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Ohio Bar Liability
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MALPRACTICE ALERT!

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UNDERSTANDING YOUR RIGHTS

Personal injury attorneys who send information to prospective clients, need to be aware of the recently-enacted amendments to DR 2-101. PUBLICITY, effective January 1, 2000. The full text of the rule is found at <http://www.sconet.state.oh.us/Rules>. The following is the notice that must be sent to prospective clients, if information is sent to them within 30 days of an accident or disaster:

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. We believe it is important for you to consider the following:

- 1. Make and keep records**--If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.
- 2. You do not have to sign anything** --You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.
- 3. Your interests versus interests of insurance company**--Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.
- 4. There is a time limit to file an insurance claim**--Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.
- 5. Get it in writing**--You may want to request that any offer of settlement from anyone be put in writing, including a written

explanation of the type of damages which they are willing to cover.

6. Legal assistance may be appropriate--You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. How to find an attorney--If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages.

8. Check a lawyer's qualifications--Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. How much will it cost?--In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

- a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?
- b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you may be obligated to pay all expenses even if you lose your case, how will payment be arranged?
- c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

***THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.**

RISK OF LIABILITY FOR OBTAINING CREDIT REPORTS

A relatively new area of exposure for lawyers is under the Fair Credit Reporting Act. Under the Act, any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both. 15 U.S.C.A. section 1681q. Although the statute provides for criminal penalties, it has also been used as the basis for civil damages and ethics grievances. The statute specifies limited situations in which a consumer reporting agency may furnish a consumer report. One such provision is the catchall provision for "a legitimate business need for the information in connection with a business transaction involving the consumer." 15 U.S.C.A. section 1681b(a)(3)(F).

Many lawyers appear unaware that obtaining credit reports for litigation purposes may run afoul of the statute. Several recent decisions illustrate this exposure. A 1998 Eighth Circuit decision concerned a plaintiff's lawyer, suing a dentist for malpractice for alleged improper touching of patients, who obtained credit reports on the dentist and his daughter. The court held that these were "consumer reports," whose use was restricted to one of the specified business purposes. The court affirmed an award of \$500 compensatory damages and \$5,000 in punitive

damages against the lawyer. *Bakker v. McKinnon*, 152 F.3d 1007(8th Cir.1998).

In a 1998 Sixth Circuit decision, a defense attorney did not fare any better. The court found no "legitimate business need" where an attorney procured a credit report on the plaintiff while defending a client. The attorney used the credit information to impeach the plaintiff at a deposition. The use of such information in litigation was not a purpose contemplated in the statute. *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir.1998).

A cause of action was also stated against a New York lawyer, sued in Arizona, for obtaining a husband's credit information for the wife to use in visitation litigation in New York. *Bils v. Nixon, Hargrave, Devans & Doyle*, 179 Ariz. 523, 880 P.2d 743 (App.1994).

Thus, before requesting credit reports in connection with a representation, always determine whether your objective in doing so constitutes a legitimate business need under the Fair Credit Reporting Act.

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