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MALPRACTICE ALERT!

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LAW FIRM CANNOT COMMIT MALPRACTICE

The Ohio Supreme Court recently decided *Natl. Union Fire Ins. Co. v. Wuerth, et al.,* 2009-Ohio-3601. In that case, the insurance company plaintiff sued a law firm for malpractice. The Court answered two questions presented to it by the United States Court of Appeals for the Sixth Circuit.

The Court first found that a law firm is not licensed to practice law in Ohio, and accordingly, cannot directly be sued for malpractice. In so holding, the Court followed precedent in the medical malpractice context.

The Court then found that a law firm can only be vicariously liable for malpractice if one or more of the firm's principals or associates are liable for malpractice. Failure to timely sue a lawyer that allegedly committed malpractice will be fatal to the claim, even if the law firm itself was timely sued.

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MALPRACTICE "TRAP" STILL EXISTS FOR 41A DISMISSALS-WRONGFUL DEATH

In 2004, the General Assembly closed a malpractice "trap" that was contained in the general savings statute, RC 2305.19. Prior to that change, a complaint that had been dismissed under Civil Rule 41A had to be re-filed either within one year from the date of the voluntary dismissal, or within the original terminating date of the statute of limitations for the claim, whichever was *earlier.* Thus, claims were time-barred when such dismissals were taken before the original statute of limitations had run, and the claim was not filed before the statute of limitations had run, although filed within one year of the 41A dismissal. Since that amendment, a complaint can be re-filed either within the original statute of limitations period, or within one year of the dismissal, whichever is *greater.*

However, the Supreme Court recently determined that for wrongful death claims, RC 2125.04 applies to claims being refiled, and not the general savings statute. The rule of law applied follows the pre-2004 amendment to 2305.19. Thus, when a complaint was re-filed within one year, but the two-year wrongful death statute of limitations expired after the dismissal, but before the case was re-filed, the claim was time-barred. *Eppley, Adm. V. Tri-Valley School Dist. Bd. of Education,* 2009-Ohio-1970. Attorneys filing such cases need to be aware of this still-existing trap.

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OHIO SUPREME COURT CONFIRMS THAT PLAINTIFFS MUST PROVE THE UNDERLYING CASE WOULD HAVE BEEN SUCCESSFUL

The Ohio Supreme Court resolved any questions with respect to whether or not its 2008 decision in *Environmental Network Corp. v. Goodman Weiss Miller LLP,* 119 O.S.3d 209, 2008-Ohio-3833, (hereinafter referred to as "*ENC*") applied only to legal malpractice claims where a client complained about the

settlement of the case giving rise to a malpractice claim. Some lawyers had attempted to limit *ENC* to such claims.

In *Neighbors v. Ellis,* 2008-Ohio-6105, the Supreme Court, without opinion, summarily reversed the Butler County Court of Appeals, where that court in turn had reversed the trial court's dismissal of a legal malpractice claim on summary judgment. *Neighbors* involved allegations that the lawyer, or the office paralegal, had failed to give the plaintiff advice regarding the filing of a product liability claim. The defense was that the lawyer did not agree to represent the plaintiff. It appeared that the plaintiff had expert testimony supporting the concept that a product liability claim might have been successful, but for the failure by the plaintiff to timely bring his claim.

It is not entirely clear exactly what facts triggered the Supreme Court's one-sentence reversal on the authority of the *ENC* case, but it is clear that *Neighbors* had nothing to do with any settlement of the underlying matter. One court, in applying both *ENC* and *Neighbors* in upholding a jury verdict in favor of the defendant lawyer, stated that although *ENC* was a "better result" claim, the *Neighbors* decision makes it clear that *ENC* also applies to "lost opportunity" claims as well, *Young-Hatten et al. v. Taylor,* 2009-Ohio-1185 (10th Dist.).

In most cases, in order to carry the burden of proof of legal malpractice, a plaintiff must prove that but for the alleged malpractice, the underlying case or matter would have been successful for the plaintiff.

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DISASTER PLANNING HANDBOOK AVAILABLE

The 2009 Law Office Management Handbook, *Disaster Planning for Lawyers: Being Prepared When Catastrophe Strikes* is available on the OBLIC website at www.oblic.com. These materials were provided in conjunction with the seminar on this topic presented at the OSBA Annual Convention. We hope you will find this information helpful to your practice.

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