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## Professional Liability

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### Protecting Attorneys Who Have Been Discharged by Their Clients From Legal Malpractice Actions

Attorneys know the attorney-client relationship is an at-will relationship where the client has the right to discharge an attorney at any time. While the attorney may seek to recover the value of the services provided to the client during the course of representation, the attorney cannot represent a client when the client no longer desires the attorney's services. Because the attorney has no right to demand that he or she remain as counsel for the client, it is important that the discharged attorney not be liable for damages caused to the client as a result of the successor attorney's conduct. A recent decision reaffirmed this important proposition and provides additional protection for attorneys discharged by their clients. *Cedeno v. Gumbiner*, 2004 Ill. App. LEXIS 228, 2004 WL 487730 (1st Dist. March 11, 2004).

In *Cedeno*, the plaintiff, Petra Cedeno, was injured on April 29, 1999, when she fell while exiting a Chicago Transit Authority ("CTA") bus. Cedeno retained James Gumbiner in connection with the filing of a personal injury action. Gumbiner referred the matter to the law office of Steinberg, Polacek & Goodman ("Goodman"). On September 8, 1999, Goodman sent a notice of claim for personal injuries ("notice") to the CTA. Sec. 41 of the Metropolitan Transit Authority Act ("MTAA") requires that within six months of the accident, notice has to be given to the CTA providing various information about the accident and the person injured. 70 ILCS 3605/41. Sec. 41 additionally provides that where the CTA has notice of an accident or injury, it is required to furnish a copy of Section 41 to the injured person. If the CTA fails to provide a copy of Section 41, a suit against the CTA cannot be dismissed for the plaintiff's failure to comply with the requirements of Section 41. Although Goodman sent the notice to the CTA and provided the required infor-

mation, the notice incorrectly identified the date of the accident as April 30, 1999. The CTA did not furnish Cedeno with a copy of Section 41.

On January 13, 2000, Cedeno discharged Goodman and retained Patrick Cummings and the law offices of Ciardelli & Cummings ("Cummings"). On April 20, 2000, nine days before the statute of limitations expired, Cummings filed suit against the CTA. In her complaint, Cedeno asserted that the accident occurred on April 29, 1999. The CTA denied this assertion in its answer.

Thereafter, the CTA moved for summary judgment based on Cedeno's failure to strictly comply with the provisions of Section 41. In particular, the CTA asserted that Cedeno's notice contained the wrong accident date, and the date set forth in the notice differed from the date asserted in her complaint. Cedeno responded that the CTA was precluded from relying on Section 41 because it had failed to furnish her with a copy of Section 41. The trial court rejected Cedeno's argument and granted summary judgment in favor of the CTA, finding that the CTA was not required to furnish a copy of Section 41 because the notice had contained the wrong accident date. Cedeno filed a notice of appeal from the trial court's order. However, the appellate court dismissed Cedeno's appeal for want of prosecution.

After the dismissal of the appeal, Cedeno filed a legal malpractice action against Gumbiner, Goodman and Cummings. Gumbiner and Goodman moved to dismiss Cedeno's complaint, asserting that because the notice was sufficient to trigger the CTA's duty to furnish Cedeno with a copy of Section 41, despite the incorrect accident date, the inclusion of the wrong date in the notice did not cause any damage to Cedeno. Gumbiner and Goodman asserted that the trial court in the underlying case had erred in granting summary judgment for the CTA. The trial court agreed, and dismissed Cedeno's claims against Gumbiner and Goodman.

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### About the Author

**Martin J. O'Hara** is a partner with the Chicago firm of *Quinlan & Carroll, Ltd.* His practice is devoted to litigation including commercial cases and the defense of professionals in malpractice actions. Mr. O'Hara received his B.A. from Illinois State University and J.D. with honors from John Marshall Law School. He is a member of DRI, IDC, ISBA and CBA.



