

**New York Pattern Jury Instructions--Civil**  
**Database Updated December 2009**  
Committee on Pattern Jury Instructions Association of Supreme Court Justices

**Division 2. Negligence Actions**  
**G. Specific Negligence Actions**  
**4. Malpractice**

PJI 2:150 Malpractice--Physician

Malpractice is professional negligence and medical malpractice is the negligence of a doctor. Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do under the circumstances. It is a deviation or departure from accepted practice.

A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an (average doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in which the doctor practices. *(If there is evidence that the doctor should have complied with standards that exceed the standards of the medical community in which the doctor practices, the following should be charged:)* The doctor must also comply with minimum (statewide, national) standards of care.)

The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasonably informed of new developments in (his, her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. A doctor must also use his or her best judgment and whatever superior knowledge and skill (he, she) possesses, even if the knowledge and skill exceeds that possessed by the (average doctor, average specialist) in the medical community where the doctor practices.

By undertaking to perform a medical service, a doctor does not guarantee a good result. The fact that there was a bad result to the patient, by itself, does not make the doctor liable. The doctor is liable only if (he, she) was negligent. Whether the doctor was negligent is to be decided on the basis of the facts and conditions existing at the time of the claimed negligence.

*[This paragraph should only be charged when there is evidence that the doctor made a choice among medically acceptable alternatives. See Caveat 2 below:]* A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances.

If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused.

*[Where appropriate, add:]*

A doctor's responsibility is the same regardless of whether (he, she) was paid.

#### Comment

The charge should be preceded by a separate charge defining negligence, see PJI 2:10, and followed by a charge on proximate cause, see PJI 2:70. It can be adapted for use with respect to claims against other health care providers such as dentists, podiatrists, nurses, chiropractors, etc.

**Caveat 1:** Each claimed departure from accepted medical practice should be the subject of a separate jury question, Steidel v Nassau, 182 AD2d 809, 582 NYS2d 805; see Davis v Caldwell, 54 NY2d 176, 445 NYS2d 63, 429 NE2d 741; see also Harris v Parwez, 13 AD3d 675, 785 NYS2d 781.

**Caveat 2:** The fifth paragraph of the Charge ("error in judgment") should not be charged unless there is a showing that defendant considered and chose among several medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125; Anderson v House of Good Samaritan Hospital, 44 AD3d 135, 840 NYS2d 508; see Comment, infra. The fact that defendant physician's diagnosis or treatment involved the exercise of medical judgment does not by itself provide a basis for giving an "error in judgment" charge, Anderson v House of Good Samaritan Hospital, supra. Further, it is improper to give the "error in judgment" charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, Rospierski v Haar, 59 AD3d 1048, 873 NYS2d 802; Martin v Lattimore Road Surgicenter, Inc., 281 AD2d 866, 727 NYS2d 836. An error in giving the "error in judgment" charge when the case does not involve a physician's choice among medically acceptable alternatives is not harmless if the primary issue is whether the physician deviated from accepted standards of care, Anderson v House of Good Samaritan Hospital, supra; see Rospierski v Haar, supra.

The second paragraph of the charge is based on the analysis in Toth v Community Hospital at Glen Cove, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368, which applied the locality rule as a minimum standard, and then added the further requirement that doctors use their "best judgment and whatever superior knowledge, skill and intelligence" they possess, see Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125.

The fifth paragraph of the charge ("error in judgment") is based on Toth v Community Hospital at Glen Cove, 22 NY2d 255, 292 NYS2d 440, 239 NE2d 368; Pike v Honsinger, 155 NY 201, 49 NE 760; Hale v State, 53 AD2d 1025, 386 NYS2d 151; see Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125; Scofield v Moreland, 23 AD3d 1082, 804 NYS2d 207 (citing PJI). The use of the phrase "medical community" in the pattern charge is supported by Toth, as well as by such cases as Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883 ("[a] physician's duty is to provide the level of care acceptable in the professional community in which he practices"); Bovay v Podolsky, 266 AD2d 843, 697 NYS2d 427 (same); Kelly v State, 259 AD2d 962, 687 NYS2d 843 (same); Ressis v Mactye, 108 AD2d 960, 485 NYS2d 132 (psychologists must have skill of "the average member of their profession"); Littlejohn v State, 87 AD2d 951, 451 NYS2d 225 (physician must have skill of "the average member of the medical profession"); Hale v State, supra (doctor must have the skill of "the average member of the medical community"); see Stuart by Stuart v Ellis Hosp., 198 AD2d 559, 603 NYS2d 212; Schoch v Dougherty, 122 AD2d 467, 504 NYS2d 855.

