

## CIRCULAR 230 EFFECTIVE DATE LOOMS

Practitioners who are not yet familiar with the recent changes to Circular 230 should soon carefully review them, as the new rules apply after June 20, 2005. (The revisions to Circular 230 are found at T.D. 9165, as amended by T.D. 9201.) The most controversial change to Circular 230 is new Section 10.35, which compels practitioners to meet extensive requirements for written communications (even emails) that are "covered opinions." Although Section 10.35 was intended to thwart the proliferation of tax shelter opinions, many other types of written communications could be considered "covered opinions." [Even IRS officials have conceded that Section 10.35 has a broader reach.] The other revisions to Circular 230 set a "best practices" standard for practitioners (Section 10.33), impose requirements for *all* written advice (Section 10.37) and require leaders of tax practices to implement procedures to ensure compliance with the covered opinion rules. Violations can result in censure, suspension or disbarment from practice before the IRS. (The American Jobs Creation Act added fines to the list of penalties for Circular 230 violations, but Circular 230 does not yet reflect this legislative change.) Chris Albright led a group of Section members (consisting of Farhad Aghdami, Stephen R. Akers, Mary Ann Mancini, Edward M. Manigault, Lloyd Leva Plaine and Barbara A. Sloan) who in less than ten days prepared extensive comments to the revisions to Circular 230. The comments were reviewed by Millie Kalik and Pam H. Schneider of the Committee on Government Submissions for the Section. The comments were submitted to the Department of Treasury on behalf of the Section by Ed Koren on May 4, 2005. (A copy of the comments can be found at [http://www.abanet.org/rppt/section\\_info/circ230comments.pdf](http://www.abanet.org/rppt/section_info/circ230comments.pdf).)

For a more extensive analysis of the revisions to Circular 230, please see Steve Akers' articles "*IRS Guidance*

*Regarding Circular 230-Effect on Estate Planning Practitioners*" and "*IRS Issues Guidance on Circular 230 Answering Some Questions But Leaving Much Uncertainty*" at <http://www.abanet.org/rppt/cmtes/pt/b-group/home.html>.

## PRO BONO COMMITTEE PRESENTS WORKSHOP AT EQUAL JUSTICE CONFERENCE

At the ABA/NLADA National Legal Aid & Defender Association 2005 Equal Justice Conference in Austin, Texas on May 5-7, the Section's Pro Bono Committee, Legal Aid Society in Minneapolis and the Volunteer Lawyers Network of Minnesota presented a workshop entitled "Pro Bono and Legal Services Partnering to Combat Predatory Foreclosure Practices." The workshop was based upon the efforts of the Section's Pro Bono Committee's Predatory Lending Subcommittee to develop initiatives to counsel consumers on how to avoid predatory loans. If you are interested in participating in the Subcommittee's work, please contact Gregory Duhl at [gduhl@law.siu.edu](mailto:gduhl@law.siu.edu) or Carol Ann Martinelli, Pro Bono Committee Chair, at [cmart26@attglobal.net](mailto:cmart26@attglobal.net).

## NEW YORK LAW FIRM CAN'T OPEN MARYLAND OFFICE UNLESS AT LEAST ONE LAWYER HAS A MARYLAND LICENSE

A New York law firm recently sought an opinion from the Maryland State Bar Association Committee on Ethics about the ethical propriety of opening a satellite office in Maryland. The New York firm already operated an office in the District of Columbia that exclusively handled federal tax matters. None of the four lawyers in that office were licensed in the District of Columbia. The New York firm was contemplating a move to Maryland and leasing an office there for its four lawyers. It was prepared to have the firm's letterhead, business cards, and door sign make it clear that the lawyers were not licensed to practice in Maryland and would only

undertake federal tax matters. The firm was also prepared to commit that none of the lawyers would represent clients in federal courts or actively solicit or seek clients in Maryland. Although ABA Model Rule 5.5 specifically allows out-of-state lawyers to enter a host state to engage in federal practice, Maryland has not yet adopted the ABA rule.

As a threshold matter, the panel made it clear that, under Maryland Rule of Professional Conduct 8.5(b), any lawyer who practices law in Maryland subjects herself to the disciplinary authority of Maryland for conduct that violates the state's rules of professional conduct. The panel also clarified that the proposed arrangement apparently complied with Maryland Rule 7.5(b), which provides that law firms which set up offices in more than one jurisdiction must prominently indicate the jurisdictional limitations of those not licensed to practice where the office is located. Nonetheless, the panel found the proposal problematic because none of the lawyers were licensed to practice in Maryland. It concluded that the arrangement would mislead potential clients in violation of Maryland Rule 7.1, which bars lawyers from making false or misleading communications about themselves or their services through serious omissions or by creating unjustified expectations.

The panel also advised that the proposed arrangement would create unauthorized practice problems. The panel stated "we feel compelled to tell you that opening a law office Maryland, where no one is admitted to the practice of law in Maryland, will result in your firm's unauthorized practice of law in this jurisdiction."

## OKLAHOMA REPEALS LAW TAXING OUT-OF-STATE LAWYERS

BNA reports that a 2004 Oklahoma law that required out-of-state attorneys to remit 5% of all income earned in the state to the Oklahoma Tax Commission was repealed under legislation signed April 6. The law, which required out-of-state attorneys to register with the tax

commission, to report all income in the state, and to withhold and remit 5% of their income to the commission, was part of broader tort legislation enacted last year. Sources told BNA that the new law, which was intended to prevent out-of-state attorneys from going to Oklahoma to file "frivolous" lawsuits, had unintended consequences - some lawyers who had nothing to do with torts were being impacted, and other states were preparing to retaliate.

