

Questionable Tactics

Lawyers can protect against suits that second-guess litigation choices

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At the end of every trial, at least half the litigants are likely to be unhappy. The losers inevitably seek reasons and excuses for the disappointing end to what was probably an intense experience for them. Quite naturally, the first person usually scrutinized and blamed is their own lawyer.

Typically, these clients have no substantive complaints. Rather, they focus on the activities of their counsel in preparing for and conducting the trial. Most common are complaints that counsel failed to call witnesses or to introduce evidence, failed to make objections, failed to offer experts or failed to adequately cross-examine a witness.

These activities lend themselves to scrutiny and criticism primarily because there generally is no clear demarcation between "right" and "wrong" ways to handle them; they are primarily the kind of tactical judgment calls that lawyers must make throughout the litigation process.

But given the ease with which any disgruntled litigant can find another lawyer to second-guess the judgment calls of former counsel, there is a strong need for a recognized rule of immunity from liability for tactical and judgmental decisions made by lawyers in the course of litigation.

Rules in 10 Jurisdictions

To date, however, only about 10 jurisdictions have expressly adopted such immunity rules. Most of these rules explicitly state that the expert testimony of other lawyers that they would have acted differently from the lawyer in question is not by itself enough to support a malpractice action.

For instance, in *Rorrer v. Cooke*,

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329 S.E.2d 355 (1985), the North Carolina Supreme Court upheld a summary judgment in favor of a defendant lawyer, ruling that allegations that the lawyer failed at trial to present relevant evidence, inadequately cross-examined a witness, failed to offer a "necessary" expert and failed to offer certain records were insufficient to state a cause of



action. The court held that an affidavit from a lawyer expert stating that he or she would have acted differently was insufficient to establish a prima facie case of a lawyer's negligence.

In one of the most widely recognized decisions on this issue, the 6th U.S. Circuit Court of Appeals in Cincinnati examined the rationale of immunity in *Woodruff v. Tomlin*, 616 F.2d 924 (1980).

The court reasoned that, if a lawyer is liable for his or her tactical and judgmental decisions, then "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."

Other jurisdictions that have adopted this reasoning in recognizing a rule of immunity for tactical decisions by lawyers include Florida, Georgia, Illinois, Iowa, Minnesota and Tennessee. The 3rd U.S. Circuit Court of Appeals applied the Tennessee cases to reach the same conclusion.

In jurisdictions that have not

expressly recognized that lawyers are not liable for the informed and honest exercise of their professional judgment in the selection of trial tactics, some precautions are advisable for litigators:

•Make informed decisions.

Allegations of malpractice for judgmental and tactical decisions are likely to be defeated if the lawyer can demonstrate that a decision to proceed in a certain manner was a knowledgeable choice.

•Involve the client.

Remember, it is the client's interests that are at stake. A client who is informed only after the fact of decisions to not call witnesses or to not present certain evidence is much more likely to second-guess the lawyer, especially if there is an adverse outcome.

Even if the client objects to a tactical decision about which the lawyer feels strongly, the lawyer generally can proceed over the client's objection. Naturally, a lawyer who decides to proceed against a client's wishes should document why the decision was in the client's best interests.

•Document the file. If there is more than one way to proceed on any issue, write a memo to file explaining the reasoning for electing one approach over the other. If the client consents to proceed in that direction, note it. A lawyer who does not have consent should summarize the discussions with the client, the client's reasoning, and why the lawyer elected to proceed as he or she did. Being able to show that all options were considered before choosing a course provides a much more credible defense later.

The adoption by a number of jurisdictions of a rule of immunity for tactical decisions by lawyers in the course of civil litigation underscores the need for a general rule to that effect.

Until such a rule is adopted, however, a lawyer's best protection against claims based on judgment and tactical decisions is to make—and document—informed and knowledgeable choices. ■