney’s attempt to assess the appropriate settlement value of a case represents a quintessential judgment call. Some courts have attempted to carve out a safe harbor from malpractice claims that simply complain that the settlement amount was too low. But claims second-guessing settlements have escaped the reach of the attorney-judgment rule with what appears to be increasing frequency. This can no doubt be attributed to the many factors that were outlined by the *Thomas* court, such as the potential for attorneys to push hasty distress settlements on unwitting clients to cover up some negligent act or omission that compromised the value of the underlying claim.

#### *D. Appeals*

Appellate attorneys face a vexing dilemma. Appellate judges and

---

252. *Id.* at 108.

253. *Id.* at 107.

254. *See, e.g.,* *Davis v. Damrell*, 174 Cal. Rptr. 257 (Ct. App. 1981).

255. 4 RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* §30.41 (5th ed. 2000).

256. *See Meyer v. Wagner*, 709 N.E.2d 784, 790-91 & n.12 (Mass. 1999).

experienced appellate attorneys almost uniformly advise lawyers to shed all but their strongest arguments in an appeal brief.<sup>257</sup> The United States Supreme Court, for example, has noted that “[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”<sup>258</sup> But what if an appellate attorney sheds the weaker arguments and the appeal is unsuccessful? A disappointed client may claim that one of the discarded arguments would have won the appeal if only the attorney had raised it. A number of courts have recognized that an appellate attorney’s decision to forego or concede issues on appeal falls under the attorney-judgment rule’s protection.

For instance, in *Woodruff v. Tomlin*,<sup>259</sup> the father of two minors injured in a multi-vehicle accident sued two truck drivers. One of the minors was driving her father’s car at the time of the accident, and the other minor was the passenger. The truckers countersued the minors, alleging that the minor-driver was negligent and that the passenger “aided and abetted” her.<sup>260</sup> The jury returned with a verdict for the truckers, finding that the truckers were free from fault and that the minors were both at fault.<sup>261</sup> In his appeal brief, the father’s lawyer conceded that the trial evidence supported the jury’s finding that the minor-driver was negligent, choosing to focus the appeal on the passenger’s freedom from fault.<sup>262</sup> The appellate court affirmed the truckers’ judgments against the minor-driver but reversed their judgments against the passenger.<sup>263</sup> The father later alleged that his attorney committed malpractice by conceding, in his appeal brief, that the trial evidence supported the jury’s finding that the minor-driver was negligent.<sup>264</sup>

The Sixth Circuit rejected that claim based on the attorney-judgment rule, observing that the attorney’s decision to focus on salvaging the passenger’s claim during the appeal “clearly appears to have been based on professional judgment.”<sup>265</sup> The Sixth Circuit first noted that the attorney had not conceded anything that wasn’t already obvious from the record; the trial evidence “clearly” supported the jury’s finding of negligence by the minor-

---

257. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); Henry J. Bemporad & Sarah P. Kelly, *Novel Issues, Futile Issues, and Appellate Advocacy: The Troubling Lessons of Blousley v. United States*, 35 ST. MARY’S L.J. 93, 94 (2003).

258. *Jones*, 463 U.S. at 751-52.

259. 616 F.2d 924 (6th Cir. 1980), cert. denied, 449 U.S. 888 (1980).

260. *Id.* at 927.

261. *Id.*

262. *Id.* at 933.

263. *Id.* at 927-28.

264. *Id.* at 928.

265. 616 F.2d at 933.

driver.<sup>266</sup> Thus, there was solid footing for the lawyer's pragmatic decision not to attack that aspect of the jury verdict.<sup>267</sup> And by the time of the appeal, it was clear that the passenger's injuries, which included permanent leg damage, were far more severe than the minor-driver's injuries.<sup>268</sup> Given these factors, the court concluded that "the concessions in the appellate brief resulted from a tactical decision reached in the exercise of professional judgment and d[id] not furnish a basis for a malpractice action."<sup>269</sup>

