

# Error-in-Judgment Rule Might Not Protect Where Law Is Unsettled

The so-called error-in-judgment rule applies to immunize attorneys from legal malpractice claims for the exercise of their judgment with respect to strategic decisions. Under this concept, an attorney cannot be second-guessed with respect to litigation strategy so long as he or she understood all of the reasonable options available and conferred with the client when there was a reasonable opportunity to do so.

Take, for example, the lawyer defending against a personal injury claim who knows that under the applicable principles of substantive and procedural law it is possible to join someone as an additional defendant. Suppose the lawyer decides, as a matter of strategy and after consulting with the client, that the client may get a better result by not joining the additional defendant even though the client is giving up the opportunity to share with or shift the burden to the potential additional defendant. This could happen, perhaps, because the additional defendant potentially might raise issues hazardous to the client. Under the error-in-judgment doctrine the lawyer may counsel such a decision without the client being permitted to second-guess the decision in a subsequent malpractice action. On the other hand, if the lawyer did not understand that under the applicable law the joinder of an additional defendant was an option, then this doctrine does not apply to immunize the lawyer. Other defenses still may or may not apply, but the error-in-judgment rule would not.

But what if the law is unsettled (“unsettled” meaning that it is “not decided or determined [and is] characterized by uncertainty, irregularity, or instability”; *Webster’s Third New International Dictionary* (2002))? Does the doctrine immunize a lawyer who chooses not to entertain a strategy because it is unsettled as to whether that strategy can be employed successfully? These questions were addressed in a recent Alaska case.

In *L.D.G., Inc. v. Robinson*, 290 P.3d 215 (Alaska 2012), Alaska law was unsettled at the time that a lawyer was defending a wrongful death action against his client, a bar, with respect to a point of dram-shop liability. Specifically, under circumstances where it is not the customer who asserts the dram-shop claim but a third party who is involved

in a motor vehicle accident with the intoxicated customer, it was undecided whether the bar could join the customer as a third-party defendant. Stated differently, at the time of the underlying matter, “Alaska’s dram shop case law was unsettled whether alcohol sellers could apportion fault to consumers” in claims brought by others for harm caused at least in part as a result of the customer’s intoxication.

Because of this ambiguity, defense counsel in the underlying action did not recommend that an attempt be made to join the customer. The jury at the trial level found that the “criminally negligent” conduct of the bar’s employee serving the customer was not a cause of the harm. Given that finding, the verdict had to be in favor of the plaintiff bar. And that finding was the subject of judicial intervention to overturn the jury verdict.

Thereafter the Supreme Court of Alaska handed down a decision in another case — settling the issue — wherein it held that a drinking establishment can join a customer as a third-party defendant to apportion fault in response to a dram-shop claim asserted by a third party. This decision apparently prompted the bar to sue its own defense counsel in the underlying action for his failure to join the customer. The lawyer filed a motion to dismiss on the basis that the court should apply the error-of-judgment doctrine. The doctrine has been applied in some other jurisdictions (although not in Pennsylvania) to “provide immunity for judgment error regarding unsettled propositions of law.”

The bar argued that the doctrine does not apply under these circumstances. It posited that a lawyer must “‘weigh the benefit and the possible harm and see which course’ to take, and that it was inappropriate to dismiss [the bar’s] claim without granting the parties an opportunity to present expert evidence on the standard of care or an opportunity to determine [defendant lawyer’s] considerations (if any) in making the decision not to add [the customer].”

The trial court granted the motion to dismiss, finding that the defendant lawyer “did not, as a matter of law, breach his duty of care to his clients in applying that law to their case.” Moreover, in denying a reconsideration motion the trial court made it clear that its ruling did not depend upon whether the defendant lawyer had “vigorously researched” the case law on this issue. Instead it was persuaded by the premise that “[a]t the time, ‘the dram shop statute was an exceptional statute where all fault was attributed to the alcohol seller’ ” and that, once and if this issue should reach the Supreme Court, a lawyer is not required to anticipate a future Supreme Court ruling to the contrary.

In a unanimous decision, the Supreme Court reversed. It did not dispute that it was unsettled “whether the defendant [liquor] licensee could bring in ... [an] intoxicated person for fault allocation purposes.” Basing its decision

## Avoiding Liability



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upon an analysis of prior Alaska case law, the court held that “where the law is unsettled — as it was here — there is at least a viable claim that the standard of care requires the attorney to advise a client to follow the reasonably prudent course of action in light of the uncertainty. ...” The Supreme Court concluded that “a prudent defense lawyer would have considered attempting to add [the customer] as a defendant for fault allocation.”

Assuming that this ruling would be applied in Pennsylvania, *L.D.G.* raises the question of whether the doctrine will apply not only where the law is unsettled but also where the law has changed what was previously thought to be settled law. Until the Supreme Court of Pennsylvania has spoken on a point of state law, that point of law is not settled. However, there are instances where the Supreme Court seemingly has spoken but a body of case law showing a contrary trend then develops. That could be by the appellate state courts and federal courts interpreting Pennsylvania law where they criticize (or in some instances even ignore) the Supreme Court precedent. It could also be by way of a body of contrary precedent developing in foreign jurisdictions. Such a trend may suggest that if and when the Supreme Court revisits the issue it may reverse itself. Therefore an argument could be fashioned — which is not necessarily embraced by this author — that a lawyer must anticipate a reversal of seemingly well-settled law where a contrary trend of case law has developed that may suggest that it really is not well-settled at all. Although not stated in so many words, the holding in *L.D.G.* suggests that duty of care requires that a lawyer conduct this kind of analysis and so advise the client and the fact that the point of law is technically settled would not provide the error-in-judgment defense.