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Court of Appeals Discusses “Professional Judgment” Rule for Legal Malpractice

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Division I of the Washington Court of Appeals in Seattle recently discussed the “professional judgment” rule in *Dang v. Floyd, Pflueger & Ringer*, PS, ___ Wn. App.2d ___, 2022 WL 9732289 (Oct. 17, 2022). Under that rule, a lawyer is generally not liable for legal malpractice if the lawyer was simply exercising reasonable professional judgment.

The plaintiff doctor in *Dang* argued that his defense counsel in a regulatory hearing before the Washington Medical Quality Assurance Commission made decisions on witnesses and exhibits that led to an unfavorable outcome. The defendant law firm in the subsequent legal malpractice case moved for summary judgment relying on the professional judgment rule. The trial court granted the motion. The Court of Appeals affirmed.

Although the facts involved in *Dang* are case-specific, the Court of Appeals’ opinion includes a very useful summary of both the procedural and substantive aspects of the professional judgment rule.

On the procedural side, the Court of Appeals held that the professional judgment rule is not an affirmative defense that must be pled in a defendant’s answer. Rather, the Court viewed the rule in the context of legal malpractice as essentially rebuttal evidence that the standard of care had been met.

On the substantive side, the Court of Appeals outlined the way the professional judgment rule plays out:

In general, an error in professional judgment or in trial tactics, without more, does not subject an attorney to liability for legal negligence merely because the professional judgment or tactic led to a disadvantageous outcome. . . . The attorney judgment rule is dependent on the attorney arriving at a professional judgment or trial tactic while exercising the standard of care consisting of “the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.” . . . The attorney judgment rule reflects that a range of strategic approaches may be reasonable and within the standard of care in a given representation, notwithstanding that a reasonable strategy based on an appropriate evaluation may not lead to the desired outcome. *Id.* at *6 (citations omitted).

Dang both clarifies the procedural point and offers a thorough summary of the substantive aspects of the professional judgment rule.

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 has served on the Oregon State Bar Legal Ethics Committee and is a member of 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

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