Similarly, the Oklahoma Supreme Court applied the attorney-judgment rule to an appellate attorney's decision not to raise on appeal arguments that had failed in the lower court and which rested on unsettled principles of law. In *Manley v. Brown*,<sup>270</sup> the clients complained that they would have escaped liability in the underlying case if their attorney had challenged, at trial and on appeal, the validity of certain construction liens. The attorney had asserted these arguments in a pretrial motion that failed, but opted against raising them again at trial or on appeal. The law underlying the clients' technical attack on the liens "was far from settled" when the case was tried and appealed.<sup>271</sup>

The court held that the attorney could not "be declared negligent in having failed to press on appeal arguments that lie in an arena of unsettled law or in making substandard strategy choices."<sup>272</sup> It emphasized that the "[f]ailure repeatedly to advocate a questionable theory of defense rejected earlier . . . does not constitute a lawyer's breach of due care."<sup>273</sup> "When the law is clouded because it stands unconcretized by precedential pronouncements, a lawyer who acts in good faith and in an honest belief that his advice and acts are well founded will not be held responsible for failing to anticipate how the law's ambiguity will ultimately be resolved."<sup>274</sup>

#### *E. Nonlitigation Decisions*

The attorney-judgment rule is most often associated with litigation strategy, whether before or during trial. But some courts have found that the policies underlying the rule may also justify applying it in cases having

---

266. *Id.*

267. *Id.*

268. *Id.* at 927, 933.

269. *Id.*

270. 989 P.2d 448 (Okla. 1999).

271. *Id.* at 452.

272. *Id.* at 458.

273. *Id.* (italics omitted).

274. *Id.*

nothing to do with trial or litigation strategy.

One example is *Brown v. Gitlin*,<sup>275</sup> where a 50% shareholder in a closely held corporation accused his lawyer of botching the sale of his shares. After the sale, the buyer declared the sale void, arguing that the seller failed to register the sale with the secretary of state in the manner required by Illinois securities laws.<sup>276</sup> During the underlying litigation, the trial court held that the sale did not need to be registered, but an appellate panel disagreed.<sup>277</sup> The seller later alleged that his attorney committed malpractice by failing to register the stock transfer.<sup>278</sup>

After noting that Illinois law “distinguishes between errors of negligence and those of mistaken judgment,” the Illinois Court of Appeals held that the lawyer could not be held liable for failing to appreciate that the state’s securities laws applied to this transaction.<sup>279</sup> Much of the opinion focused on expert testimony opining that the average Illinois lawyer would have viewed this as a run-of-the-mill sale of a business between two close partners—not a stock transfer implicating securities laws. But the heart of the court’s reasoning is reflected in its observation that at the time of the attorney’s omission, “there was no clear answer on whether this type of transaction between 50% [o]wners of a corporation required a [Rule] 4G filing.”<sup>280</sup>

The Iowa Supreme Court reached the same conclusion in *Martinson Mfg. Co. v. Seery*,<sup>281</sup> where a corporation claimed that its attorney’s faulty tax advice prevented it from reaping the intended benefits of its acquisition of another company. The malpractice claim hinged on the proper interpretation of a phrase within an IRS Code provision.<sup>282</sup> Both parties offered “well-qualified tax experts, attorneys whose opinions supported totally different interpretations of this section.”<sup>283</sup>

The court held that the defendant-attorney had not committed legal malpractice.<sup>284</sup> The court reasoned that under Iowa law, an attorney cannot be held liable for “an error in judgment on points of new occurrence or of nice or doubtful construction, or for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable

---

275. 313 N.E.2d 180 (Ill. App. Ct. 1974).

276. *Id.* at 181.

277. *Id.*

278. *Id.* at 181-82.

279. *Id.* at 182, 183.

280. *Id.* at 183.

281. 351 N.W.2d 772 (Iowa 1984).

282. *See id.* at 774-776.

283. *Id.* at 774.

