



# MALPRACTICE ALERT!

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Change is the air on many fronts! This issue of **Malpractice Alert!** will inform you of developments affecting the practice of law:

- *Ohio Ethics Guide: Client File Retention*
- *Opinion 2016-2 Duty to Report Unprivileged Knowledge of Misconduct*
- Discussion of cases on attorney-client privilege
- Amendment to Rule 1.7 of Ohio Rules of Professional Conduct

Several of these topics were the subjects of the **OBLICAlert**, our email notice of new developments in the law. If you would like to receive this email publication, you can sign up by [clicking here](#).

Thank you for the positive comments I have received about **Malpractice Alert!** Please continue to let me know your thoughts at [gmote@oblic.com](mailto:gmote@oblic.com) or 614-572-0620. Remember, the OBLIC Ethics and Loss Prevention Hotline is available to answer your questions. OBLIC is here for YOU!

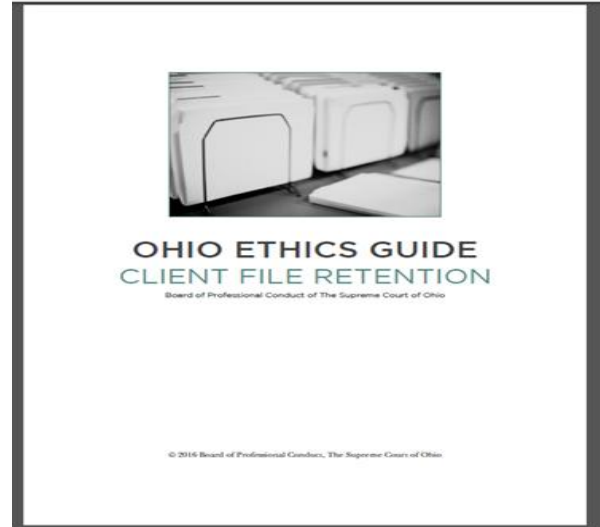
Gretchen Mote, JD, Director of Loss Prevention Editor, **Malpractice Alert!**

## OHIO ETHICS GUIDE: CLIENT FILE RETENTION

The Ohio Supreme Court Board of Professional Conduct recently issued the [Ohio Ethics Guide: Client File Retention](#). ([click to access](#).)

This Ethics Guide answers the question:

- What do I do with client files that are closed and dormant?



The Ethics Guides, as a resource, address subjects about which the staff of the Board of Professional Conduct receives frequent inquiries from judges and attorneys. “What to do with closed client files” is certainly one of those topics of inquiry! While the Ethics Guides provide nonbinding advice from the staff of the Board of Professional Conduct, the information in this Ethics Guide is helpful for all practicing attorneys.

This Ethics Guide discusses the relevant Ohio Rules of Professional Conduct pertaining to attorneys’ responsibilities regarding client files and property. In addressing Ohio’s client file retention requirements, this Ethics Guide notes: “It is nearly impossible to establish a minimum retention period for client files that applies to all circumstances.”

Although it does not give a “magic” solution for closed files, this Ethics Guide provides sample language for letters to clients that deal with file disposition and destruction. If you have additional questions on this topic, please feel free to contact Gretchen Mote at OBLIC.



## **OPINION 2016-2 DUTY TO REPORT UNPRIVILEGED KNOWLEDGE OF MISCONDUCT**

[Opinion 2016-2 \(click to access\)](#), issued April 8, 2016 by the Ohio Supreme Court Board of Professional Conduct, addresses the duty of a lawyer under Rule 8.3 of the Ohio Rules of Professional Conduct. Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions about the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Lawyer's Oath of Office.

The questions presented in this new opinion are:

- whether a lawyer who represented a client against the client's prior lawyer to recover monies the lawyer allegedly misappropriated from the client has an ethical obligation under Rule 8.3 to report the lawyer to the appropriate disciplinary authority, and
- whether the information acquired from the client about their prior lawyer's conduct is privileged, thereby eliminating any duty to report.

The opinion states that the Rules of Professional Conduct do not contain a strict reporting requirement that a lawyer report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when:

1. the lawyer has unprivileged knowledge, and
2. it raises a question as to another lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."

The opinion also notes that Rule 8.3 requires lawyers:

- to report their own misconduct,
- to err on the side of reporting, if a lawyer has reservations whether to report.

In addition, the opinion says that to invoke the reporting requirement, a lawyer must have actual knowledge that another lawyer has violated a Rule of Professional Conduct. A lawyer is also not required to report misconduct that would involve disclosure of privileged information.

The opinion concluded:

- A lawyer has a duty to report unprivileged knowledge of another lawyer's misconduct under Rule 8.3 of the Ohio Rules of Professional Conduct.
- A lawyer is required to keep information related to the representation of a client confidential, including information protected by the attorney-client privilege under applicable law.
- A lawyer is not required to report privileged information of another lawyer's misconduct.
- A lawyer may, however, reveal information related to the misconduct of a lawyer if the client gives his or her informed consent to the disclosure under Rule 1.6 of the Rules of Professional Conduct.

