

December 13, 1994

OPINION NO. 94-089

The Honorable Richard L. Ross
Morgan County Prosecuting Attorney
70 West Main Street
McConnelsville, Ohio 43756-1215

Dear Prosecutor Ross:

You have requested an opinion concerning pleadings filed in civil and criminal cases. Specifically, you wish to know:

1. Whether the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, and the public records law permit the removal of a pleading from a court file?
2. May a pleading that is stricken from the record be removed from a court file?
3. Is a pleading filed when it is file-stamped by the clerk of court or docketed by the clerk?
4. May a clerk of court permit a party to correct a typographical error in a pleading that has been filed with the court?
5. If an author of a pleading upon hindsight decides that he should have added or subtracted something from the original pleading, may the author remove the original pleading from the court file and substitute an amended pleading in place of the original pleading?

Removal of a Pleading from a Court File

Because your first, second, and fifth questions concern the removal of a pleading from a court file, these questions will be considered together. By way of background, you state that the act of removing the pleading from the court file consists of the withdrawal and permanent separation of the pleading from the court file.

No provision in the Ohio Rules of Civil Procedure or the Ohio Rules of Criminal Procedure addresses the withdrawal of pleadings from court files. Similarly, no provision within the public records law, which is set forth in R.C. 149.43, provides for the removal or withdrawal of a pleading from a court file. Instead, R.C. 149.43 provides that:

(A) As used in this section:

(1) *"Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, records containing information that is confidential under section 4112.05 of the Revised Code, and records the release of which is prohibited by state or federal law.*

....

(B) *All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)*

R.C. 149.43(A)(1) defines the term "public record" to mean any record that is kept by any public office, with certain specified exceptions. R.C. 149.011, in turn, defines the terms "public office" and "records," for purposes of R.C. Chapter 149, as follows:

(A) "Public office" includes any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

....

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

Because a court is an entity established by law for the exercise of a function of government, a court is a "public office." See 1982 Op. Att'y Gen. No. 82-104 at 2-285 ("[t]here is no question but that a probate court is a governmental unit"); see also R.C. 149.011(B) (for purposes of R.C. Chapter 149, "state agency" includes any court or judicial agency); 1974 Op. Att'y Gen. No. 74-097 at 2-391 ("those records which a court is required to keep are, with the exceptions noted in R.C. 149.43, public records, which must be open at all reasonable times for inspection"). Moreover, since a

pleading is received by, is under the jurisdiction of, and is utilized by, a public office to render its decision, the retention of the pleading assures the proper functioning of the public office and, accordingly, is classified as a "record." See *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985); *State ex rel. Martinelli v. Corrigan*, 71 Ohio App. 3d 243, 593 N.E.2d 364 (Cuyahoga County 1991); Op. No. 74-097. The term "public record," as defined in R.C. 149.43(A)(1), thus includes pleadings filed with a court.

As noted above, R.C. 149.43(B) clearly mandates that "[a]ll public records shall be promptly ... made available for inspection to any person at all reasonable times during regular business hours," and provides for copies to be made upon request. "This mandate applies to all items which are classified as public records under R.C. 149.43(A)(1)." Op. No. 82-104 at 2-285. Since pleadings filed with a court are public records, R.C. 149.43(B) requires that pleadings be made available to any person for inspection at all reasonable times during regular business hours.

1994 Op. Att'y Gen. No. 94-006, which addressed the question whether members of the public may remove deed, mortgage, or other record books from the recorder's office to make copies, examined the language of R.C. 149.43(B) and concluded that R.C. 149.43(B) requires only that the custodian of public records make those records available for inspection at all reasonable times and to make copies thereof available at that location. Op. No. 94-006 at 2-21 and 2-22; see *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St. 3d 509, 597 N.E.2d 120 (1992). R.C. 149.43(B) does not, however, "entitle the public to remove public records from the custody of the person responsible for the maintenance of those records." Op. No. 94-006 at 2-21.

Pursuant to various provisions within the Revised Code, the clerk of a court of common pleas, municipal court, or other court of record is the custodian of the court's public records, R.C. 1901.31(E); R.C. 2303.09; R.C. 2303.31; see also *State ex rel. Mothers Against Drunk Drivers v. Gosser* (when statutes impose a duty on a particular official to oversee records, that official is the person responsible to make the records available for inspection during business hours and to make copies available at cost), and is responsible for making those records available for inspection by the public in accordance with the access requirements of R.C. 149.43(B). See Op. No. 94-006 at 2-21 and 2-22. R.C. 149.43 does not, however, require the clerk of court to permit the public to withdraw or remove pleadings, which constitute public records for purposes of R.C. 149.43, from court files. See *id.*; see also *Ohio Farmers Co-Operative Milk Ass'n v. Davis*, 59 Ohio App. 329, 333, 17 N.E.2d 924, 926 (Crawford County 1937) (G.C. 2875, now R.C. 2303.09, requires a bill of exceptions to "be carefully preserved in the clerk's office and not [be] withdrawn or removed therefrom").