284. *Id.* at 775-8.

doubt may well be entertained by informed lawyers.’’<sup>285</sup> The court noted that “neither litigant could produce any case authority on the point in issue.”<sup>286</sup> Nor could the court, through its own, independent research.<sup>287</sup> It concluded that the trial court had erred in submitting the case to the jury where “the evidence was so strong as to show as a matter of law that the interpretation of [IRS Code] section 334(b)(2) was a question on which reasonable doubt could be entertained by well-informed lawyers.’’<sup>288</sup>

But another court refused to apply the attorney-judgment rule where experts had testified that the defendant-attorney should have advised the client of an alternative course of action. In *Gruse v. Belline*,<sup>289</sup> a client who failed to obtain a mortgage and thus defaulted on a real-estate sales contract claimed that his attorney committed malpractice by not advising him to rely on a mortgage-financing contingency clause to escape the contract. The attorney countered that he exercised sound judgment in attacking the contract’s validity on other grounds, but the evidence showed that the attorney never told his client about the mortgage-financing contingency clause or the possibility of invoking it to void the contract.<sup>290</sup> Moreover, the attorney’s own expert testified that the better approach would have been to tell the client about this option.<sup>291</sup> Given this record, the court refused to disturb the jury verdict against the lawyer.<sup>292</sup>

Rather than being an indictment of the attorney-judgment rule, the *Gruse* decision seems to rest, in large part, on the lawyer’s failure to disclose pertinent information—and possible options—to the client. This is evidence that some courts will look not only at whether the disputed decision was an exercise of professional judgment, but also at whether the attorney kept the client informed of the possible alternatives before the fact.

### III. THE PROPRIETY OF THE RULE

#### A. *Criticism by Courts and Commentators*

The attorney-judgment rule has drawn some criticism. This criticism typically falls into three broad categories: (1) it is a special rule that unfairly

---

285. *Id.* at 775 (quoting 7 AM. JUR. 2D *Attorneys at Law* § 201 (1980)).

286. *Id.* at 777.

287. 351 N.W.2d at 777.

288. *Id.* at 778.

289. 486 N.E.2d 398 (Ill. App. Ct. 1985).

290. *Id.* at 403.

291. *Id.*

292. *Id.*

protects lawyers in ways that other professionals who exercise judgment are not protected; (2) it allows judges to make factual decisions that should be left to the jury concerning the reasonableness of an attorney's conduct; and (3) it is contrary to the public interest by, in effect, lowering the standard of care. Lurking just beneath the surface of all of these criticisms is the notion that judges, being lawyers themselves, are likely to sympathize with lawyers sued for malpractice and give them preferential treatment.

One of the dissenting judges in *Woodruff v. Tomlin*<sup>293</sup> minced no words in voicing his disapproval of the attorney-judgment rule and his belief that it is nothing more than preferential treatment for lawyers. He quipped that the physicians who had been before the Sixth Circuit in medical-malpractice cases had never had "the audacity to contend that [they were] honest and had a good faith privilege to be exempt from liability."<sup>294</sup> He asserted that "[i]n malpractice cases there is no reason for ever exempting attorneys from liability without extending the same exemption to physicians."<sup>295</sup> He called the attorney-judgment rule "an outrageous proposition," and emphasized that the public "ought not to be fearful of engaging the services of an attorney who is exempted by law from liability for misconduct or negligence."<sup>296</sup>

Likewise, a dissenting appellate judge in Texas criticized that state's broad "good faith" version of the attorney-judgment rule, observing that "[b]y carving out a 'good faith' exception in legal malpractice cases, Texas courts have lowered the standard of care for attorneys."<sup>297</sup> He pointed out that this "good faith" standard "applie[d] a subjective rule" rather than judging attorneys "on a purely objective basis, as are members of other professions."<sup>298</sup> These criticisms resonated with the Texas Supreme Court, which later overruled the line of Texas cases seeming to suggest that as long as an attorney's conduct was based on his or her subjective good faith, liability could not attach.<sup>299</sup> Instead, Texas attorneys who make tactical decisions are to be judged on an objective basis that examines "the attorney's reasonableness in choosing one course of action over another," with the ultimate question being whether "a reasonably prudent attorney

---

293. 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

294. *Id.* at 938 (Weick, J., dissenting in part).

295. *Id.*

296. *Id.*

297. *Cosgrove v. Grimes*, 757 S.W.2d 508, 513 (Tex. App. 1988) (Bass, J., dissenting), *rev'd* 774 S.W.2d 662 (Tex. 1989).

