

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## **OPINION 2005-10**

Issued December 2, 2005

***[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]***

**SYLLABUS:** An attorney does not violate the ethical duty to preserve a client's funds under DR 9-102(A) and the ethical duty to promptly deliver funds to a client under DR 9-102(B)(4) by reporting "unclaimed funds" pursuant to R.C. Chapter 169, so long as the attorney has diligently tried to contact the client at the last known address and the client's whereabouts are unknown.

**OPINION:** This opinion addresses a question regarding the ethical duty of preserving client funds and the reporting of unclaimed funds to the state when an attorney holds client funds in a trust account and the client's whereabouts are unknown.

Does an attorney violate the ethical duty to maintain a client's funds under DR 9-102 by reporting "unclaimed funds" pursuant to R.C. Chapter 169?

Ohio attorneys have an affirmative duty to preserve the identity of funds and property of a client.

DR 9-102(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

To fulfill the duty of preserving client funds, a lawyer must deposit clients' funds that are nominal in amount or funds that are to be held for a short period of time in an interest-bearing trust account identified as an IOLTA (Interest on Lawyer's Trust Account). Funds that are more than nominal in amount or funds to be held for a long period of time are deposited into a regular trust account on behalf of the individual client. Laws related to the establishment of an IOLTA are set forth in Section 4705.09 and 4705.10 of the Ohio Revised Code. Rules related to IOLTA, adopted by the Ohio Legal Assistance Foundation pursuant to R.C. 120.52, are available at [www.olaf.org](http://www.olaf.org).

Ohio attorneys also have an affirmative duty to promptly pay or deliver to a client the funds that the client is entitled to receive.

DR 9-102(B) A lawyer shall:

- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

In the normal course of a representation, an attorney will release to the client any funds held in a trust account that become due to the client. But, if a client's whereabouts become unknown during or after the representation, an attorney will be unable to release the money to the client.

Ohio attorneys are subject to Ohio law regarding the disposition of unclaimed funds. Chapter 169 of the Ohio Revised Code governs the disposition of unclaimed funds.

Pursuant to R.C. Section 169.03 (A)(1), all "holders" of unclaimed funds must report to the director of commerce, funds that have reached the statutory dormancy period.

R.C. 169.01 (D)(1) "Holder" means any person that has possession, custody, or control of moneys, rights to moneys, or other intangible property, or that is indebted to another, if any of the following applies:

- (a) Such person resides in this state;
- (b) Such person is formed under the laws of this state;
- (c) Such person is formed under the laws of the United States and has an office or principal place of business in this state;
- (d) The records of such person indicate that the last known address of the owner of such moneys, rights to moneys, or other intangible property is in this state;

- (e) The records of such person do not indicate the last known address of the owner of the moneys, rights to moneys, or other intangible property and the entity originating or issuing the moneys, rights to moneys, or other intangible property is this state or any political subdivision of this state, or is incorporated, organized, created, or otherwise located in this state. Division (D)(1)(e) of this section applies to all moneys, rights to moneys, or other intangible property that is in the possession, custody, or control of such person on or after July 22, 1994, whether the moneys, rights to moneys, or other intangible property becomes unclaimed funds prior to or on or after that date.

Ohio Rev. Code Ann. §169.01(D)(1) (West 2002).

Ohio attorneys who meet the statutory definition of “holders,” would fall under a statutory duty to report “unclaimed funds.”

“Unclaimed funds” are defined in Sections 169.01 (B)(1) and 169.02 of the Ohio Revised Code.

R.C. 160.01(B)(1) “Unclaimed funds” means any moneys, rights to moneys, or intangible property, described in section 169.02 of the Revised Code, when as shown by the records of the holder, the owner has not, within the times provided in section 169.02 of the Revised Code, done any of the following:

- (a) Increased, decreased, or adjusted the amount of such funds;
- (b) Assigned, paid premiums, or encumbered such funds;
- (c) Presented an appropriate record for the crediting of such funds or received payment of such funds by check, draft, or otherwise;
- (d) Corresponded with the holder concerning such funds;
- (e) Otherwise indicated an interest in or knowledge of such funds;
- (f) Transacted business with the holder.

Ohio Rev. Code Ann. §169.01(B)(1) (West 2002).

Pursuant to R.C. 169.02(J) funds held by a “holder” as a fiduciary for benefit of another are considered unclaimed funds.

R.C. 169.02 Subject to division (B) of section 169.01 of the Revised Code, the following constitute unclaimed funds:

(J) Subject to division (M)(2) of this section, all moneys, rights to moneys, or other intangible property, and any income or increment on them, held or owed by a holder which is a fiduciary for the benefit of another, or a fiduciary or custodian of a qualified retirement plan or individual retirement arrangement under section 401 or 408 of the Internal Revenue Code, unclaimed for three years after the final date for distribution.

Ohio Rev. Code Ann. §169.02(J) (West Supp. 2005).

Legal questions regarding an attorney's statutory duty to report unclaimed funds should be directed to legal counsel in the Department of Commerce, Unclaimed Funds Division.

As to the question of an attorney's ethical duty, it is the Board's view that when an attorney uses diligent efforts to locate a client at the client's last known address, but the client's whereabouts are unknown the reporting of unclaimed funds, pursuant to Ohio law upon reaching the statutory dormancy period, does not violate an attorney's ethical duty to preserve client funds.

In conclusion, the Board advises that an attorney does not violate the ethical duty to preserve a client's funds under DR 9-102(A) and the ethical duty to promptly deliver funds to a client under DR 9-102(B)(4) by reporting "unclaimed funds" pursuant to R.C. Chapter 169, so long as the attorney has diligently tried to contact the client at the last known address and the client's whereabouts are unknown.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.**