



MALPRACTICE ALERT!

OBLIC

Ohio Bar Liability
Insurance Company

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ELECTRONIC FILING IN FEDERAL COURT

Attorneys practicing in the federal courts in Ohio, and elsewhere, need to be aware of the requirements for electronic filing of pleadings and other documents with the various courts, or “Electronic Case Filing,” referred to as ECF. The rules regarding electronic filing will vary with the particular district court. Generally, an attorney must register with the court prior to filing via the ECF system.

In the Northern District of Ohio, electronic filing of Social Security reviews electronically has been required since January 1, 2001. Mandatory electronic filing for the bankruptcy courts in the Northern District will be required as of January 1, 2004. Filing electronically in civil cases in the Northern District is strongly encouraged, but not mandatory. For more information regarding filing in the Northern District, go to www.ohnd.uscourts.gov/, and for bankruptcy www.ohnb.uscourts.gov/.

In the Southern District of Ohio, electronic filing in civil and criminal cases has been required as of September 1, 2003. The U.S. Bankruptcy Court for the Southern District of Ohio will accept for electronic case filing all documents in compliance with its filing requirements as of January 1, 2004, and such filing will be mandatory July 1, 2004. For more information regarding there requirements, please refer to the “ECF” rules on the websites for the Southern District at www.ohsd.uscourts.gov/ (District Court) or www.ohsb.uscourts.gov/ (Bankruptcy Court).

There are certain exceptions to these requirements, and review of the particular local rules and guidelines is required. Attorneys who handle cases from time to time in other federal jurisdictions also need to be aware of the particular requirements for ECF in those jurisdictions. If one is not familiar with such requirements, it may be wise to consult with local counsel familiar with such rules.

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41(A) DISMISSALS, SERVICE OF PROCESS ISSUES

Malpractice Alert! has warned attorneys in previous issues of the potential malpractice trap in taking a 41(A)(1)(a) dismissal of a case. One trap is that the plaintiff will have one year under the Savings Statute to refile the case, unless the statute of limitations has not yet run as of the date of the 41(A)(1)(a) dismissal. If that is true, then the case must be refiled prior to the actual statute of limitations date, or within one year from the dismissal, whichever date occurs first.

Remember, a 41(A)(1)(a) voluntary dismissal by a plaintiff can only be taken in cases where no prior dismissal of the case has occurred. The one year period under the Savings Statute starts to run when the 41(A)(1)(a) dismissal is filed, not when it is journalized by the court.

It may be possible to use a 41(A)(1)(a) dismissal if one encounters a timely service of process issue. Under Civil Rule 3(A), an action is “commenced” by the filing of a complaint and service is obtained on a defendant within one year from the date of filing. Failure to properly serve defendant within one year of filing, or to “commence” the action, can result in a dismissal

with prejudice, for example, see *Maryhew vs. Yova* (1984), 11 O.S.3d 154. However, some courts have ruled that in order to take advantage of the Savings Statute, O.R.C. 2305.19, a plaintiff need only to have “attempted to commence” an action. If an effort has been made to serve a defendant, then some attempt to commence the action took place, and a plaintiff can dismiss the case and take advantage of the Savings Statute to later refile the case. This tactic may be particularly useful if a plaintiff is facing a motion to dismiss for failure to serve defendant within one year from the date of filing.

Cases discussing the Savings Statute, and the requirement that service must either be obtained, or attempted on a defendant include *Motorist Mut. Ins. v. Huron Rd. Hosp.* (1995), 73 O.S.3d 391, *Thomas v. Freeman*, 79 O.S.3d 221, 1997 – Ohio – 395, *Whitt v. Hayes* (May 6, 2003), 4th Dist. No. 02CA2856, *Sorrell v. Estate of Datko* (2001), 147 O.App.3d 319.

IMPORTANCE OF REPRESENTATION AGREEMENTS

A recently reported case serves to illustrate the importance of documenting representation of a

client in writing. The lawyer believed that the client had not yet met all the conditions for the lawyer to proceed to represent the client, the client disagreed, and believed the lawyer had agreed to represent him. There was no written fee agreement documenting how or when the lawyer was to undertake representation. The Supreme Court stated that “neither a formal contract nor the payment of a retainer is necessary to trigger the creation of the attorney-client relationship.” Such a relationship may be based upon the “reasonable belief” of the client. *Cuyahoga Cty. Bar v. Hardiman*, 100 O.S.3d 260, 2003-Ohio-5596.

OBLIC continues to strongly suggest that formal engagement letters and/or fee agreements be entered into for all client matters, particularly new client matters, defining the nature and scope of the representation. If a lawyer declines representation, such declination should be done in writing as well, to avoid any confusion between the lawyer and the person who sought representation.

OBLIC would like to wish all of its policyholders a peaceful and prosperous New Year!

The contents of this newsletter are provided for informational purposes only, and should not be construed as providing legal advice.
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