298. *Id.*

299. *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989).

could make [such a choice] in the same or similar circumstance[s].”<sup>300</sup>

Some courts fear that the attorney-judgment rule makes it a bit too tempting for judges to make inappropriate factual findings on the breach-of-duty question. For example, when reviewing a lower-court decision granting summary judgment despite conflicting expert testimony, the Minnesota Supreme Court commented that “[b]ecause judges in reviewing courts are lawyers, there is a normal tendency to act as a finder of fact when addressed with these issues of trial preparation and strategy, in a way a judge might not do if the experts were from a field outside law.”<sup>301</sup>

The rather stinging dissent in Michigan’s landmark *Simko v. Blake*<sup>302</sup> case raised these same concerns. In a passage replete with attempts to use the majority’s own language against it, the *Simko* dissenters complained that the majority had taken the negligence question from the jury based on a dubious rule that, even as formulated by the majority, still requires factual findings:

It is implicit in the formulation adopted by the majority, requiring a lawyer to act as would a lawyer of “ordinary learning, *judgment*, or skill,” that errors of judgment may constitute negligence. Whether an error of judgment, or a “mere” error of judgment, constitutes negligence depends on whether a lawyer of ordinary learning, judgment, diligence, or skill would have avoided the error or “mere” error of judgment. That “generally” is a question of fact for the trier of fact to decide.<sup>303</sup>

The *Simko* dissent also questioned the majority’s belief that our judicial system would be overburdened by “unnecessarily inordinate quantities” of superfluous motions and evidence if the court were to impose a duty requiring attorneys to do more than what is legally adequate to vindicate clients’ rights.<sup>304</sup> The dissent explained that it is because lawyers cannot possibly predict court rulings that “an ordinarily careful, prudent, diligent, and skillful lawyer burdens the legal system with motions that, in retrospect, may have been unnecessary.”<sup>305</sup> “Lowering the standard of care for

---

300. *Id.*

301. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992).

302. 532 N.W.2d 842 (Mich. 1995).

303. *Id.* at 850 (Levin J., dissenting) (quoting majority opinion at 844 n.8)(emphasis added by dissenting opinion)(footnote omitted).

304. *Id.* at 851 (quoting language from majority opinion at 847 (quoting *Simko v. Blake*, 506 N.W.2d 258, 259-60 (Mich. App. 1993))).

305. *Id.*

lawyers,” the dissent warned, “will not reduce the burden of over-lawyering by lawyers who fail to recognize their professional responsibility.”<sup>306</sup> In other words, “[l]owering the standards will not raise the level of professional responsibility.”<sup>307</sup>

It is safe to conclude that the *Simko* dissenters believed that the attorney-judgment rule has gotten too big for its britches, insulating lawyers from liability for judgment decisions despite the longstanding view that legal malpractice occurs when lawyers fail to exercise reasonable judgment.

### *B. Comparison to Rules Protecting Other Professionals*

As noted above, some critics argue that the attorney-judgment rule is nothing more than preferential treatment for lawyers—an outgrowth of their professional kinship with the judges who have created and applied the rule. Although this argument has some emotional appeal, it is not entirely accurate. A closer look reveals that courts across the country have adopted rules to protect other kinds of professionals from liability for informed strategy decisions.

#### *1. Medical Judgment*

The first and most obvious comparison is to the “professional judgment” or “error in judgment” defense that some jurisdictions recognize in medical-malpractice actions.<sup>308</sup> The general rule is that where there are several methods of recognized treatment or diagnosis, a doctor can use his or her best professional judgment in selecting among them.<sup>309</sup> “[A] difference of medical opinion concerning the desirability of one particular medical procedure over another does not . . . establish that the determination to use one of the procedures was negligent.”<sup>310</sup> When doctors could disagree in good faith about what constitutes the most proper or effective diagnosis or treatment, a doctor is not liable for exercising his or her best professional judgment in picking one:

Medicine is not a field of absolutes. There is not ordinarily only one correct route to be followed at any given time. There is always the need for professional judgment as to what course of conduct would be most appropriate with regard to the patient’s condition.

---

306. *Id.* at 852.