### NEW BANKRUPTCY ACT: PROVISIONS AFFECTING REAL ESTATE

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Act"), 2005 (P.L. 109-8), was enacted into law on April 20, 2005 and applies to all bankruptcy cases filed on or after October 17, 2005 (with limited exceptions as to certain provisions). The Act was debated for more than eight years in Congress, and constitutes the most extensive revision of the Bankruptcy Code since 1978. The goal of the Act is to streamline the Bankruptcy Code, speed up proceedings, limit abuses (the FBI estimates ten percent of filings involve fraud), and "level the playing field." According to Jack Murray, Chair of the Section's Commercial Real Estate Transactions and Management Group, approximately half of the Act's provisions deal with business, not consumers, and at least 21 provisions relate in some manner to real estate. For example, in one of these real estate related provisions, shopping center landlords are the beneficiaries of special protections contained in amendments to Section 365(f) (Executory Contracts and Unexpired Leases) of the Bankruptcy Code. These special protections recognize the need of shopping center landlords to maintain the proper tenant "mix" to generate customer traffic, the interdependence of the tenants in providing different types of goods and services, and the importance of quickly determining whether the lease will be affirmed, rejected or assigned by the tenant-debtor. Section 365(b)(3) will now provide that, with respect to defaulted leases in a shopping center, the debtor's right to assume or assign such leases is conditioned upon a heightened (as opposed to non-shopping center leases, which are covered by Section 365(b)(1)) standard for "adequate assurance of future performance." Under Section 365(b)(3),

"adequate assurance of future performance" includes assurance of financial condition and operating performance and maintenance of percentage rent, as well as lack of disruption of the tenant mix and compliance with the provisions of the lease, such as radius, location, use, and exclusivity. This subsection prohibits the debtor from conducting a new or different business, or assigning the lease to a tenant who would conduct its business, in a manner inconsistent with the existing permitted use(s) of the space or the existing tenant mix or theme of the shopping center.

### SECTION PUBLICATIONS

The following two books are now available through the ABA bookstore at [www.ababooks.org](http://www.ababooks.org)

#### *The Commercial Lease Formbook: Expert Tools for Drafting and Negotiation*

Dennis M. Horn, editor  
Compiled by the RPPT Commercial Leasing committee, this book and CD-Rom contain over 800 pages of commercial lease forms. The 19 lease forms with commentary are divided into separate chapters on office leases, retail leases, industrial and warehouse leases, and other specialized leases.  
PC: 5430450  
RPPT Member Price: \$199.95  
Regular Price: \$219.95

#### *The Funding of Living Trusts*

by Carla Neeley Freitag  
This guide provides an overview of trust funding and details specific, practical steps for transferring a wide variety of assets from the client to the trustee, including sample completed forms, transmittal letters, and client letters. It also analyzes developing case and statutory law involving trust funding issues.  
PC: 5430453  
RPPT Member Price: \$119.95  
Regular Price: \$129.95

### GET A LAWYER'S TOOLKIT!

We still have many copies of the "Lawyer's Toolkit for Health Care Advance Planning". The kit provides you with tools you can give your clients to help them do good advance planning. It includes many excellent checklists and a disk with electronic copies of

all of them. It's available for FREE by emailing us at [rppt@abanet.org](mailto:rppt@abanet.org) or calling 312-988-5651.

### RPPT PARTICIPATES IN ABA TASK FORCE ON ATTORNEY CLIENT PRIVILEGE

The ABA Presidential Task Force on the Attorney Client Privilege was established in reaction to "attacks" on the privilege. Initial concerns appear to be focused on pressure on corporations and other entities to waive the privilege under proposed Federal Sentencing Guidelines and by the Department of Justice, the SEC and other governmental agencies in various situations. Another area of concern is the tension between the privilege and the need of auditors to have access to attorney-client privileged communications to detect financial statement fraud.

The website for the task Force is <http://www.abanet.org/buslaw/attorney-client/home.shtml>. The site has a good amount of material which can be reached by clicking on the link to the Task Force Listserv Archive.

Jerry Hoenig (Real Property) and Terry Franklin (Probate & Trust) are RPPT's liaisons to the Task Force. You may contact Jerry at 770-664-1345 or [ghoenig@docsol.com](mailto:ghoenig@docsol.com) and Terry at 213-617-2950 or [tfranklin@trustlitigation.la](mailto:tfranklin@trustlitigation.la).

### FALL CLE MEETING

Planning for the Fall CLE Meeting co-sponsored with the Section of Taxation in San Francisco **September 16 - 17** is well under way. Mark your calendars to join us for what promises to be an exciting and informative program. Full details will be available on the website soon. Check [www.abanet.org/rppt/2005](http://www.abanet.org/rppt/2005)

RPPT Will present programs on about 30 topics, including using LLC's to avoid land loss, affordable housing, vapor intrusion, investing in and transferring art, surrogate decision making and splitting up a family business.

You can also find more information on the Section of Taxation web site at [www.abanet.org/tax](http://www.abanet.org/tax)

To change your email address or remove your name from any future general distribution emails, complete the form at <http://www.abanet.org/members/join/coa2.html>.