



MALPRACTICE ALERT!

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Ohio Bar Liability
Insurance Company

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STATUTE OF LIMITATIONS: FORMAL WITHDRAWAL NOT REQUIRED TO TERMINATE ATTORNEY-CLIENT RELATIONSHIP

Attorneys in Ohio may be relieved to learn that the statute of limitations for a malpractice claim is not dependent upon formal withdrawal approved by a trial court under its local rules. The Ohio Supreme Court so held in a recently decided case, *Smith v. Conley*, 109 O.S.3d 141, 2006-Ohio-2035. In that case, the lawyer and client terminated the relationship. However, local rules of court in the relevant jurisdiction required the lawyer to withdraw under its rules. The client later sued for malpractice, filing suit beyond one year from the date of termination, but within one year from the date the lawyer's formal motion to withdraw was granted by the court. The issue before the court was to determine the date from which the one-year statute of limitations began to run.

In a 6-1 decision, the Court held that the relevant date is the date the lawyer and client understand that the relationship was terminated, and not the date of formal withdrawal under the local rules, which vary from jurisdiction to jurisdiction. Thus, where there has been a clear termination of representation by the lawyer and client, a motion to withdraw and subsequent granting will not serve to extend the termination of the attorney-client relationship for legal malpractice claims in Ohio. This decision is consistent with several Ohio appellate decisions that have been decided in the past.

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FAMILY LAW-QDRO CONCERNS

One of the more frequent claims encountered over the past several years involving family law practice concerns the filing of QDRO'S (Qualified Domestic Relations Orders) with employers or pension plans. The usual claim situation involves an agreement between counsel in which opposing counsel agrees to file a QDRO involving that counsel's client's employer/pension plan. The claim arises when a QDRO is not timely filed, and the failure to file the QDRO only becomes apparent upon the retirement or death of the client's ex-spouse when the client does not receive benefits that she/he expected.

In the context of the termination of the divorce case, the lawyer may not think to question or confirm the other side's actual filing of the QDRO. The simple remedy to this situation, regardless of who agrees to prepare and file the QDRO, is to confirm that in fact a QDRO has been filed with and accepted by the employer or pension plan administrator. This should be done before the lawyer's file can be considered "closed" for the representation.

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ALERT FOR COLLECTION ATTORNEYS

The United States Court of Appeals for the Sixth Circuit recently held that collection attorneys who filed an affidavit stating that they believed funds to be garnished were "not exempt under the law of this state (Ohio) or the United States" were not shielded from liability for making a false statement, *Todd, et al. v. Weltman, Weinberg & Reis Co.*, No. 04-4109 (6th Cir. January 13, 2006). The law firm argued that, as a witness testifying via

affidavit, it had absolute immunity for statements so made.

The Court outlined three rules regarding witness immunity defenses: 1) A private witness testifying at trial is absolutely immune for her testimony; 2) A private witness testifying at a grand jury is absolutely immune for her testimony; 3) A private witness testifying as a complaining witness has no immunity for her testimony.

The Court compared the false affidavit in the garnishment to a “malicious prosecution claim” in finding that the law firm was not immune to FDCPA claims relating to incorrect statements made in the affidavit. The Court also noted that the law firm defendant had allegedly done no discovery to ascertain the source of the debtor’s funds prior to filing the affidavit.

Law firms doing collection work covered by the FDCPA should ascertain the source of property or funds to be garnished before so proceeding. Failure to do so may result in FDCPA claims being brought relating to false or misleading representations made when collecting a debt under Section 1692(e) and (f) of Title 15 USC.

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POLICY DEDUCTIBLES

OBLIC policy deductible amounts apply to any settlement or judgment payable under the

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policy, or to “claim expense,” which is defined to include fees charged by an attorney designated by the Company and other costs associated with the defense of a claim.

Attorneys should only carry a deductible that, in the event of a claim, could be paid promptly. The difference in cost between deductibles per insured attorney is relatively small compared to the actual dollar difference in deductible amounts. The inability to pay the deductible purchased when due may be a negative factor regarding any future underwriting decisions.

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