

**July-August 2023 *Multnomah Lawyer Ethics Focus***

**New OSB Opinion on Staff Theft of Client Funds**

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In June, we discussed an Oregon State Bar ethics opinion issued this past year on depositing funds—with client consent—into trust accounts to correct discrepancies that arose beyond a law firm’s control, such as bank errors or thefts. Earlier this year, the Oregon State Bar issued an ethics opinion that deals with what is usually an even more searing experience for a law firm: the discovery that a trusted bookkeeper or other staff member has stolen client funds. In many respects, the new opinion, OSB Formal Opinion 2023-202, is a companion to last year’s OSB Formal Opinion 2022-199. Both are available on the OSB web site and both merit careful review by lawyers involved in managing their firms.

In this column, we’ll survey Opinion 2023-202. The opinion addresses three principal questions: (1) must the law firm inform the clients affected of the theft? (2) must the law firm obtain a conflict waiver from the clients affected to continue representing them in the matters involved? and (3) may the law firm restore the funds stolen to the trust account? With each, Opinion 2023-202 offers direct practical answers to this fraught situation.

Like Opinion 2023-202, we’ll begin with four qualifiers.

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First, the opinion assumes that firm lawyers are not complicit in the theft. When they are, the lawyers involved are more likely to need good criminal defense counsel.

Second, the opinion uses the term “staff” broadly and does not distinguish between firm employees and independent contractors who are assisting the firm with the sensitive functions involved in managing the firm’s trust account.

Third, the opinion does not attempt to parse the degree to which even an honest lawyer failed to adequately supervise the staff member involved. When supervisory failings occur, Oregon case law suggests discipline may follow under RPC 5.3, which addresses lawyer responsibility for supervising nonlawyers.

Fourth, the opinion notes—but does not explore—other substantive legal ramifications beyond the professional rules that may come into play. These include, but are not necessarily limited to, litigation with the clients impacted over the funds stolen, insurance coverage issues and involvement in resulting criminal investigations.

***Informing the Clients***

Although a law firm may be understandably embarrassed that a staff member stole client funds, Opinion 2023-202 provides pointed counsel (at 3):

Having a client's money stolen from a law firm trust account by law firm staff is an event that must be communicated to the client under RPC 1.4 ("the communication rule") within a reasonable period of time following Lawyer's discovery of the theft.

In reaching this conclusion, the opinion relies on ABA Formal Opinion 481 (2018) that reaches a similar conclusion on the duty to disclose potential material errors to clients.

### ***Conflict Waivers***

Opinion 2023-202 offers an equally direct answer (at 3) on whether a conflict exists:

The theft of a client's money held in trust by law firm staff creates a conflict under RPC 1.7(a)(2) stemming from the possibility of claims or other material adverse roles (such as being a witness in a criminal investigation or a complainant in a bar proceeding) between the client and the lawyer.

In light of this conflict, Opinion 2023-202 counsels (at 3-4) that a law firm must evaluate whether it can continue to represent the clients involved:

The lawyer must, therefore, evaluate whether, as required by RPC 1.7(b)(1) (which regulates conflict waivers), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" going forward and, if so, must obtain a conflict waiver under RPC 1.7(b) based on the client's informed consent to continue representing the client in the matter concerned.

The opinion notes that the Professional Liability Fund has a template waiver on its web site for conflicts arising from potential errors.

If the law firm concludes that it cannot continue to meet the requisite standards in light of the theft, Opinion 2023-202 suggests that the firm must then withdraw (or seek leave to withdraw if the rules of the forum require court permission).

***Restoring the Funds***

Opinion 2023-202 effectively cross-references Opinion 2022-199 on the question of restoring the funds involved. The earlier opinion found that a lawyer cannot unilaterally deposit the lawyer's own funds into trust because RPC 1.15-1(b) and OSB Formal Opinion 2005-145 (rev. 2016) interpreting RPC 1.15-1(b) generally prohibit lawyers from depositing their own funds into trust (above account fees) because doing so would defeat overdraft protection incorporated into the trust account rules. Opinion 2022-199 reasoned, however, that a lawyer could either reimburse clients directly for a bank error or—with the clients' permission following adequate disclosure—write checks to the clients for deposit into the trust account to cover the error.

While acknowledging that the two opinions are predicated on fundamentally different facts, Opinion 2023-202 concludes that the remedies discussed in Opinion 2022-199 make equal sense in the staff theft scenario. Therefore, the new opinion approves the same approach: offering to either

reimburse clients directly for the losses or—again with the clients’ permission following adequate disclosure—writing checks to the clients for deposit into the trust account to cover the theft. The opinion closes by cautioning that a firm cannot condition reimbursement on a client agreeing to waive the conflict involved.

#### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.