The Immunity of Attorneys for the Occasional Bad Result

It is an unpleasant fact that a bad result may occur when representing a client. Attorneys are not “guarantors,” “backstops” or “insurers” of the outcome of a matter they handle.

By **John L. Slimm and Jeremy J. Zacharias** | January 15, 2018

Bad results might occur at trial, on appeal, in arbitrations, or as a result of the closing of a commercial transaction. However, attorneys are not liable simply because a bad result has occurred. For example, a plaintiff’s attorney is not liable to his or her client simply because the jury awards less than the settlement demand. Likewise, a defense attorney is not liable to his or her client because the court or jury awards more than the settlement offer. Attorneys are not liable solely because an appellate court rules against their client. In addition, attorneys handling arbitrations are not

liable simply because of a bad result or when the arbitrators exceed their authority. Finally, transactional attorneys are not liable when the deal goes awry or when the business fails following the closing. This article will examine the above situations and explain why and how this immunity applies to attorneys.

In New Jersey, the client does not have a viable malpractice claim simply because a poor result has occurred. Also, although an attorney owes a duty to exercise a reasonable degree of care, that duty should not be considered in a vacuum, but it must be considered with the type of service the attorney undertakes to perform. *Ziegelheim v. Apollo*, 128 N.J. 250, 260-261 (1992).

In representing clients, bad results occur for numerous reasons that may be outside of the attorney's control. The standard requires the attorney to formulate a reasonable legal strategy. However, the obligation to formulate a legal strategy simply requires that the attorney use reasonable professional judgment in doing so, whether or not that strategy is ultimately successful. *See, Charter Oak Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 344 N.J. Super. 408 (App. Div. 2001).

Bad results can occur for reasons outside of the attorney's control. Attorneys are not liable to clients solely because a jury renders a verdict at trial contrary to the client's position or when the appellate court rules against the client's position. New Jersey Model Jury Charge 5.51A makes it clear that the law does not require that an attorney guarantee a favorable result and that standard legal practice will not necessarily prevent a poor result. If the attorney has applied the required knowledge and skill to his/her client, he/she is not liable simply because a favorable result has not been achieved.

Many factors comprise a jury's verdict or an appellate court's decision, some within an attorney's control and some outside anyone's control. For example, in *Ziegelheim*, the New Jersey Supreme Court held that attorneys who pursue reasonable strategies in handling cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. *Ziegelheim* at 267.

In *Granata v. Broderick*, 2013 N.J. Super. Unpub. LEXIS 1680, the Appellate Division held that "whether a trial lawyer has committed an act of legal malpractice depends not on the outcome of the proceeding, but on whether the lawyer adhered to the appropriate standard of care in representing the client." *Quoting Morlino v. Medical Ctr.*, 152 N.J. 563 (1998). The Appellate Division in *Granata* also held that the exercise of judgment by the attorney is critical in any legal malpractice action. A trial lawyer is not the insurer of a good result, either in the trial stage or on appeal, but must act consistently with the applicable standard of care.

Also, attorneys are not liable for recommending that a client enter a binding arbitration which concludes with costs higher than the client expected. In *Goodwin v. Donahue Hagan Klein & O'Donnell*, 2011 N.J. Super. Unpub. LEXIS 3133, after filing for divorce on Oct. 31, 2006, Goodwin retained O'Donnell to represent him in the litigation. On April 24, 2008, O'Donnell recommended the matter proceed to

arbitration as the least expensive and most expeditious means of resolving the marital dispute. Both parties executed an arbitration agreement that identified the arbitrator, fixed the arbitrator's fee and allocated its cost. The arbitrator issued his final arbitration award nine months later. The plaintiff was dissatisfied with the award, leading to a legal malpractice suit, where the plaintiff alleged that the arbitration, in which he spent an additional $200,000, was neither cheaper nor quicker than a court proceeding. The trial court granted summary judgment, and the Appellate Division affirmed, holding that there was no legal duty to refrain from recommending arbitration, especially considering New Jersey's strong public policy in favor of arbitration. The Appellate Division also held that no jury could reasonably find the required nexus for a legal malpractice claim between the defendant's alleged negligent advice and the plaintiff's claimed damages resulting from the arbitration decision.

