Best's Insurance Law Podcast

# Attorney Discusses Landmark New York Case Pertaining to Legal Malpractice Claims - Episode #111

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**Hosted by:** John Czuba, Managing Editor
**Guest Attorney:** Anthony (Tony) Grande of Grande Legal & Consulting
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**John Czuba:** Welcome to the "Insurance Law Podcast," the broadcast about timely and important legal issues effecting the insurance industry. I'm John Czuba, managing editor of *Best's Directory of Recommended Insurance Attorneys*. We're pleased to have with us today attorney Tony Grande, Tony is the owner of Grande Legal and Consulting located in New York City.

With almost three decades of experience, Tony has been a property/casualty partner and former managing partner for several prominent insurance defense law firms from New York City, New Jersey, and California prior to opening up his new law form. Grande Legal and Consulting offers full service consulting, litigation, and trial practice.

The firm's primary focus is defending property damage claims and other actions on behalf of insurance carriers, TPAs and major owners, developers, contractors, construction managers, and other design professionals involved in significant construction projects. We're very pleased to have you with us today, Tony.

**Tony Grande:** Thank you John, happy to be back.

**John:** Today's discussion centers on a controversial case recently decided by the New York Court of Appeals pertaining to legal malpractice claims. Tony, can you please tell us about the new standard announced by the highest court of New York in *Grace v. Law* that everyone seems to be talking about today?

**Tony:** In *Grace v. Law* the court of appeals addressed a case of first impression in legal malpractice, holding that the failure to appeal bars the legal malpractice action only when the client was likely to have succeeded on appeal in the underlying action. The good news for the plaintiff bar is the converse is also true, which is sometimes drowned out by the hoopla about the case and the plaintiffs.

That is to say that if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action. Consequently the likely to succeed standard in legal malpractice cases adopted by the Court of Appeals for the first time, teaches or holds that going forward the failure of the plaintiff to appeal an underlying adverse ruling does not bar a subsequent malpractice action unless the defendant can prove that the plaintiff would have been likely to succeed had the plaintiff appealed the adverse ruling or decision below.

**John:** Tony, why is *Grace versus Law* such as seminal or watershed case for legal malpractice litigation in particular?

**Tony:** Because the majority of the Court of Appeals with only one judge dissenting, rejected the alternative standard, or the non-frivolous appeal standard advocated or proposed by the defense. i.e. because plaintiff's claims in the underlying action were not frivolous they should be required to appeal any adverse decision or ruling prior to bringing a subsequent legal malpractice suit.

Accordingly it would appear from the Court of Appeals thus adopted or affirmed a more narrow standard, namely the plaintiff contemplating a legal malpractice suit need only appeal the adverse decision if he was likely to succeed. The implication from *Grace v. Law* is clear, if the plaintiff is not likely to succeed on the appeal, the plaintiff is free to pursue a legal malpractice claim without the cost or time that would ordinarily be necessary to appeal the adverse underlying action or decision.

In a nutshell, the new rule from *Grace v. Law* basically raises a new and potentially powerful argument on causation for defendants in legal malpractice cases. To wit, that if an appeal was likely to succeed, then even assuming arguendo there was negligence or malpractice by the attorney of the firm in question, any negligence or malpractice was not a proximate cause of the plaintiff's damages if the plaintiff failed to properly appeal the adverse decision or ruling below.

**John:** Now Tony, how does the new likely to succeed standard enunciating in this case change the landscape or fabric of legal malpractice litigation?

**Tony:** Prior to *Grace* an attorney pursuing a malpractice action based on an adverse ruling in the underlying action was, as we say on the horns of a dilemma. Before *Grace*, plaintiffs were sometimes or often constrained to pursue a potentially futile appeal to preserve their position or argument that the adverse ruling below would not have been reversed or cured on appeal.

Thus the Court of Appeals in *Grace* establishes or established the likely to succeed standard as a means in effect of measuring whether or if an appeal needed to be pursued before the plaintiffs could proceed to commencing a legal malpractice action.

**John:** Tony, what is the practical implication or import of *Grace v. Law* for adjusters, insurance executives, defense counsel, or lawyers and law firms involved in legal malpractice litigation, or who are sued for legal malpractice?