In addition, R.C. 149.351(A), which concerns the safekeeping of public records, provides as follows:

All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records programs established by the boards of trustees of state-supported

institutions of higher education under section 149.33 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully. (Emphasis added.)

R.C. 149.351(A) thus means that the clerk of a court, as custodian of the court's public records, may not permit the removal of a pleading or other public record from a court file unless a law permits its removal or such removal is permitted by the appropriate records commission. See 1986 Op. Att'y Gen. No. 86-057 at 2-313 through 2-315.

As indicated above, R.C. 149.43 is not a law that permits the removal of a pleading from a court file. Rather, R.C. 149.43(B) requires the clerk of court to make the pleadings and other public records within a court file available for inspection at all reasonable times and to make copies thereof available at that location. Accordingly, reading the language of R.C. 149.43(B) that requires the custodian of public records to make those records available for public inspection *in pari materia* with the language of R.C. 149.351(A), it is clear that the clerk of court also is not authorized to remove a pleading from a court file unless a law permits its removal or such removal is permitted by the appropriate records commission. See generally *Bobb v. Marchant*, 14 Ohio St. 3d 1, 3, 469 N.E.2d 847, 849 (1984) ("[s]tatutes relating to the same subject matter should be construed *in pari materia*" (quoting *Warner v. Ohio Edison Co.*, 152 Ohio St. 303, 89 N.E.2d 463 (1949) (syllabus, paragraph one))).

With respect to your second and fifth questions, no provision of the Revised Code, the Ohio Rules of Civil Procedure, or the Ohio Rules of Criminal Procedure authorizes the removal from a court file of either a pleading that is stricken from the court's record, or an original pleading when a substitute pleading is filed in place of the original.¹ In addition, whether there is a rule adopted by the appropriate records commission concerning the removal of pleadings from court files is a matter of local concern. Accordingly, a clerk of court, as custodian of the court's public records, may not remove from a court file a pleading that is stricken from the court's record or an original pleading when a substitute pleading is filed in place of the original pleading, unless removal of the stricken or original pleading is permitted by the appropriate records commission. R.C. 149.351(A).

In light of the foregoing, it appears that no provision within the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, or R.C. 149.43, the public records law, authorizes the removal of a pleading from a court file. R.C. 149.351 prohibits a clerk of court from removing from a court file a pleading that is stricken from the record or an original pleading when a substitute pleading is filed in place of the original pleading, unless removal of the stricken or original pleading is permitted by law or by the appropriate records commission.

¹ As a general matter, when an amended pleading is filed with a court, the original pleading is not removed from the court file. Rather, the amended pleading supersedes the original pleading, which remains in the court file. See *Abram & Tracy, Inc. v. Smith*, 88 Ohio App. 3d 253, 263-64, 623 N.E.2d 704, 711 (Franklin County 1993).

Filing of a Pleading with the Clerk of Court

Your third question asks whether a pleading is filed when it is file-stamped by the clerk of court or docketed by the clerk. In Ohio, a pleading is filed when it is delivered to the clerk of court and received by him to be kept in its proper place in his office. *King v. Penn*, 43 Ohio St. 57, 61, 1 N.E. 84, 86 (1885). Moreover, it is presumed that "[t]he endorsement upon the document by the clerk of the fact and date of filing is evidence of such filing." *Insurance Co. of North America v. Reese Refrigeration*, 89 Ohio App. 3d 787, 790, 627 N.E.2d 637, 639 (Hancock County 1993); accord *King v. Penn*; *In re Hopple*, 13 Ohio App. 3d 54, 55, 468 N.E.2d 129, 130 (Wood County 1983). Therefore, a pleading is filed when it is delivered to and received by the clerk of court for filing, and endorsement upon the pleading by the clerk of the fact and date of filing is evidence of that filing.

