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OHIO ATTORNEY
GENERAL'S OFFICE
NOV 17 2016
OPINIONS

Mike DeWine, Ohio Attorney General
Attn: Opinions Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
OpinionsRequest@OhioAttorneyGeneral.gov

Dear Attorney General DeWine:

In 2012, the Lorain County Court of Common Pleas created Loc. R. 2, which states in relevant part:

> **IV. Evidence and Record Retention**
>
> The following evidentiary materials which have been proffered and admitted into evidence will be retained by the Court in accordance with the appropriate period of retention:
> - papers, documents, photographs, diagrams, blueprints (all must be 8 ½ x 11 in size);
> - CDs, DVDs.
>
> Evidence which is not admitted or which has not been specifically identified herein shall be retained and kept by the party, person, agency, office or department offering such evidence pursuant to all applicable rules governing the retention of such evidence.
>
> All exhibits must conform to the standards for retention set forth in this rule. By way of example, oversized demonstrative exhibits, such as presentation boards, shall be substituted with an exact duplicate copy 8 ½ x 11 in size.
>
> Additionally, the Court's receipt and admission of other types of evidence shall not be construed as taking possession, custody or control of said evidence. Possession, custody, or control at all times shall remain with the offering party, person, agency, office or department.

> Upon the expiration of the appropriate period of retention, evidence or records in the custody of the Clerk and/or Court may be destroyed after notice and in accordance with the relevant rules.

Loc. R. 2 (part IV).

The Lorain County Court of Common Pleas has previously interpreted this rule to mean that the proponent of a piece of evidence at trial becomes the custodian of that evidence following the trial despite its offer and admission into evidence. Defense counsel therefore can offer a piece of evidence the State will eventually offer and, under the Local Rule, the defense counsel is now responsible for keeping and maintaining it.

Consequently, the questions I submit for your consideration are:

1. **Does Lorain County Court of Common Pleas Loc. R. 2 conflict with Ohio's Public Record Laws or other legal authority?**

2. **Who is the appropriate custodian or holder of evidence which has been marked and admitted during court proceedings (both trial and appellate stages)?**

3. **Does a court of common pleas have authority to order admitted evidence held by someone other than the person identified in the second question?**

4. **If a court of common pleas has authority to order evidence held by someone other than it or the clerk, what recourse is there against that third party if they fail to maintain the evidence or it is lost, damaged, or otherwise destroyed?**

Previous Attorney General Opinions dealing with retention of evidence and the appropriate custodian have cited R.C. 2933.42 in support of its analysis. Ohio Attorney General Opinion 91-021; *see also* OAG Opinions 94-089 and 05-009. Effective July 1, 2007, however, the General Assembly repealed former R.C. 2933.42 and created R.C. 2981.01 *et seq.* dealing with the disposition of property and forfeiture. Chapter 2981, however, is less than clear regarding its effect, if any, on evidence which is not named in a forfeiture specification which has been admitted as evidence in a case.

Following extensive research, my staff identified several sources of legal authority which appear to address the issue. None, to my knowledge, answer it directly. App. R. 9 and 30 deal with the composition and custody of the record on appeal. App. R. 30(B), for instance, states that the "clerk shall have custody of the records and papers of the court." The "record on appeal" includes the transcript, exhibits, and a certified copy of the docket and journal entries. App. R. 9(A)(1).

R.C. 2303.14, R.C. 149.351, and R.C. 149.011(G) address a court and clerk's responsibilities to maintain records and documents filed with the court. R.C. 2303.14 specifies that the clerk of court of common pleas "shall keep the journals, records, books, and papers appertaining to the

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court and record its proceedings. As used in public records issues, "record" means both a "case document and an administrative document, regardless of physical form or characteristic, manner of creation, or method of storage." Sup. R. 44(B). Under Sup. R. 44(C)(1), "case document" means "a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices, subject to the exclusions in division (C)(2) of this rule." Combining the statute and Rules of Superintendence, the clerk of court must therefore keep the record which is comprised of exhibits. R.C. 149.351(A) further provides that "[a]ll 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 . . . ." If the statutes are read together, *in para materia*, exhibits are likely part of the record which the Clerk must keep.

Courts have long struggled with the precise question to whom items marked and admitted as evidence in a case should be entrusted. *Compare State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012 Ohio 3328 (holding court records are public records and are presumed open to public access) with *State ex rel. Miami Valley Broad. Corp. v. Davis*, 158 Ohio App. 3d 98, 2004 Ohio 3860 (holding under R.C. 149.011(G) and R.C. 149.351(A) that clerk could not remove from court file and return to counsel attachments to a pleading improperly ordered stricken by the court). Even recent legislative enactments dealing with retention of certain evidence does not appear to specifically address *who* should retain it once it has been marked and admitted into evidence during the pendency of a case. R.C. 2933.82 ("Retention of biological evidence").

The Attorney General has previously opined on permutations of these issues. Attorney General Opinions 91-021, 94-089, and 05-009 each addressed discrete issues attendant to these questions. All of those opinions, however, pre-date the legislative repeal of R.C. 2933.42 and the enactment of Chapter 2981. The effect, if any, of the General Assembly's repeal of R.C. 2933.42 on those prior opinions is unclear. To date, the Attorney General has not declared any of the previous opinions on this topic as superseded or overruled.

Accordingly, I respectfully request the Attorney General to issue a formal opinion regarding the following four (4) questions:

1. **Does Lorain County Court of Common Pleas Loc. R. 2 conflict with Ohio's Public Record Laws or other legal authority?**

2. **Who is the appropriate custodian or holder of evidence which has been marked and admitted during court proceedings (both trial and appellate stages)?**

3. **Does a court of common pleas have authority to order admitted evidence held by someone other than the person identified in the second question?**

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4. **If a court of common pleas has authority to order evidence held by someone other than it or the clerk, what recourse is there against that third party if they fail to maintain the evidence or it is lost, damaged, or otherwise destroyed?**

If you require additional information to answer these questions, please feel free to contact the undersigned, Assistant Prosecuting Attorney Gerald Innes or Assistant Prosecuting Attorney Matthew Kern.

Very truly yours,

DENNIS P. WILL
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Lorain County, Ohio

DPW/ljb