



MALPRACTICE ALERT!

OBLIC

Ohio Bar Liability
Insurance Company

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MORE ON FEE SHARING ARRANGEMENTS

Opinion 2003-3 from the Board of Commissioners on Grievances and Discipline was discussed in the July 2003 issue of "Malpractice Alert!" This Opinion clarified DR2-107 involving division of fees among lawyers.

Lawyers sharing fees on a case where the fee is determined by a pre-determined formula, and not on the basis of actual work performed by each lawyer, must agree to "assume responsibility for the representation." In doing so, you (and OBLIC) may become the insurer for co-counsel's errors or omissions in handling a case. OBLIC suggests the following issues be considered before agreeing to co-counsel with another lawyer not in your firm.

First, make certain that co-counsel has his or her own professional liability insurance. If that lawyer does not, they must make disclosure to the client of that fact pursuant to DR1-104, the mandatory disclosure of lack of insurance of at least \$100,000 per claim, \$300,000 aggregate per policy year. OBLIC strongly suggests that if co-counsel is uninsured, you do not enter into any co-counsel arrangement with that lawyer. The result could be payment for an act or omission committed by the other lawyer, and OBLIC will not take a positive view of any such situation at coverage renewal time.

We also suggest, particularly if you are counsel who brings co-counsel into a matter, that you state in writing to such co-counsel exactly what duties you understand she or he will be undertaking on behalf of a client, such as the filing of suit, etc. The client should be copied on this letter, as well.

Although such a letter of understanding may be irrelevant to the client's malpractice claims against both lawyers, it will be of considerable assistance in asserting a cross-claim for indemnification and/or contribution against erring co-counsel, particularly if that lawyer disputes the extent of the duties undertaken by that lawyer.

An additional discussion of DR2-107 and fee sharing can be found in the September/October 2003 issue of Ohio Lawyer, "Counsel Comments" by OSBA General Counsel Eugene P. Whetzel.

COVERAGE FOR LAWYERS AS TITLE AGENTS

When must an OBLIC insured lawyer add coverage for activities as a title agent? The OBLIC policy provides coverage for "an act, error, or omission of the Insured or any person for whose act, error or omission the Insured is legally liable, in rendering or failing to render Professional Services for others in the Insured's capacity as a lawyer or Notary Public." The definition of "Professional Services" within the policy does not include activities as a licensed title agent.

If a lawyer is asked to provide a certificate of title or an opinion of title, such services do fall within the coverage of the policy as described above. Assume the lawyer is a licensed title agent. In the course of issuing a title policy, a lien or encumbrance is not listed as an exception in a title policy when such policy is issued. A loss to the title insurer or other party is incurred due to the omission from the title policy. Such act or omission, arising out of the lawyer's activity as a title agent, is not covered unless the lawyer obtained

an endorsement to his or her policy for activities as a licensed title agent.

Please note that individual insured lawyers can be insured under the OBLIC policy for their acts or omissions as title agents, but OBLIC does not provide E&O coverage to a title agency or corporation.

CLAIM FREQUENCY BY AREAS OF PRACTICE (AOP's)

A review of claims reported to OBLIC between January 1, 1998 and May 31, 2003 indicates that the relative frequency of claims by areas of practice has not dramatically changed in the past two and one-half years. The percentage of claims by AOP is as follows, with the comparative percentage from our 2001 study in parenthesis.

Plaintiff Personal Injury	22.0%	(23.5%)
Family Law	12.5%	(14.2%)
Probate, Estate & Trusts	12.2%	(10.6%)
Real Estate	10.0%	(10.3%)
General Litigation	7.5%	(7.0%)
Commercial	5.5%	(5.7%)

Collection	5.0%	(5.4%)
Corporate	4.2%	(4.2%)
Worker's Comp	3.7%	(4.9%)
Criminal	3.7%	(NA)
Other	13.7%	(14.2%)

A review was also conducted of all claims closed from January 1, 1998 to May 31, 2003. The average payments made for over 400 claims in the study totaled about \$28,900, which included both payments made to claimants, and defense legal fees and expenses incurred. It is also interesting to note that the average payment made for personal injury, family law or real estate areas of practice was less than the overall average for all claims. Of the top four AOP's for claim frequency, only the "average" Probate, Estate and Trust claim exceeded the \$28,900 average for all claims.

Trouble spots for claim severity by AOP's with three or more closed claims in the study included Collections (one large claim skewed the average), Commercial, Corporate, Employment, and Securities areas of practice.

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