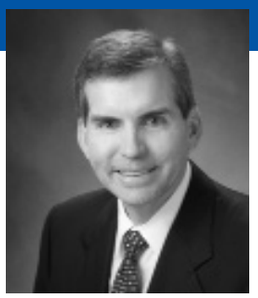
Must a Client Appeal Underlying Matter Before Pursuing a Legal Malpractice Claim?

Avoiding Liability



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When a client loses at the trial level and is advised by independent counsel that the loss was arguably caused by legal malpractice on the part of the client's lawyer, the client is sometimes faced with the following quandary: Must the underlying matter be appealed before the malpractice action becomes ripe? After all, an appeal may prove successful, vitiating trial counsel's mistake and resulting in a reversal of the outcome or, at the very least, giving the client the opportunity for a new trial. This defense has been expressed and, in some instances, judicially recognized as estoppel, forfeiture or failure to mitigate damages. See, e.g., *Deere & Co. v. Reinhold*, 2000 U.S. Dist. LEXIS 5276 at *23.

This defense has even been characterized as an absence of probable cause, that is, the lawyer's negligence at trial was not deemed the proximate cause of client's injury because the failure to appeal was a superseding intervening cause of the harm. It has also been argued, although judicially rejected, that a per se rule should be applied to block legal malpractice claims in every instance where an appeal was not taken in an attempt to overcome counsel's alleged error. But courts nationally have applied various standards for when a nonfrivolous appeal should be taken to avoid this defense. No matter which legal theory is applied to this defense, however, the burden is on the defendant lawyer to establish its application.

This defense was most recently considered by the New York Court of Appeals, for which it presented an issue of first impression. In *Grace v. Law*, ___ N.E.3d ___ 2014 WL 53253632014, the client retained two law firms at different times to represent him to assert medical malpractice claims against, among others, the U.S. Department of Veterans Affairs (VA) and an ophthalmologist for the alleged untimely treatment of neovascular glaucoma. The client contended that the VA had wrongfully canceled his appointment at a VA outpatient clinic, which delayed the diagnosis during a period critical to the diagnosis and treatment of the disease, resulting in his losing vision in one eye. The client sued the VA and the United States under the Federal Tort Claims Act, asserting claims for medical malpractice and negligence for cancelling the appointment. When it was later learned that the ophthalmologist was not employed by the VA, but instead by a local university, the court granted the VA leave to commence a third-party action against the ophthalmologist and the university, and the client amended his complaint to assert claims against these third-party defendants.

Thereafter, the ophthalmologist and the university moved for and were granted summary judgment against the client on the basis that all of his claims were time-barred. The VA moved for and was granted summary judgment for claims involving the ophthalmologist's conduct on the basis that he was an independent contractor of the VA and not its employee. Only the claim against the VA for cancelling the client's appointment remained.

In response to these rulings, one of the defendant lawyers wrote the client a letter in which the lawyer indicated "that [the client] was unlikely to succeed on the remaining claim against the VA, and that trial on that claim would be lengthy and, due to expert costs, expensive." In response, the client directed one of the defendant law firms to discontinue the underlying lawsuit. The court opinion does not indicate whether any lawyer ever discussed with the client the issue of whether the client should appeal from the orders granting summary judgment.

The client then retained counsel to represent him in a legal malpractice action against his former lawyers and their law firms for their failures to timely commence suit against the ophthalmologist and the university. In the lawsuit that ensued, both law firms defended on the basis of the client's failure to appeal the underlying action, one characterizing the voluntary discontinuance instead of an appeal as an estoppel and the other as forfeiture. Both groups of defendants moved for summary judgment on this basis, contending that the court should recognize "that a plaintiff forfeits his or her opportunity to commence a legal malpractice action when he or she fails to pursue a nonfrivolous or meritorious appeal that a reasonable lawyer would pursue." The client argued that the court should "adopt a 'likely to succeed' standard," that is, if the defendant law firms could show that the client would have been "likely to succeed on appeal," then their "alleged negligence was not a proximate cause of his damages." The court denied both motions for summary judgment.

Under New York practice, the defendant law firms were allowed to and did immediately appeal to the Supreme Court, Appellate Division, New York's intermediate appellate court, which affirmed. That court rejected application of a per se rule, an approach that "has been rejected by several of our sister states." Instead, it applied a "likely to succeed on appeal" standard. But the court found "that the record was insufficient to hold that defendants' 'representation of plaintiff did not preclude him from prevailing in the underlying lawsuit or upon appeal.' " There was one dissenter who contended that the rule should be that the standard for the defense is the failure to take a nonfrivolous appeal. The Appellate Division granted the motions of defendant law firms for leave to appeal to the Court of Appeals.

In a unanimous decision, the Court of Appeals affirmed. It noted various standards that have been applied to determine under what circumstances failure to appeal the underlying matter should constitute a defense. For example, it cited *Hewitt v. Allen*, 43 P.3d 345 (Nev. 2002), wherein "the Supreme Court of Nevada held that the voluntary dismissal of an underlying appeal does not constitute abandonment where the appeal 'would be fruitless or without merit'… [wherein t]he District of Nevada interpreted *Hewitt* to mean that a defendant would have to show that the pending appeal was 'likely' to succeed." The court also cited the Florida District Court of Appeals in *Segal v. Segal*, 632 So. 2d 76 (Fla. 2d DCA 1993), where it stated that "[w]here a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained."

The court rejected defendant law firms' argument that the "likely to succeed" standard requires speculation as to the outcome of the appeal that was not taken. In its view, "courts engage in this type of analysis when deciding legal malpractice actions generally" when deciding the

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outcome of the "case within a case" based upon non-negligently presented proofs or defenses of same in the legal malpractice trial. The court rejected the "nonfrivolous/meritorious appeal standard" proffered by defendant law firms "as that would require virtually any client to pursue an appeal prior to suing for legal malpractice."

Although *Grace* and the cases cited therein address the issue of whether to appeal, presumably the same principle would apply to the decision of whether post-trial motions should be filed following a verdict. In either instance, a dicey situation would be presented where the lawyer wants to appeal and the client does not. Clearly, under these circumstances, the lawyer should strongly urge his or her client to seek other counsel to address this issue.