On appeal, Cedeno contended that Gumbiner and Goodman were negligent for providing defective notice of her accident to the CTA. Cedeno asserted the notice with an incorrect accident date was the equivalent of not providing any notice under Section 41. Cedeno additionally asserted that had the correct accident date been included in the notice, the CTA would not have had a basis for moving for summary judgment, and the trial court would not have had a basis for entering judgment in favor of the CTA. Gumbiner and Goodman responded that any injury caused to Cedeno resulted from Cummings' failure to pursue the appeal from the entry of judgment in favor of the CTA, not the inclusion of the wrong date in the notice. Gumbiner and Goodman asserted the trial court erred in granting judgment in favor of the CTA, and that had an appeal been pursued Cedeno would have prevailed, thereby allowing her to prosecute her claim against the CTA.

The *Cedeno* court began its analysis by recognizing that "where the conduct of a successor attorney constitutes the independent and superseding cause of plaintiff's damages, the discharged attorney cannot be found to have committed legal malpractice." 2004 Ill. App. LEXIS 228 at \*9. In support of this proposition, the *Cedeno* court cited to *Mitchell v. Schain, Firsell & Burney, Ltd.*, 332 Ill. App. 3d 618, 773 N.E.2d 1192, 266 Ill. Dec. 122 (1st Dist. 2002), and *Land v. Greenwood*, 133 Ill. App. 3d 537, 478 N.E.2d 1203, 88 Ill. Dec. 595 (4th Dist. 1985). In *Mitchell*, the court held that the successor attorney's failure to refile a suit within one year of the entry of the dismissal for want of prosecution constituted the independent and superseding cause of the plaintiff's damages, thereby precluding a claim against the predecessor counsel for allowing the matter to be dismissed for want of prosecution. *Mitchell*, 332 Ill. App. 3d at 621-622. Similarly, in *Land*, the court held that successor counsel's failure to voluntarily dismiss the action and refile it constituted the independent and superseding cause of the plaintiff's damages, thereby precluding a claim against the predecessor counsel for failing to obtain timely service on the defendants. *Land*, 133 Ill. App. 3d at 540. The *Land* court held that because the cause of action was viable at the time of the predecessor counsel's discharge, "It therefore follows that plaintiff can prove no set of facts which connect defendant's conduct with any damage sustained by plaintiff." *Id.* at 541.

In light of these principles, the court considered Cedeno's claim against Gumbiner and Goodman, predecessor counsel to Cummings. The court initially held that the inclusion of the incorrect accident date in the notice did not relieve the CTA of its requirement to furnish Cedeno with a copy of

Section 41. The court held that the CTA's obligation to furnish a copy of Section 41 was to be liberally construed, and that the notice including all of the information required under Section 41 was sufficient, despite the incorrect accident date. The CTA's failure to furnish a copy of Section 41 thus precluded it from seeking a dismissal of Cedeno's complaint.

After holding that the notice was sufficient, the *Cedeno* court further held that Gumbiner and Goodman could not be liable to Cedeno. Although recognizing that the CTA would not have moved for summary judgment, and the trial court would not have granted summary judgment in the absence of the error in the notice, the court found these facts insufficient to create liability on the part of Gumbiner and Goodman. In so holding the *Cedeno* court stated:

Where her claim remained actionable after defendants' discharge, and the circuit court's misapplication of the law served as an intervening cause, it cannot be said that plaintiff's damages proximately resulted from defendants' Notice.

2004 Ill. App. LEXIS 228 at \*16.

This holding by the *Cedeno* court is most important. Although *Mitchell* and *Land* have become well-settled law, their application in *Cedeno* furthers a discharged attorney's protection. *Cedeno* allows discharged attorneys to make arguments in their malpractice suits that they could not make in the underlying action as a result of being discharged. In other words, discharged attorneys are not bound by the result obtained by successor counsel, but rather can assert that had the matter been handled appropriately, the result would have been different. Thus, *Cedeno* provides a discharged attorney the ability to rely on *Mitchell* and *Land* to argue that the cause of action was viable at the time of discharge, even when the court in the underlying action determined otherwise.

Accordingly, the primary focus in defending legal malpractice actions against attorneys discharged during the course of the underlying litigation must be on whether the action was viable at the time of the attorney's discharge, regardless of the actual outcome of the underlying action. This focus allows the court in the legal malpractice case to determine whether the predecessor counsel's conduct caused the damages asserted by the client. As causation arguably is the most critical element of a legal malpractice action, attorneys who defend legal malpractice actions should familiarize themselves with the analysis and holding in *Cedeno*.