**Tony:** That's a good question, John. The answer's really quite simple. Now if an appeal after an adverse or bad outcome in the underlying action is likely to succeed, it must be taken first or any subsequent malpractice action, regardless of actual negligence or malpractice, could be dismissed on the grounds that the claim ab initio is barred, waived, or forfeited for failure to first appeal the adverse underlying decision or order.

**John:** How do you respond to the feedback from some quarters that this decision imposes yet another unfair advantage, or another obstacle or hurdle to succeeding on a legal malpractice action which is not prevalent in other causes of action?

**Tony:** I'm mindful that legal malpractice claims do lend themselves to dispositive motion practice. They can often be positioned for either a motion to dismiss or a motion for summary judgment. The perception that *Grace v. Law* is unfair, or needlessly raises the bar in legal malpractice cases, I believe is an overstatement. Perhaps the short answer to the question, John, can be found in the actual wording in *Grace* which clearly holds to the contrary.

*Grace* holds, "On balance the likely to succeed standard is the most efficient and fair for all parties. This standard will obviate premature legal malpractice actions by allowing the appellate courts to correct any trial error, and allows attorneys to avoid unnecessary lawsuits, i.e. malpractice suites, by being given the opportunity to rectify their client's unfavorable result."

**John:** Tony, what is the lesson or take away after this case for insurance adjusters, insurance executives, and defense counsel like yourself that regularly litigate in this space.

**Tony:** That's a good question to conclude with, John, since we're probably running out of time for this podcast. In light of *Grace v. Law* it is perhaps not an overstatement to argue that there is a new condition precedent or additional sine qua non element to legal malpractice actions in New York. To wit, going forward, if an appeal of the adverse underlying decision was reasonably likely to succeed, an appeal must be undertaken now before commencing any legal malpractice action.

Or else any subsequent malpractice case regardless of its merits is barred, waived, or forfeited for failure to prosecute and perfect an appeal. Consequently it's my firm belief and my strong recommendation that after *Grace* it would be wise and prudent for anyone in this space including insurance adjusters, underwriters, or defense counsel charged with evaluating the viability of legal malpractice claims to add *Grace v. Law* to their best practices list and give thought to increasing the budget allocated for experts and dispositive motions, and possibly even for pre answer motion to dismiss.

Suffice it to say John, the take away or lesson here for adjusters and practitioners in the legal malpractice arena, is that there is any plausible evidence or grounds to argue plaintiff neglected to appeal an adverse decision in the underlying action, which reasonably would have been likely to succeed on appeal and may now be strong grounds for additional dispositive motion practice either at the conclusion of discovery in the form of a motion for summary judgment, or in a best case scenario, possibly during the pleading stage in the form of a pre answer motion to dismiss.

Consequently the only caveat or bad news from insurance adjusters or underwriters after *Grace*, is that the likely to succeed standard may spawn additional dispositive motion practice and require additional experts which could lead to further protracted litigation or increase the budget for motion practice and experts.

However, depending upon the unique facts and circumstances of each case, my guess is the smart money would be as long as there's at least a 50/50 probability of success of such a motion, whether it's for a summary judgment motion at the end of discovery, or better still during the pleading stage, adjusters, defense counsel, or even client attorneys or law firms sued for malpractice should be taking a long, hard look at *Grace v. Law* and deciding whether to recommend or even demand these motions.

Although I am mindful and respect that claims adjusters or even clients with a deductive or an FIR may be loath to hearing suggestion that they fear may increase the budget or cost of litigation, I would strongly encourage against that impulse. Bearing in mind that while proactive motion practice based on *Grace* could increase the overall cost of defending these cases, hard experience teaches us in litigation like many other pursuits, oftentimes a good offense can also be a good defense.

**John:** That was Tony Grande owner of Grande Legal and Consulting located in New York City, and special thanks to today's producer John Weber. Thank you all for joining us for the Insurance Law Podcast. To subscribe to this audio program visit podcast.insuranceattorneysearch.com or go to online directories such as iTunes, or Google, or Yahoo's podcast directory. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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