

WELCOME TO THE HARMONIE GROUP

ISSUE: DISCHARGING LIABILITY AFTER CLIENT DISCHARGE

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RISK MANAGEMENT NOTE:

It is important for an attorney to review the scope of the representation when discharged by a client or when the relationship otherwise ends. A letter providing explicit guidance to the client on preserving claims, rights and evidence may mitigate any potential exposure of the attorney in the event a malpractice action is later filed. Further steps can be taken if a suit is filed alleging that claims were lost by the prior attorney; defenses can be asserted based on the former client's failure to pursue alternate remedies or otherwise mitigate damages.

ARTICLE:

Unfortunately an attorney-client relationship sometimes ends on a point of client dissatisfaction. Dissatisfaction can stem from a disagreement or from a serious mistake by the attorney. Of course, this can lead to a malpractice lawsuit by the client against the attorney. However, there are important steps that should be taken upon discharge which can sometimes prevent such a suit from being filed or at least succeeding. These steps can be taken by the former attorney and, where a claim is imminent and a liability carrier is notified, by the defense counsel appointed by the insurance carrier who can assist the client in taking these steps.

To begin with, it is important for an attorney who has been discharged to advise his former client in writing of the status of matters. The client must be told how to reserve legal rights and remedies which are available to the client. This can act to shift the responsibility for the protection of those rights to the client and any successor counsel. It is important that such a letter make clear that the client and any successor counsel have the burden from the termination date forward to take steps to preserve and prosecute claims for the client.

Advice regarding preservation of any prospective claims must accurately state the statute of limitations date for such claims. Indeed, it has been held that where an attorney is discharged before the limitations date but erroneously advises the client that his prospective claim has a two-year instead of a one-year statute period, that lawyer can be liable for lulling the client into a false sense of security in delaying his action in finding new counsel. *Lopez v. Clifford Law Offices*, 841 N.E. 3d 465 (Ill. Dist. 2005).

In the case where the former attorney has lost a cause of action due to inexcusable default or failure to file within the statute of limitations, the client may still have another cause of action under a different theory or statute which has a longer limitations period. It is extremely important to advise the client of any such possible alternative remedies and when and how those steps should be taken. Indeed, even after suit is filed for a lost claim, it is very important for an attorney and his defense counsel to

review the law as to whether alternate remedies might exist and to immediately notify the former client or his new lawyer of the duty to mitigate damages by pursuing the alternate claim.

Such notice can act an effective defense to a malpractice claim. Courts have almost universally recognized a duty of a client to mitigate his damages as a defense in a legal malpractice action. 2 R. Mallen & J. Smith Legal Malpractice, § 20.21 at 68-9 (2006). The duty to mitigate requires a party to make reasonable efforts to minimize all losses and damages. *CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Authority*, 108 Cal. App. 4th 382 (2003). But those client efforts only need to be reasonable under the facts and circumstances of the case. *Dunn v. Maxey*, 118 Ohio App. 3d 665 (1997); *Leavenworth Plaza Associates v. L.A.G. Enterprises*, 28 Kan. App. 2d 269 (2000). For example, a client has been required to take timely steps to minimize losses from a fraudulent sale permitted by the negligence of his former attorney who the client sued. *Paya v. Lanham*, 2005 Wash. App. LEXIS 309 (2005). However, a client was not required to attempt to void and re-litigate a personal injury claim where settlement proceeds were stolen by a staff member in the former attorney's office. *Bullard v. Bailey*, 91 Wash. App. 750, 959 P. 2d 1122 (1998).

The existence of an alternative remedy can also be embodied in the defense that the former client cannot prove that he was actually damaged. In other words, there can be no proximate cause of damages unless the client's rights have been lost in a way that cannot be recovered. This has been found to be a defense where an existing action can be reopened and amended. *Swanson v. Sheppard*, 445 N.W. 2d 654 (N.D. 1989). In one of our legal malpractice defense cases, we were successful in asserting an alternate remedy as a defense where the former client still had a statutory remedy after his tort remedy had been lost by the former attorney, even though that statutory remedy did not permit a jury trial. While the former client protested this loss of a jury trial right, we demonstrated that it would be impossible as a practical matter for a jury in the malpractice case to distinguish and adjudicate a difference in result from a jury versus a non-jury trial in the underlying case.

Upon discharge it is also important for the former attorney to advise the client to retain important documents and physical evidence which may be needed for future claims or other legal matters. Further, the attorney should document precisely what materials and physical evidence have been preserved and provided to the client so that the attorney is not later accused of spoliation of important evidence or documents.

It is also important that the former attorney advise the client of legal steps which may be needed to be taken, even far in the future, and even where the discharge has been a friendly and natural one. This is well illustrated by the case of *Barnes v. Turner*, 278 Ga. 788, 606 S.E. 2d 849 (2004). There a client sued his former attorney after that attorney did not renew a U.C.C. financing statement lien which was only effective for five years. When the client failed to renew the lien he lost his security interest and sued the lawyer. The Georgia Supreme Court held that the attorney had a duty to either renew the filing years later or advise the client at the time of discharge that this step needed to be taken.

Once litigation is brought against the attorney, certain steps might be taken beyond asserting causation and mitigation defenses. This might include suing another attorney or other professional involved in the case or transaction. Other professionals can be joint tortfeasors and reduce the original defendant attorney's share of liability, or the other professional's actions may even be intervening causes of the harm. Sometimes the other attorney or the other professional may even be the attorney currently representing the former client in the legal malpractice case.

However, claims against successor attorneys are strongly discouraged in most states, particularly where the successor attorney's actions are not part of the original defendant's tort but rather a later tort. E.g., *Cherry Hill Manor Assoc. v. Faugno*, 182 N.J. 64, 861 A.2d 123 (2004); *Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633 (1997); *Connell, Foley & Geiser, LLP v. Israel Advisory Service, Inc.*, 872 A.2d 1100 (App. Div. 2005); *Musser v. Provencher*, 28 Cal. 4th 274, 121 Cal. Rptr. 2d 373, 48 P.2d 408 (2002). On

the other hand some states do consider the attorney as the client's agent and permit an attorney's action to be attributed to the client. *Dennis v. Brown*, 326 Mont. 422, 110 P.3d 17 (2005). In that way, the conduct of successor counsel might be used as a mitigation defense.

It is important for an attorney to review the scope of the representation when the relationship terminates. A letter providing guidance to the client may mitigate any potential exposure of the attorney in the event a malpractice action is later filed. Further steps can be taken if a suit is filed.

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