



MALPRACTICE ALERT!

OBLIC

Ohio Bar Liability Insurance Company

September 2004 • 1650 Lake Shore Drive • Columbus, OH 43216-2708 • 614/488-7924 • 800/227-4111

FAILURE TO DISCLOSE LACK OF INSURANCE

In *Columbus Bar Assoc. v. Port*, 102 O.S.3d 395, 2004-Ohio-3204, a lawyer was indefinitely suspended for a multitude of serious disciplinary violations. One of violations referenced involved DR 1-104, requiring disclosure to clients of insufficient malpractice insurance.

It is not possible to determine what penalty would have been imposed if the only violation had involved DR 1-104. This is the first reference we have noted in a disciplinary case to a violation of DR 1-104. That rule requires disclosure to clients of lack of malpractice insurance with limits of liability of at least \$100,000 per occurrence and \$300,000 in the aggregate.

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FDCPA – LITIGATION

In a recent district court decision, FDCPA (Fair Debt Collection Practices Act) claims brought against a law firm attempting to collect a debt were dismissed on the basis of “absolute immunity” for statements made in judicial proceedings.

The collection firm attached an affidavit to its collection complaint filed in state court which allegedly contained a false statement. The creditor had made the statement, and the statement had not been referenced in the law firm’s complaint.

But even if it had, the court ruled that nothing in the FDCPA abrogated the long-standing rule providing absolute immunity for statements made in judicial proceedings that are related to the subject matter of the proceedings.

The case is *Etapa v. Asset Acceptance Corp.*, et al., No. 03-86-KSF (E.D. Kentucky Apr. 29, 2004).

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RULES 33 AND 36 AMENDED TO REQUIRE ELECTRONIC COPY

Effective July 1, 2004 Civil Rule 33(A) was amended to require a responding party to quote the interrogatory immediately preceding the party's answer or objection. According to the Staff Note accompanying the Rule, this provision ensures that the court and parties are not required to consult two documents or different parts of the same document in order to review the full text of an interrogatory and the corresponding answer or objection. The provision is similar to the second sentence of S.D. Ohio Civil Rule 26.1.

The first paragraph of division (A) was also modified to require that “A party serving interrogatories shall provide the party served with both a printed and an electronic copy of the interrogatories. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of interrogatories may seek leave of court to be relieved of the requirement.” This format will enable the responding party to readily include the interrogatories and corresponding answers and objections in the same document without having to retype each interrogatory.

Corresponding amendments were made to Civil Rule 36(A) relative to requests for admission.

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3-DAY RULE NOT APPLICABLE

The Supreme Court recently ruled that the 3-day mail rule contained in Civil Rule 6 (E) did not extend the

time in which to file a motion for JNOV under C.R. 59, or a motion for new trial under C.R. 59. In general, time periods not triggered by the service of a notice or other document are not subject to the 3-day extension. When a time period is triggered by the entry of judgment, for example, then the time to respond is from that date, and no additional time is added under C.R. 6(E). *Harvey v. Hwang*, 103 O.S.3d 16, 2004-Ohio-4112.

The same situation applies to filing timely objections to a magistrate's decision under C.R. 53(E). See *Harvey*, supra, and OBLIC's "Malpractice Alert!" from September, 2001. The C.R. 6(E) 3-day extension does not apply.

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NEW LAWS WILL IMPACT ASBESTOS, SILICA AND MIXED DUST INJURY CLAIMS

Two newly enacted pieces of legislation will effect how asbestos injury claims and silica and mixed dust injury claims are handled. HB 292 for Asbestos Injury Claims, effective September 2, and HB 342 for Silica and Mixed Dust Claims, effective September 1, 2004, respectively establish minimum medical requirements for filing certain claims, establish premises liability and prescribe the requirements for shareholder liability under the doctrine of piercing the corporate veil. HB 292 also specifies the plaintiff's burden of proof in tort actions involving exposure to asbestos. Please see www.legislature.state.oh.us/bills.cfm?ID=125 HB 292 or HB 342 for further analysis.

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UPDATE OF CRIMINAL RESTITUTION PROVISIONS

The March 2004 issue of *Malpractice Alert* reported that HB 490, effective January 1, 2004, included a provision which gave municipal courts the authority to order restitution in misdemeanor and minor misdemeanor cases to the victim or the victim's survivor for economic losses as a result of the offender's crime. Responding to the hue and cry that resulted, corrective legislation was passed in HB 52, effective June 1, 2004, to modify this provision. Further clarification of the restitution issue is expected by the post-election General Assembly. For further analysis, please see www.legislature.state.oh.us/bills.cfm?ID125 HB 52.

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Congratulations to:

Duke W. Thomas, Chair of OBLIC's Board of Directors, on receiving the Columbus Bar Association 2004 Bar Medal. Mr. Thomas is a past recipient of the OSBA Medal as well. The Bar Medal is the highest award presented by the Bar Association.

John M. Adams, Chair Emeritus of OBLIC's Board of Directors, as he celebrates 50 years as a lawyer.