A Clerk of Court May Not Permit a Party to Correct a Typographical Error in a Pleading that Has Been Filed with the Court

Your fourth question asks whether a clerk of court may permit a party to correct a typographical error in a pleading that has been filed with the court. No provision of the Revised Code, the Ohio Rules of Civil Procedure, or the Ohio Rules of Criminal Procedure authorizes a clerk of court to permit a party to correct a typographical error in a pleading that has been filed with the court. In addition, as stated above, the clerk of court is the custodian of the court's public records. As custodian, the clerk of court is required to file and safeguard the court's records. R.C. 1901.31(E); R.C. 2303.09; R.C. 2303.31. The clerk of court preserves the record for the judges of the court. See *State ex rel. Dawson v. Roberts*, 165 Ohio St. 341, 135 N.E.2d 409 (1956) (the clerk of courts is a ministerial officer of the court); *Stolz v. Selz*, 12 Ohio Dec. 664 (C.P. Montgomery County 1900) (a clerk of court performs his duties under the direction of the court). Accordingly, if the clerk of court were authorized to permit a party to correct a typographical error in a pleading without leave of the court, the clerk would not be discharging his duty to preserve the records of the court in a proper manner. The clerk would be deciding which parts of the record may be changed by the parties. The clerk would thus be usurping the functions and duties that are performed by judges of the court.

This is not to say, however, that typographical errors that are discovered in pleadings may never be corrected. A party may correct a typographical error by way of amendment in accordance with the appropriate rules of civil or criminal procedure. See, e.g., *State v. Kocak*, C.A. Nos. 2676 and 2678, slip op. at 3 (Lorain County Oct. 25, 1978) (unreported) ("amendments of indictments have been permitted when the defects were insignificant, such as a typographical error or incorrect name spelling"); *State v. Miller*, 75AP-1, slip op. at 5-6 (Franklin County April 1, 1975) (unreported) ("the word as changed was merely a conjunctive one and of a minor nature which could conceivably have been of a typographical nature, and we hold that such change was readily subject to Crim. R. 7").

R. Civ. P. 15(A), which governs amended and supplemental pleadings in civil cases, provides as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

With respect to the amendment of pleadings in criminal cases, R. Crim. P. 7(D) states, in part:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.

Accord R.C. 2941.30. R. Civ. P. 15(A) and R. Crim. P. 7(D) thus set forth specific procedures for correcting typographical errors in pleadings that are filed in civil and criminal cases.

"It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner." 1984 Op. Att'y Gen. No. 84-050 at 2-168; *accord Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951); *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N.E. 6 (1922). Since R. Civ. P. 15(A) and R. Crim. P. 7(D) do not authorize a clerk of court to permit a party to correct a typographical error in a pleading that has been filed with the court, correction of a typographical error in a pleading in such a manner would be in a manner different than that set out in R. Civ. P. 15(A) and R. Crim. P. 7(D) and is therefore impermissible. *See generally, e.g.*, 1993 Op. Att'y Gen. No. 93-026 at 2-134 (since R.C. 505.104 specifies that the transfer and exchange of township property may be accomplished by resolution of the board of township trustees, the trustees may not transfer and exchange township property by mere agreement); 1987 Op. Att'y Gen. No. 87-050 (determining that a statute that permits township trustees to sell by public auction township property that it finds, by resolution, that it does not need does not permit the sale of such property by any method other than by public auction); Op. No. 84-050 at 2-168 ("a township may not establish a deferred payment plan for the purchase of fire-fighting equipment or the purchase of machinery, tools, trucks and other equipment for use in road construction, maintenance, or repair, except as provided pursuant to R.C. 505.37(D) and R.C. 5549.02"). Accordingly, a clerk of court may not permit a party to correct a typographical error in a pleading that has been filed with the court.

Conclusion

Based on the foregoing, it is my opinion and you are hereby advised that:

1. No provision within the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, or R.C. 149.43, the public records law, authorizes the removal of a pleading from a court file.
2. R.C. 149.351 prohibits a clerk of court from removing from a court file a pleading that is stricken from the record or an original pleading when a substitute pleading is filed in place of the original pleading, unless removal of the stricken or original pleading is permitted by law or by the appropriate records commission.
3. A pleading is filed when it is delivered to and received by the clerk of court for filing, and endorsement upon the pleading by the clerk of the fact and date of filing is evidence of that filing.
4. A clerk of court may not permit a party to correct a typographical error in a pleading that has been filed with the court.

Respectfully,

LEE FISHER
Attorney General

Based on the foregoing, it is my opinion and you are hereby advised that:

1. No provision within the Ohio Rules of Civil Procedure, the Ohio Rules of Criminal Procedure, or R.C. 149.43, the public records law, authorizes the removal of a pleading from a court file.

December 13, 1994

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Morgan County Prosecuting Attorney
70 West Main Street
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SYLLABUS:

94-089

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