307. *Id.*

308. *See Nestorowich v. Ricotta*, 740 N.Y.S.2d 668, 672 (App. Div. 2002) and cases cited therein.

309. *Mathis v. Morrissey*, 13 Cal. Rptr. 2d 819, 825 (Ct. App. 1992).

310. *Id.* (quoting *Clemens v. Regents of Univ. of California*, 87 Cal. Rptr. 108, 117 (Ct. App. 1970)).

[I]t is for the doctor to use his best judgment to pick the proper one.<sup>311</sup>

A doctor is not liable for malpractice “merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective or a diagnosis proves inaccurate.”<sup>312</sup> Ohio has even codified a form of the “professional judgment” rule to protect doctors from claims concerning nonconsensual HIV testing.<sup>313</sup>

A number of jurisdictions have gone a step further in articulating these principles, specifically instructing jurors that doctors are not liable for “an error in judgment” in situations where they “chose among several medically acceptable treatment alternatives.”<sup>314</sup> This instruction is designed to “protect[] against second-guessing of genuine exercises of professional judgment,” insulating doctors who are forced to “choose from two or more responsible and medically acceptable approaches.”<sup>315</sup>

## 2. *Business Judgment*

Similarly, when corporate directors are accused of leading corporations astray through poor decisionmaking, they routinely invoke the “business judgment” defense. The business-judgment rule is a standard of judicial review that protects the broad discretion given to a corporation’s board of directors in making business decisions.<sup>316</sup> The rule prevents courts from inquiring into the actions of corporate directors “so long as those actions were taken in good faith and after a reasonable investigation.”<sup>317</sup> This safeguards against unfair hindsight scrutiny of a director’s informed business decisions, which are often made under uncertain conditions.<sup>318</sup>

The rule establishes a presumption that directors who make business decisions do so on an “informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the corporation.”<sup>319</sup>

---

311. *Barton v. Owen*, 139 Cal. Rptr. 494, 504 (Ct. App. 1977).

312. *Shahram v. Horwitz*, 773 N.Y.S.2d 642, 642 (App. Div. 2004)(citations omitted).

313. See OHIO REV. CODE ANN. § 3701.24.2(E)(5)(2005); *Davis v. Liebson*, 797 N.E.2d 139 (Ohio Ct. App. 2003), *app. denied*, 802 N.E.2d 154 (Ohio 2004).

314. *Nestorowich v. Ricotta*, 767 N.E.2d 125, 129 (N.Y. 2002)(quoting New York’s standard jury instruction PJI 2:150(5) and *Martin v. Lattimore Rd. Surgicenter*, 727 N.Y.S.2d 836, 837 (App. Div. 2001)).

315. *Id.*

316. 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1036 (perm. ed. rev. vol. 2004).

317. *In re Croton River Club, Inc.*, 52 F.3d 41, 44 (2nd Cir. 1995).

318. *Pergament v. Frazer*, 93 F. Supp. 13, 23 (E.D. Mich. 1950), *aff’d*, 203 F.2d 315 (6th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953); *Radol v. Thomas*, 772 F.2d 244, 256-57 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

319. *Poth v. Russey*, 281 F. Supp. 2d 814, 826 (E.D. Va. 2003), *aff’d*, 99 Fed. Appx. 446 (4th Cir. 2004).

Generally, courts will not substitute their judgment for that of the board of directors, unless there is a showing of “a breach of fiduciary duty, such as fraud, bad faith or unconscionable conduct.”<sup>320</sup>

The Second Circuit captured the essence of the rule in observing that a hindsight reconstruction of a director’s decision does not reflect the pressing and uncertain business realities that directors face in the real world:

The circumstances surrounding corporate decisions are not easily reconstructed in a courtroom years later since business imperatives often call for quick decisions, inevitably based on less than perfect information; a reasoned decision at the time it was made may seem a wild hunch viewed years later against a background of perfect knowledge.<sup>321</sup>

### 3. *Similarities and Differences*

There are obvious parallels between attorneys trying to predict how certain trial or litigation tactics will play out and directors trying to predict how business decisions will affect a corporation’s future. The same is true for doctors trying to predict how alternative courses of treatment might affect a patient. There are always risks, and even when acting in good faith and on an informed basis, none of these professionals can ensure favorable results. The various professional-judgment rules reflect the policy that liability should not attach under such circumstances.