### C. Error in Judgment

When used in the context of medical malpractice litigation, the term "error in judgment" is something of a misnomer, as it is not properly used in a case where the issue involves a claimed misjudgment by the defendant practitioner, see Anderson v House of Good Samaritan Hospital, 44 AD3d 135, 840 NYS2d 508. Rather, the so-called "error in judgment" rule represents a narrow principle of law that protects medical practitioners from liability when they are sued for making non-negligent choices among medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125; Anderson v House of Good Samaritan Hospital, supra; see Schrempf v State, 66 NY2d 289, 496 NYS2d 973, 487 NE2d 883; Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862; Ibguy v State, 261 AD2d 510, 690 NYS2d 604; Darren v Safier, 207 AD2d 473, 615 NYS2d 926. Where alternative procedures are available to a physician, any one of which is medically acceptable and proper under the circumstances, there is no negligence in using one rather than another, Koehler v Schwartz, 48 NY2d 807, 424 NYS2d 119, 399 NE2d 1140; Henry v Bronx Lebanon Medical Center, 53 AD2d 476, 385 NYS2d 772; Schreiber v Cestari, 40 AD2d 1025, 338 NYS2d 972; see Gross v Friedman, 138 AD2d 571, 526 NYS2d 152, aff'd, 73 NY2d 721, 535 NYS2d 586, 532 NE2d 92; Annot: 89 ALR4th 799. To be distinguished from true "error in judgment" cases involving choices among medically acceptable alternatives are those in which the term "error in judgment" or a similar formulation is used but the real question is simply whether the practitioner's treatment represented a permissible exercise of medical judgment, see Oelsner v State, 66 NY2d 636, 495 NYS2d 359, 485 NE2d 1024; Johnson v Yeshiva University, 42 NY2d 818, 396 NYS2d 647, 364 NE2d 1340; Davis v Patel, 287 AD2d 479, 731 NYS2d 204.

The "error in judgment" charge implies the exercise of some judgment in choosing from among two or more available, medically acceptable alternatives, Martin v Lattimore Road Surgicenter, Inc., 281 AD2d 866, 727 NYS2d 836; Spadaccini v Dolan, 63 AD2d 110, 407 NYS2d 840 (citing PJI). Thus, it should not be given unless there is a showing that defendant considered and chose among several medically acceptable alternatives, Nestorowich v Ricotta, 97 NY2d 393, 740 NYS2d 668, 767 NE2d 125 (citing PJI) ("error in judgment" charge improper where neither party contended that ligation of renal artery was acceptable alternative means of treatment); Anderson v House of Good Samaritan Hospital, 44 AD3d 135, 840 NYS2d 508 (citing PJI) ("error in judgment" charge improper where claim involved physician's alleged misdiagnosis and there was no issue as to whether physician had failed to use best judgment in choosing among medically acceptable alternatives); Martin v Lattimore Road Surgicenter, Inc., supra (citing PJI) ("error in judgment" charge appropriate only in narrow category of cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives); Grasso v Capella, 260 AD2d 600, 688 NYS2d 666 (where there was no evidence that defendant surgeon had to consider and choose among medically acceptable alternatives, trial court properly refused to give "error in judgment" charge); see Capolino v New York City Health & Hospitals Corp., 199 AD2d 173, 605 NYS2d 87 ("error in judgment" charge should have been given where it was possible for jury to determine that there was more than one course acceptable under medical standards at time of treatment); Petko v Ghoorah, 178 AD2d 1013, 580 NYS2d 668 (court did not err in giving "error in judgment" charge where each party's expert testified to acceptable methods of diagnosing and treating condition). It is improper to give the "error in judgment" charge when the evidence simply raises the issue of whether defendant physician deviated from the degree of care that a reasonable physician would have exercised under the same circumstances, Martin v Lattimore Road Surgicenter, Inc., supra.

A mere difference of opinion among medical providers is not, standing alone, sufficient to sustain a prima facie case of medical malpractice, Weinreb v Rice, 266 AD2d 454, 698 NYS2d 862; Ibguy v State, 261 AD2d 510, 690 NYS2d 604; Darren v Safier, 207 AD2d 473, 615 NYS2d 926. The permissible exercise of medical judgment is measured by the state of medical knowledge at the time of the act or omission, Johnson v Yeshiva University, 42

NY2d 818, 396 NYS2d 647, 364 NE2d 1340; Fallon v Loree, 136 AD2d 956, 525 NYS2d 93; Paradies v Benedictine Hospital, 77 AD2d 757, 431 NYS2d 175. Liability for malpractice must be based on the facts confronting defendant at the time of the occurrence and should not be subjected to "the second guess of a jury," Topel v Long Island Jewish Medical Center, 55 NY2d 682, 685, 446 NYS2d 932, 431 NE2d 293; see Krapivka v Maimonides Medical Center, 119 AD2d 801, 501 NYS2d 429; Henry v Bronx Lebanon Medical Center, 53 AD2d 476, 385 NYS2d 772.