

Do Lawyers Have to Be Able to Predict the Future?

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In addition to their efforts in court or in negotiating deals, lawyers are often asked by their clients to assess risk and likelihood of success of various legal initiatives. These assessments may be relevant to the client's determination of what path to take or of valuing a certain outcome (such as the risk of litigation).

The challenge is that while a lawyer can assess risk or value a claim based on her or his experience and the applicable law, there are no guaranteed outcomes. Litigation can be unpredictable, opposing parties can throw curveballs and there could be any number of unforeseen issues that change the course of a legal representation. And yet, a client is likely relying on the lawyer's assessment.

So what happens when the outcome of the legal matter is dramatically different from what the lawyer predicted? For instance, what happens when the lawyer who predicted a defense verdict instead loses a costly trial, with a high award against the client?

In such cases, the clients (or their insurers) may blame the lawyers for not seeing it coming, especially where the client had the opportunity to settle the case or take a different approach to a legal issue, but declined to do so, relying on the lawyer's valuation or assessment.

Attorneys are not required to accurately predict the future in all circumstances. Sometimes, the lawyer can do everything right and there can still be an unanticipated outcome. But there could be instances in which the client alleges that the lawyer overlooked a critical legal factor, or that the lawyer failed to give proper consideration to the relevant issues, which ultimately harmed the client in relying on the lawyer's advice.

Here are some factors when considering the risk of malpractice liability for a lawyer's evaluation of the likely success or value of a legal representation.

What Is Required for 'Competent Representation?'

ABA Model Rule of Professional Conduct 1.1 requires lawyers to provide "competent representation" to a client. Although rules like these are not solely determinative of the standard of care owed by lawyers to clients, they are instructive. **Comment [5] to Model Rule 1.1** suggests that the scope of competent representation anticipates more than just the final court appearance or negotiated deal.

It can include the lawyer's efforts to analyze the strengths of the matters beforehand: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."

Thus, in reviewing whether an attorney did a thorough or competent job in assessing a matter, the client or a court

may focus on whether the attorney appropriately inquired into the issues or adequately prepared for the analysis. Of course, what constitutes the “methods and procedures” of “competent practitioners” could vary by jurisdiction, by practice area or even by the client’s exposure.

The Professional Judgment Rule

It is common knowledge in the profession that very few legal matters can be predicted or valued with absolute certainty. There are always numerous factors at play that impact the likelihood of a certain outcome or the financial risk involved. In fact, if the outcome of legal disputes could be known with certainty, clients likely would not need lawyers.

Thus, many states recognize the professional judgment rule, which provides that a lawyer generally is not liable for errors or omissions in representing a client that arise from an honest exercise of professional judgment.

This draws on the concept that, when a lawyer has considered the applicable facts and law, a lawyer’s best judgment should not be a source for liability, especially when there may be multiple potential approaches to the same problem.

Reasonable legal minds can differ over a likely outcome, strategy or approach; second-guessing the lawyer’s recommendations with the benefit of hindsight does not necessarily mean that legal malpractice has occurred.

Although the application of this rule provides some protection to attorneys engaged in valuation analysis, the rule generally will not excuse the lawyer’s failure to thoroughly consider the relevant facts. Even in jurisdictions that recognize the professional judgment rule, the lawyer still must be acting reasonably and with the appropriate information.

Typically, it is sufficient for an experienced attorney to thoroughly review the facts and, relying on her or his experience with similar cases, making an educated conclusion regarding the client’s likelihood of success. Documenting the review of the record, known facts and applicable law can help show that the lawyer acted reasonably in exercising her or his judgment.

Legal malpractice disputes that arise out of a lawyer’s valuation or likelihood of success analysis thus may involve reviewing whether the lawyer’s position was justified in light of the facts and law. For that reason, it can be helpful (although not required) for lawyers to document in writing the support for their opinion and other variables that may impact the case.

It is also recommended that lawyers avoid providing “guarantees” of an outcome. Such guarantees may not be supported by the law and needlessly adopt risk for malpractice exposure.

What to Tell Insurers

It is common for lawyers involved in civil defense work to interact with their client’s insurers, who may be financially contributing to the defense of a claim covered by insurance. Although the insurance company may have their own counsel monitoring the matter, the insurance company may also be relying on the insured’s defense counsel to provide an analysis of the potential liability risk.

The insurer may ask defense counsel to assess the risk against its insured to assist the insurer in valuing the claim and considering settlement. In such an event, it is important for the defense counsel to document the assessment, to identify the factors at play, and to provide the information requested.

Indeed, as an agent of the insured, defense counsel likely has an obligation to be truthful and forthcoming in its

communications with the insurance company and to provide the insurer with sufficient information for it to make a determination of valuation.

By considering these factors, lawyers can reduce the risk of claims or grievances in their future.

Shari L. Klevens is a partner at Dentons and serves on the firm’s U.S. board of directors. She represents and advises lawyers and insurers on complex claims and is co-chair of Dentons’ global insurance sector team.

Alanna Clair is a partner at the firm and focuses on professional liability defense and complex insurance defense.

Klevens and Clair are co-authors of “Georgia Legal Malpractice Law” (2022), “District of Columbia Legal Malpractice Law” (2021) and “The Lawyer’s Handbook: Ethics Compliance and Claim Avoidance” (2013).

Your Key Contacts



Shari L. Klevens
Partner, Washington, DC
D +1 202 496 7612
shari.klevens@dentons.com



Alanna Clair
Partner, Washington, DC
D +1 202 496 7668
alanna.clair@dentons.com