But although the basic principles underlying these professional-judgment rules are the same, there is one practical aspect of the medical-judgment rule that may distinguish it from the attorney-judgment rule: courts’ unwillingness to take the medical-judgment question from the jury. Juries generally decide whether a doctor exercised reasonable medical judgment as a question of fact.<sup>322</sup> Indeed, even those jurisdictions recognizing the most liberal “error of judgment” rule for medical professionals appear to view that rule as nothing more than an extra layer of clarification in jury instructions concerning the medical standard of care.<sup>323</sup>

In contrast, and as stated previously, the jurisdictions that have adopted the attorney-judgment rule view it as a rule that empowers courts to decide

---

320. *Id.*

321. *Joy v. North*, 692 F.2d 880, 886 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

322. *See, e.g.*, *Stewart v. Olean Med. Group, P.C.*, 795 N.Y.S.2d 420, 422 (App. Div. 2005), *reargument denied*, 796 N.Y.S.2d 567 (App. Div. 2005); *Snow v. Bond*, 438 S.W.2d 549, 550-51 (Tex. 1969); *Brown v. Stickle*, 886 So.2d 515, 522 (La. App. 2004), *writ denied*, 896 So.2d 1011 (La. 2005).

323. *See Nestorowich v. Ricotta*, 767 N.E.2d 125, 129 (N.Y. 2002) and cases cited therein.

the breach-of-duty question as a matter of law. The ability to escape malpractice claims on motion, as a matter of law, is a significant advantage to lawyers invoking the attorney-judgment rule. Some courts may balk at supplanting the jury's traditional role of deciding whether a lawyer breached his or her duty, but in the vast majority of national cases, courts have not hesitated to apply the attorney-judgment rule as a matter of law. In this sense, it is hard to argue with critics who say that the attorney-judgment rule gives lawyers an arrow that is not necessarily found in doctors' quivers.

On the other hand, the business-judgment rule does not appear to bare any fewer teeth than the attorney-judgment rule. A few courts have struggled with whether the business-judgment rule empowers courts to dispose of cases on motion,<sup>324</sup> and litigants have even argued that summary judgment is never appropriate because the rule's applicability is always a question of fact requiring juries to assess the defendant's credibility.<sup>325</sup> But this position has been rejected.<sup>326</sup> At its core, the business-judgment rule embodies judicial deference to directors' business decisions, and it is a rule that creates an imposing wall of presumptions for complaining shareholders to surmount.<sup>327</sup> Commentators have observed that those presumptions can have the practical effect of taking ultimate questions of fact from the jury.<sup>328</sup> Courts are indeed willing to grant dispositive motions based on the business-judgment rule where the record reveals no evidence sufficient to overcome the rule's formidable presumptions.<sup>329</sup> And some advocate that the rule, when properly construed and applied, is more akin to an abstention doctrine that should be enforced through motions to dismiss before the summary-judgment stage.<sup>330</sup>

Ultimately, the caselaw protecting judgment decisions by professionals

---

324. *Resolution Trust Corp. v. Wright*, 868 F. Supp. 301, 305 (W.D. Okla. 1993)(observing that the business-judgment rule "still requires that the officer or director be acting in his fiduciary capacity, the performance of which is an issue of fact"); *In re Trans-Action Commercial Investors, Ltd.*, Nos. 97-46121 T, 97-46123 T, 2002 WL 32341923, at \* 21 (Bankr. N.D. Cal. June 28, 2002) (stating that "[w]hether the business judgment rule immunizes a general partner from liability for a particular action or inaction in connection with the business of a limited partnership is clearly a question of fact"); *see also* *Rabouin v. Metro. Life Ins. Co.*, 699 N.Y.S.2d 655, 659 (Sup. Ct. 1999), *aff'd*, 723 N.Y.S.2d 651 (App. Div. 2001).

325. *See In re Trans-Action Commercial Investors, Ltd.*, 2002 WL 32341923, at \* 21.

326. *Id.* at \*21-22.

327. *See* ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* § 8.03 (2d ed. 2005).

