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Gone But Not Forgotten: Unclaimed Funds in Trust Accounts

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On rare occasions, lawyers find they have funds in trust for clients who have moved without providing a forwarding address. The reasons are many and examples include small amounts left in trust to cover future work that never materialized or seemingly uncollectable judgments that were paid long after they were entered. The trust account rules, RPCs 1.15-1 and 1.15-2, impose strict duties when handling client funds. Our fiduciary duties remain even when clients have “disappeared” and we continue to hold their funds in trust. Further, statutory duties under the Uniform Disposition of Unclaimed Property Act—ORS 98.302-98.436—also enter the mix.

At the same time, handling “unclaimed” funds remaining in trust isn’t something that most lawyers run into every day. Fortunately, the Oregon State Bar has clear instructions on its web site for complying with both the statutory and regulatory duties involved. Oregon State Bar Formal Opinion 2005-48, which is also available on the OSB web site, discusses both in considerable detail. In this column, we’ll survey the statutory and regulatory duties involved in the context of three recurring questions in this relatively uncommon scenario: (1) what is my obligation to find a client with “unclaimed” funds in trust? (2) what do I

do if I cannot locate the client? and (3) do other states handle this issue the same way?

Trying to Find the Client

When a lawyer discovers what appear to be “unclaimed” funds in trust, the lawyer is obliged to try to find the client. OSB Formal Ethics Opinion 2005-48 summarizes (at 3) the statutory and regulatory obligations involved:

The Act requires Lawyer to “exercise reasonable diligence” to determine the whereabouts of Client and, where possible, to communicate with Client and take necessary steps to prevent abandonment from being presumed. This same duty is implicit in the duty under Rule 1.15-1 to safeguard Client’s property.

“Reasonable diligence” will vary with the circumstances. It will often include sending letters or emails to the client’s last known addresses, calling the client’s last known telephone number, and Internet searches. Even in today’s electronic environment, people can still effectively become unlocatable—especially if substantial time has passed between the completion of the work involved and discovery of the unclaimed funds. To avoid any questions later, prudence suggests documenting in writing the steps taken in the effort to locate the client and including that record in the client file concerned. Under ORS 98.332(1), property held by fiduciaries—including lawyers through their trust accounts—is presumed abandoned after three years unless the owner has

“corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary.”

Handling Unclaimed Funds

If the client cannot be located and the three-year presumptive period has run, then the Uniform Disposition of Unclaimed Property Act governs the disposition of the funds. Under ORS 98.386(2), unclaimed funds in lawyer trust accounts are reported to the State Treasurer but paid to the Oregon State Bar for funding low-income legal services. A link to the requisite reporting form and the address to direct the funds are both available on the Oregon State Bar web site, along with detailed instructions.

Formal Ethics Opinion 2005-48 notes (at 4) that even after the appropriate report has been filed and the funds have been transmitted to the Bar, a lawyer “should continue to take steps reasonable under the circumstances to try to locate [the] [c]lient and must maintain reasonable records sufficient to permit [the] [c]lient to make a claim for the return of property for the period permitted under the Act.”

How “Uniform” Is the Uniform Act?

Oregon RPC 1.15-1(a) notes that “[l]awyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained.” In an era of

multi-state offices by larger firms and multi-state practices by even small firms and solos, it is increasingly common for firms to have trust accounts in more than one state. All of the states in the Northwest have variants of the “uniform act.” They are, however, not completely “uniform” in the sense that “abandonment presumptions” vary as do the agency payees for unclaimed funds. Firms facing this issue in another state, therefore, should carefully review the unclaimed property statute and related authority in that state. Guidance is available regionally on state bar web sites and through ethics opinions in each state around the Northwest: Washington (www.wsba.org; WSBA Advisory Opinion 2176); Idaho (www.isb.idaho.gov; ISB Formal Ethics Opinion 121); and Alaska (www.alaskabar.org; Alaska Bar Ethics Opinion 90-3).

Summing Up

To meet our statutory obligations under the Unclaimed Property Act and our corresponding duties under the trust account rules, prudent firm risk management includes periodically and systematically reviewing all trust balances. For reasons many and varied, periodic review may turn up funds that appear to be “unclaimed.” Periodic review may also increase the odds of locating and returning the funds involved to the client concerned. If a reasonable search does not locate the client, however, firms should carefully review and

follow the guidance on the Oregon State Bar web site for reporting and paying over the unclaimed funds involved.

ABOUT THE AUTHOR

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