Also, in some situations concerning business transactions, plaintiffs allege that the attorney's conduct was a substantial contributing factor to a loss sustained as a result of a business failure. In *Jack v. Stewart*, A-5986-96T5 (1999), the Appellate Division held that the plaintiff's expert must offer competent opinions regarding: (a) why the business failed; (b) whether the reason for the failure was relevant to the expert's opinion of actionable malpractice; (c) knowledge of the specific industry or business; and (d) that the attorney's actions caused the failure of the business or the plaintiff's consequent loss. In *Jack*, David Jack and Michael Stewart retained an attorney in connection with forming a business involving traffic signs. When this business venture ultimately failed, Jack sued his former business partner, Stewart, and their attorney, alleging that Stewart did not pay the promised new capital into the company. Jack retained an expert, who testified that there was a conflict and detailed the ways this conflict manifested itself to Jack's disadvantage. The court found that the testimony of the plaintiff's expert did not support the requisite element of proximate causation, holding that the attorney did not negotiate any of the agreements for the business transactions, did not render any business judgment, and his role was to draft and review the agreements dictated by his clients and to attend the various real estate closings. The Appellate Division found that there was no proof that it was the attorney's manner of performance that caused the plaintiff's alleged damage, i.e., the loss of investment in the business and the obligations incurred. The court held that the failure of the business venture was due to market factors and inexperience of the principals.

In some situations, the plaintiff purchaser will file a legal malpractice action against the attorney who handled the transaction and the closing, asserting that the attorney served as a "backstop" who should have protected the client purchaser from fraud perpetrated by the sellers. In *Grubbs v. Knoll*, 376 N.J. Super. 420 (App. Div. 2005), the Appellate Division rejected such a theory of liability. As noted by the trial court in *Grubbs*, "The lawyer is not the court of last resort on a closing. Lawyers simply do not have an affirmative duty to detect and prevent fraudulent conduct by a seller and/or a realtor."

In other jurisdictions, courts have held that attorneys are not liable for bad results occasioned by the errors of the court. In *Shealy v. Lunsford*, 355 F. Supp. 2d 820 (M.D.N.C. 2005), the plaintiff originally hired the defendant Robert V. Shaver Jr. to defend her in a North Carolina state court action. Shaver filed a motion on behalf of the plaintiff, a resident of South Carolina, to dismiss the lawsuit based on lack of personal jurisdiction. That motion was denied by the trial court, and Shaver filed a notice of interlocutory appeal. After Shaver filed the notice of appeal, the trial court clerk entered default against Shealy because Shaver did not file an answer. After Shealy had an entry of default lodged against her, she fired Shaver and his firm and hired John W. Lunsford to defend her in the default judgment hearing. After default judgment was entered for $2 million, Shealy fired Lunsford and hired another attorney. In the malpractice case against Shaver, Shealy alleged that Shaver and his firm committed malpractice by failing to file an answer. Shaver argued that no act or omission of his could have been a cause of the plaintiff's damages. Shaver argued that the entry of default was not a proximate cause of Shealy's damages since that entry of default was erroneously entered by the clerk of court and the underlying action should have been stayed by the appeal. The district court held that the underlying action should have been stayed after Shaver filed a notice of appeal. In granting Shaver's motion for judgment on the pleadings, the court held that the complaint did not state facts that would show that Shaver was negligent or breached a fiduciary duty in his representation of Shealy.

It is an unpleasant fact that a bad result may occur when representing a client. Poor results may occur at trial, on appeal, in arbitrations and, on some occasions, as a result of a commercial transaction. However, attorneys are not liable to the client simply because of the occasional bad result. Simply put, attorneys are not "guarantors," "backstops" or "insurers" of the outcome of a matter they handle or when the poor result occurs as a result of an error of the court.

Slimm is senior counsel and Zacharias is an associate in the Professional Liability Department of Marshall Dennehey Warner Coleman & Goggin in Mount Laurel.