328. *See, e.g.*, Matthew Taylor, *Tender Offers and the Business Judgment Rule*, 7 U. MIAMI BUS. L. REV. 171, 198 (1998).

329. *See, e.g.*, *Washington Bancorporation v. Said*, 812 F. Supp 1256, 1268-70 (D.D.C. 1993); *see also* Joel B. Harris & Charles T. Caliendo, *Who Says the Business Judgment Rule Does Not Apply to Directors of New York Banks?*, 118 BANKING L. J. 493, 495 (2001).

330. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 97 n.85 (2004).

other than lawyers reveals that the policies underlying the attorney-judgment rule are not unique to lawyers. And lawyers are not alone in benefiting from a professional-judgment defense.

### *C. The Best Approach*

The attorney-judgment rule is an appropriate legal doctrine, reflecting some undeniable realities of practicing law that our tort jurisprudence should not ignore. No amount of skill, expertise, or diligence will enable lawyers to predict with certainty how unsettled law will be settled or how a judge or jury will react to certain trial tactics. “A lawyer would need a crystal ball, along with his library, to be able to guarantee that no judge, anytime, anywhere, would disagree with his judgment or evaluation of a situation.”<sup>331</sup> Rather than being a special rule preferring lawyers over other professionals, the attorney-judgment rule is simply the lawyer’s version of the nearly identical “crystal ball” rules that protect business and medical professionals.

The rule will not deteriorate into the broad, subjective “good faith” defense that some critics have feared if courts diligently apply a three-pronged analysis requiring proof of (1) a true strategy decision (2) made on an informed basis (3) in good faith. This three-pronged analysis involves both objective and subjective inquiries.

#### *1. Did the Attorney Make a True Strategy Decision?*

A court facing an attorney-judgment argument should first determine whether the defendant made a true strategy decision. The defense should be reserved to those types of decisions. This initial step may sound elementary, but it is the pivotal inquiry. In practice, it may also prove more challenging than one might anticipate at first blush. Attorneys asserting the defense may try to fit every alleged act or omission under the “professional judgment” umbrella. The court must determine whether the alleged malpractice properly fits within that description.

The question should be an objective one: When the defendant made the disputed decision, would any lawyer in the defendant’s position have faced a choice of possible courses of action despite knowing the relevant law and facts? If so, then the defendant made a true strategy decision. Not all strategy decisions will look alike, but as the cases discussed above illustrate, there are two broad categories: (1) choices that arise because the law is unsettled and (2) “pure” tactical choices.

---

331. *Baker v. Fabian, Thielen & Thielen*, 578 N.W.2d 446, 452 (Neb. 1998) (quoting *Denzer v. Rouse*, 180 N.W.2d 521, 525 (Wis. 1970), *overruled on other grounds by Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis. 1983)).

### 2. *Was the Attorney's Strategy Decision an Informed One?*

If the court determines that the defendant made a true strategy decision, the court should next determine whether it was an informed decision. This is a subjective question that is closely aligned with the question of whether the defendant made a true strategy decision, and there may be some conceptual overlap.

Courts have pointed out that attorneys do not make strategic decisions when they fail to do basic research and remain ignorant of the law and possible arguments that might be asserted on the client's behalf.<sup>332</sup> As the Ninth Circuit once observed, "[t]here is nothing strategic or tactical about ignorance."<sup>333</sup> So courts considering an attorney-judgment argument must determine whether the defendant's strategy was affected by his or her ignorance of relevant law or facts that ordinary research or investigation would have revealed. If so, then the decision was not an informed one, and the rule should not apply.

### 3. *Did the Attorney Act in Good Faith?*

As mentioned previously, some courts have downplayed or questioned the importance of subjective good faith when applying the attorney-judgment rule. This is a mistake. Although subjective good faith *alone* should not absolve lawyers from liability, proof of subjective good faith—*combined with* proof of the other elements described above—should be required.

Bad faith precludes the true exercise of professional judgment. Indeed, some courts may view the good-faith question as integral to determining whether the defendant made a true strategy decision in the first place, perhaps viewing it as a second layer to the initial "true strategy decision" inquiry rather than a separate element. However articulated, the good-faith element reflects that the attorney-judgment rule is not intended to insulate strategy decisions that are motivated, for example, by a lawyer's desire to obscure a shortcoming in his or her legal services.

