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Washington Court of Appeals Addresses “Professional Judgment” Rule in Legal Malpractice

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Division I of the Washington Court of Appeals recently addressed the “professional judgment” rule in *Angelo v. Kindinger*, 2022 WL 1008314 (Wn. App. Apr. 4, 2022). The rationale of the rule, which is a long-standing part of the decisional law of legal malpractice, is that a lawyer should not be held liable for malpractice for a good faith judgment within a range of reasonable alternatives.

Angelo grew out of an arbitration between the plaintiff, who had been a Seattle-based executive of a corporate events production firm, and his former employer over stock compensation. In seeking financial records from the employer during discovery, Angelo’s lawyer assured the arbitrator that his client had no intention of returning to the events business and, therefore, turning the records over would not be providing them to a competitor. Later, however, the Angelo did re-enter the business and won a bid to plan a large event for a major corporation. Nonetheless, the lawyer did not correct the earlier statement to the arbitrator. Angelo won the arbitration but shortly after the employer became aware of his return to the industry and moved for sanctions based, in relevant part, on the lawyer’s failure to correct the record. The arbitrator entered preliminary sanctions, scheduled additional hearings on others and froze the earlier award. Angelo and the employer then settled.

Angelo, in turn, sued his lawyer and the lawyer's firm for malpractice—arguing that the lawyer's decision not to disclose Angelo's re-entry led to the sanctions. The lawyer, however, argued successfully on summary judgment that the professional judgment rule prevented a finding of malpractice. Angelo appealed. The Court of Appeals found that fact issues precluded summary judgment and reversed.

In doing so, the Court of Appeals noted that the parties agreed that there was no legal impediment to Angelo competing against his former employer and the lawyer conceded that he knew of Angelo's plan. The lawyer argued, however, that his decision not to correct his earlier statement to the arbitrator in that regard was a matter of reasonable professional judgment. Angelo countered that he had offered expert testimony that under RPC 3.3(a), which governs candor toward a "tribunal," a lawyer has a duty to correct a statement of material fact made to an arbitrator. In the view of the expert, failing to correct the earlier statement about Angelo's intentions was not reasonable and, therefore, the professional judgment rule did not apply. The Court of Appeals concluded that the expert's testimony was sufficient to create a fact issue precluding summary judgment, reversed and remanded the case to the trial court.

Angelo offers a useful summary of when the professional judgment rule does—and does not—apply.

(*Note:* As I write this, *Angelo* was “unpublished” but a motion to publish the opinion was pending.)

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.