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MALPRACTICE ALERT!

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CLOSED FILE PROBLEMS

Opinion 92-8 of the Board of Commissioners on Grievances and Discipline states that a file must be returned to a client if the client so demands. The opinion does not make clear exactly what materials may be excluded from the file, such as personal notes of the attorney in the file, but does make clear that items such as original documents supplied by the client must be returned. The Ohio Supreme Court in recent opinions has also indicated that client files remain the property of the client, Reid, Johnson v. Lansberry (1994), 68 O.S.3d 570, 574.

So what does a lawyer do with his or her closed files? Much has been written about this issue, and varying opinions have been given regarding the nature of the file involved, age of the client, etc. We can offer suggestions. If all files are not retained permanently, then the client should be advised (in writing, of course) at the termination of representation for the matter that the office policy for such a file is to keep the file for a defined period (2 years, 5 years, 10 years, etc.), after which the file will be destroyed. Should the client desire to keep any part of the file, the client should notify the lawyer immediately.

At the "Practice 2000" seminar co-sponsored by OBLIC at the OSBA Annual Convention in May, 1999, guest speaker Jonathan Coughlin, Disciplinary Counsel, Supreme Court of Ohio, addressed this topic. He advised that in his view, the best practice is to have the client sign an acknowledgement of the office's file retention policy, and to keep that acknowledgment should any question about a closed file arise in the future, particularly a file that has been destroyed. This certainly is good advice, and

probably provides the best protection to a lawyer that one can obtain.

Is it a disciplinary violation to destroy a file, and then have the client request the file be returned? We are not certain, although Opinion 92-8 certainly suggests that a lawyer could be subject to discipline. However, if the client was advised of the lawyer's policy regarding file retention and destruction beforehand, such communication should mitigate, if not absolutely absolve, the lawyer from any disciplinary inquiry.

VOLUNTARY DISMISSAL UNDER RULE 41(A)

In April, 1993, we published an "Alert" regarding voluntary dismissal of a case taken by a plaintiff under Civil Rule 41(A). Unfortunately, the law has not changed in the intervening years, and neither has the lack of knowledge of some attorneys regarding this issue. Therefore, our 1993 precaution is worth revisiting.

A plaintiff can voluntarily dismiss a case once without prejudice under Civil Rule 41(A), which operates as an adjudication other than on the merits. The case can then be re-filed, if done so timely. Such dismissals contain a malpractice trap, however. If a 41(A) dismissal is taken after the original statute of limitations for the cause of action has run, the plaintiff has one year in which to re-file under R.C. 2305.19, the Savings Statute. However, if such a dismissal is taken prior to the original statute of limitations date, and the case is not re-filed before the statute of limitations date, the action is then time-barred.

For example, a plaintiff who voluntarily dismisses an action two days after an applicable statute of limitations date passes may have up to one year to re-file that action. The same plaintiff who dismisses the case two days prior to the statute of limitations date must re-file the action within the statute of limitations date.

This rule is a continuing trap, and lawyers engaged in civil litigation should be aware of it. Although it may seem logically inconsistent to give a plaintiff one year in which to re-file a case if a

dismissal is taken after the statute of limitations has run, but less than one year if dismissal is prior to the statute date, this is the law in Ohio at present.

We also suggest that cases voluntarily dismissed under 41 (A) be docketed for re-filing with the appropriate date. Recent experience indicates that some office staff may not be aware of the need to treat a dismissed case in the same way that a case is docketed when a file is opened. Office staff should be aware that there is a critical deadline that needs to be calendared.

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