For example, a lawyer who recommends settlement to hide his failure to secure necessary experts should not be allowed to invoke the attorney-judgment defense. The lawyer may have been fully informed of the relevant law and facts, and he may have made a strategy decision, but that decision was not made in good faith. Only lawyers who act in their client's best interests, rather than to further their own agenda, should be permitted to invoke the rule.

---

332. *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975), *overruled on other grounds by In re Marriage of Brown*, 544 P.2d 561, 569 n.14 (Cal. 1976).

333. *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970).

#### *4. Evaluating Dispositive Motions*

The attorney-judgment defense is not a true affirmative defense that justifies a shift in the burden of proof, but it is undeniably factual. That is, an attorney moving for summary judgment under the rule must come forward with proof establishing what his or her strategy *was*. The attorney's proofs must also show that the choice was an informed one that was made in good faith. This evidence will likely come in the form of an affidavit or, if the case has advanced further into discovery, deposition testimony.

A plaintiff's complaint may target acts or omissions that appear, on their face, to be tactical choices or judgment calls. But even if that is the case, this will not position courts to grant dismissal because the informed-decision and good-faith elements are subjective ones that must be satisfied with proofs beyond the pleadings. Because satisfying the rule's elements requires proofs beyond the pleadings, proper dispositive motions will be motions for summary judgment with supporting evidence, not motions to dismiss for failure to state a claim upon which relief can be granted.

If, in response to a motion for summary judgment, a plaintiff cannot persuade the court that the disputed decision was not a true strategy decision, the plaintiff's challenge will be to present evidence tending to show that the disputed decision was prompted by (1) the defendant's ignorance of law that ordinary research would have revealed; (2) the defendant's ignorance of a material fact that reasonable investigation would have revealed; or (3) the defendant's bad faith, such as a desire to further the defendant's interests rather than those of the client. In most cases, this will probably be a formidable hurdle for plaintiffs and their attorneys.

#### *5. The California Model is Flawed*

California's truncated version of the attorney-judgment rule is flawed because it only protects strategy decisions prompted by unsettled law. There is no logical reason to protect strategy decisions prompted by unsettled law but not strategy decisions prompted by other uncertainties. As the national cases demonstrate, the policies underlying the attorney-judgment rule are often implicated in scenarios that do not involve unsettled law.

Again, this is aptly illustrated by the criminal-defense attorney's classic dilemma of whether to put the accused on the stand. In making this decision, the attorney must weigh the potential benefits of the client proclaiming innocence against the risks posed by an effective cross-examination. A criminal-defense attorney cannot possibly predict how a jury will react to either choice. Some jurors expect defendants to testify if they're innocent. If they don't testify, these jurors may view that as a sign of guilt. Other jurors may take the jury instructions concerning a defendant's right not to testify at face value. This type of tactical decision,

which does not arise from any uncertainty in the law, deserves protection in the same way that tactical decisions arising from an unsettled state of the law do. The California model is incomplete, and internally inconsistent, in not protecting “pure” tactical decisions.

Thus, the California model’s hallmark is the openly inconsistent treatment of legal-malpractice defendants whose alleged misconduct was identical: making a poor strategy choice. Some California attorneys accused of making poor strategy choices benefit from a formidable “judgmental immunity” defense, while others facing the same allegations have no such defense. California courts should focus more on whether the malpractice suit concerns a strategy choice and less on what particular type of uncertainty necessitated the strategy choice.

#### IV. CONCLUSION

A growing number of jurisdictions have applied some form of the attorney-judgment rule to protect lawyers from liability for informed, good-faith strategy decisions that produce unfavorable results. The policies underlying the rule are sound. Any other approach would unfairly expose lawyers to liability based on Monday-morning quarterbacking by disgruntled clients. If courts diligently follow a three-pronged analysis requiring proof of a true strategy decision made in good faith and on an informed basis, the rule will not deteriorate into the broad, subjective “good faith” defense that some courts and critics have feared.