



# MALPRACTICE ALERT!

**OBLIC**

Ohio Bar Liability  
Insurance Company

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## CLAIMS AGAINST TRUST AND ESTATE PLANNING LAWYERS

Lawyers consulting with clients regarding estate planning should be particularly alert to future malpractice claims at any time when a client advises that possible estate tax ramifications are secondary. If the client's estate planning decision is such that taxes may be incurred, particularly if there are other means available for reducing such taxes, such a decision should be documented in writing. OBLIC suggests that counsel write a letter to the client discussing the client's decision, and confirming that the client knowingly has decided upon a course of planning in which avoidance of estate tax is secondary to other expressed goals. The best practice is to ask the client to acknowledge receipt of such a letter, and retain a copy of the counter-signed letter in the lawyer's file. Clients are likely to understand why the lawyer is mailing such a request if the reason for doing so are explained to them.

Such a letter may not defeat a claim where alternatives were available to accomplish the client's goals and reduce taxes, unless the letter discusses such alternative proposals that the client has decided to ignore, for whatever reason.

Other claims can involve alleged conflicts of interests where estate planning is done for a married couple, particularly if one or both have children from a prior marriage. Claims may arise that allege that the lawyer either favored one testator's interests over the other, or that the lawyer failed to advise that treatment of beneficiaries as intended by both could change after the death of one of the spouses, absent other planning in advance. Where necessary, a lawyer may need to suggest that one party obtain other counsel, or at least get an agreement in writing regarding the sharing of confidential information between the parties. Where a lawyer represents the

interests of more than one person, it may also be wise to advise the parties that in the event of certain specified developments, the lawyer will no longer be able to represent the interests of all parties.

Another area of exposure concerns conflicts between the bequests made in a will, and the actual title or ownership form of those assets. Claims have been made regarding a will that indicated a certain distribution of assets, but those assets were titled or owned such that the distribution would be inconsistent with the distribution as expressed in the will. OBLIC strongly advises that when drafting a will, clients be advised in writing that the form of ownership of a particular asset will govern its distribution, whether or not the language of the will is consistent with that distribution.

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## 41(A) DISMISSAL MALPRACTICE TRAP SPRUNG - FINALLY!

Section 2305.19, the "Savings Statute," and case law construing this section formerly contained a malpractice trap that has ensnared more than one lawyer over the years. If a Civil Rule 41(A) dismissal was taken by a plaintiff before the statute of limitations had run for a cause of action, then the case had to be re-filed either within one year from dismissal or by the date of the running of the limitations period, which occurred earlier. Thus, a plaintiff taking a 41(A) dismissal two days before the statute of limitations had run would have not one year in which to re-file the complaint, but only two days.

Am. Sub. HB Number 161 has now amended Sec. 2305.19 (A) to state that the plaintiff has either one year in which to re-file the complaint, or a date within the applicable statute of limitations, whichever "occurs later." In the example noted above, the

plaintiff would have one year in which to re-file the complaint, not just two days. The amendments are effective June 1, 2004.

Practice note: The one-year period begins to run with the filing of a 41(A) dismissal by the plaintiff, and not when the court journalizes any subsequent entry regarding the dismissal.

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## **GLB ACT - PRIVACY LAW UPDATE**

U.S. District Judge Reggie Walton, in a decision dated April 30, 2004, found that the Federal Trade Commission's determination that the Graham-Leah-Bliley Act applied to lawyers in private practice to be arbitrary and capricious. The Act cannot be enforced against attorneys engaged in real estate settlement, tax-planning and tax preparation (or any other area of private practice, for that matter).

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According to Dennis Archer, President of the ABA, the FTC has 60 days in which to decide whether or not to appeal this ruling. Mr. Archer also advises that Congress is considering whether or not to amend the Act as well.

The FTC's decision was strongly criticized by the organized bar, including the OSBA, because the privacy issues addressed in the Act, as possibly applicable to attorneys, were already covered by ethical rules of conduct governing lawyers and confidential client information. The Act imposed requirements on law firms regarding annual privacy notices that were not deemed necessary – but rather good only for the paper industry!

OBLIC will do its best to keep you advised of further developments with respect to the GLB Act, and its relevance to lawyers in private practice.