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News from The New York State Bar Association

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BATTLE WITH FEDERAL TRADE COMMISSION CONTINUES AS N.Y. STATE BAR ASSN. SUBMITS BRIEF OPPOSING FTC APPEAL OF MAY 2004 PRIVACY RULING

ALBANY, NY -- (01/18/2005; 1000)(EIS) -- The New York State Bar Association submitted its brief in the United States Court of Appeals for the District of Columbia Circuit in opposition to the Federal Trade Commission's appeal from the May 2004 judgment that the privacy provisions of Title V of the Gramm-Leach-Bliley Act do not apply to lawyers.

State Bar President Kenneth G. Standard of Chappaqua (Epstein Becker & said, "Attorneys always have been required by state law to keep client information confidential. Requiring them also to send notices to clients outlining their privacy policies is unnecessary and illogical -- in addition to being burdensome and confusing. The FTC overstepped its authority in a way that has no rational purpose and a court was correct in rejecting and overturning this policy."

The GLBA requires financial institutions to send out notices to customers alerting them to the possibility of disclosure of their personal financial information and providing methods for customers to "opt out" of the institution's disclosure practices. When the FTC sought to apply this provision to attorneys, the New York State Bar Association challenged that policy successfully in court.

In 1999, Congress enacted the GLBA to enhance competition in the financial industry. The Act was designed by Congress to regulate banks, securities firms, insurance companies, and other financial institutions but not lawyers. The Association's brief points out that neither the GLBA nor its legislative history refers to attorneys engaged in the practice of law, and the Act applies only to a "financial institution." Because lawyers provide legal services and are not financial institutions engaged in financial activities, lawyers do not fall within the plain meaning of the statute.

Additionally, the state bar points out, the regulation of attorney-client relationships is a power reserved to the individual states, which have been governing the ethical conduct of lawyers (including the protection of client confidences) since our nation's founding.

The NYSBA brief also notes that U.S. Supreme Court precedents prohibit a federal statute from being construed to encroach on state powers unless Congress stated such an intention. Congress gave no hint of any such intention in the enactment of the GLBA, and the NYSBA demonstrates in its brief.

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The brief concludes that "like dolphins caught in tuna nets, lawyers have been by a statutory scheme that was never intended to govern them. The FTC's 'interpretation' of the GLBA is not what Congress intended, is beyond the FTC's authority, and lacks any rational basis in logic or in the sparse administrative record that was properly struck down by the district court, whose declaratory judgment was affirmed."

The NYSBA is represented in the litigation by Proskauer Rose LLP (New York City). The oral argument on the appeal is scheduled for May 5, 2005.

The more than 71,000-member New York State Bar Association is the official organization of lawyers in New York and the largest voluntary state bar association in the nation.

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