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Losing Track: 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. Earlier this year, a significant statutory change became effective governing the disposition of “unclaimed” funds in lawyers’ trust accounts and the primary Oregon State Bar ethics opinion on the subject was amended to reflect that change. In this column, we’ll look at those changes in the context of three questions: (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, which was amended earlier this year to reflect corresponding changes to

Oregon's Uniform Disposition of Unclaimed Property Act (ORS 98.302-98.436)

puts it this way:

“The Act requires Lawyer(s) to ‘exercise reasonable diligence’ to determine the whereabouts of Client(s) and, where possible, to communicate with Client(s) 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. But, it will often include sending letters to the client’s last known address, calling the client’s last known telephone number and Internet searches. To avoid any questions later, prudence suggests documenting the steps taken in the effort to locate the client. Under ORS 98.332(1), property held by fiduciaries—including lawyers—is presumed abandoned after two 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 two year presumptive period has run, then the Unclaimed Property Act governs the disposition of the funds. This is where the significant statutory change comes in. Before this year, funds were paid over to the State Department of Lands, and if the owners could not be located through further efforts by the State, the funds were turned over to the State Common School Fund for public primary and secondary education. During its 2009 session, however, the Legislature changed the beneficiary of unclaimed

money in lawyers' trust accounts to fund low income legal services. (See SB 687; Or Laws 2009, ch 462, § 2(2).) With that change, which became effective on January 1 of this year, unclaimed funds are *reported* to the State Department of Lands but *paid* to the Oregon State Bar.

Detailed reporting information and forms are available on the State Department of Lands web site at www.oregon.gov/DSL/UP. Under ORS 98.352(4), reports are generally filed in October for funds deemed unclaimed as of June 30. Information on payment of funds to the Bar is available on the OSB web site at www.osbar.org/IOLTA/info.html. Formal Ethics Opinion 2005-48 notes 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.” But, they are not completely “uniform” in the sense that “abandonment

presumptions” vary as do the agency payees for unclaimed funds. Guidance is available regionally on state bar web sites and through ethics opinions in each state around the Northwest: Washington (www.wsba.org; WSBA Informal Ethics 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.

ABOUT THE AUTHOR

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