## ATTORNEY-CLIENT PRIVILEGE CASES

Recent decisions from the Courts of Appeal for the Ninth District and the Tenth District addressed attorney-client privilege when responding to discovery.

In the Ninth District case, plaintiff-appellant appealed from an order of the Common Pleas Court in a legal malpractice case directing the plaintiff's successor attorneys in the underlying matter to produce their complete files, including confidential communications after the alleged malpractice occurred.

Defendants-appellees asserted that the requested communications were essential to developing their defense against the legal malpractice claim and were subject to disclosure under the self-protection exception to the attorney-client privilege.

The attorney-client privilege is governed by Ohio Revised Code 2317.02(A) and in cases not addressed under the statute, by common law. Citing *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, the Court said, "When assessing the breadth of the attorney-client privilege, we must consider that the ultimate purpose of its protection "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance and administration of justice."

The Court noted that Ohio has recognized a number of exceptions to the attorney-client privilege that are not codified in R.C.2317.02(A). This matter implicates the self-protection exception, "which permits an attorney to testify concerning attorney-client communications when necessary to establish a claim for legal fees on behalf of the attorney or to defend against a charge of malpractice or other wrongdoing in litigation between the attorney and the client." See *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 2010-Ohio-4469.

The Court examined the self-defense exception, noting that "it is not a rule of discovery; rather, it is a rule of disclosure that allows an attorney to

disclose his or her communications with a former client to support a claim for outstanding legal fees or to defend against a claim of malpractice or other wrongdoing."

The Court concluded that "since the exception is simply designed to equalize the defending attorney's footing, it makes little sense to expand the self-protection exception so that the defending attorney can breach the attorney-client relationship between the plaintiff/former client and his or her new attorney, an avenue that is unavailable to other civil defendants. No authority from Ohio supports such a dramatic expansion."



The Ninth District Court opined that the Ohio Supreme Court and Eighth District Court of Appeals cases, cited therein, suggest that the attorney-client privilege protects confidential communications between a malpractice plaintiff and subsequent counsel. The Court found that appellees sought confidential communications between plaintiff-appellant and subsequent attorneys and held that under the circumstances, these communications do not fall under the self-protection exception to the attorney-client privilege and are not subject to disclosure on that basis. The Ohio Supreme Court declined to accept jurisdiction. [\(Click here to read the decision.\)](#)

This decision protects the attorney-client privilege between clients and subsequent counsel. It may also increase the difficulty of discovering communications essential to developing a defense against a legal malpractice claim.

The dissenting opinion would have remanded the matter to conduct an in-camera inspection of the file to weigh the benefit of protecting the privilege against the difficulty of discovering the facts relevant to liability through other means.



In the Tenth District case, an attorney appealed from an order requiring him to produce documents related to his representation of clients in a dispute arising from recovery of the shipwreck of SS Central America. The Court found that the order was analogous to a discovery order because the attorney asserted it would lead to discovery of materials protected by attorney-client privilege.

The attorney produced a flash drive digital storage device with a purported 49,000 emails and requested the Court conduct an in-camera review of the drive. He asserted the trial court's order would force him to produce emails containing communications with other clients, violating the attorney-client privilege protection belonging to those third-parties. The trial court denied the request for an in camera review of the flash drive.

The Tenth District Court noted that in Ohio, the burden of showing that testimony or documents are confidential or privileged rests on the party seeking to exclude it. The Court discussed R.C. 2317.02(A) and found that the attorney failed to carry the burden of establishing that production would result in disclosure of materials protected by attorney-client privileges held by the third-party clients.

The Tenth District Court noted that any emails relating to attorney-client privileged communications between the attorney and third-party clients were subject to the "claw-back provision" of Civil Rule 26(B)(6)(b) ([Click to access Ohio Rules of Civil Procedure](#)) and that they were to be promptly sequestered and returned to attorney's counsel. Therefore, the appellate court said it appears that the trial court imposed reasonable measures to protect against waiver of potential attorney-client privilege held by attorney's third-party clients.

This decision points out some of the complications involving discovery of client email communications and how other protections may be used if attorney-client protection is not invoked. ([Click here to read 10<sup>th</sup> Dist. decision.](#))

## AMENDMENT TO RULE 1.7 OF OHIO RULES OF PROFESSIONAL CONDUCT

Effective March 15, 2016, the Ohio Supreme Court adopted an amendment to Rule 1.7 of the Ohio Rules of Professional Conduct to change the wording in Comment [36], line 3, from "husband and wife" to "spouses" to reflect gender neutral language.

Amendments were also adopted by the Ohio Supreme Court in rules and forms that address marriage and the related topics of divorce, child support, guardianships, adoption, domestic relations, and domestic violence to remove gender-specific terms. These forms include:

- Affidavit of Income and Expenses
- Affidavit of Property
- Health Insurance Affidavit
- Motion and Affidavit or Counter Affidavit for Temporary Orders Without Oral Hearing
- Complaint for Divorce Without Children
- Complaint for Divorce With Children

[\(Click here to read amendments.\)](#)

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