

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2008-3**

Issued August 15, 2008

**SYLLABUS:** The proper disposition of client funds in a lawyer's IOLTA or individual client trust account, when either the identity or the whereabouts of the client who is the owner of the funds is unknown, is for a lawyer to follow the statutory procedure for the disposition of unclaimed funds to the state set forth in Chapter 169 of the Ohio Revised Code. A lawyer's reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect a client's confidentiality under Rule 1.6.

**OPINION:** This opinion addresses a question regarding the proper disposition of client funds in a lawyer's IOLTA (Interest on Lawyer's Trust Account) or individual client trust account if either the identity or the whereabouts of the owner of the funds is unknown.

What is the proper disposition of client funds in a lawyer's IOLTA or individual client trust account if either the identity or the whereabouts of the client who is the owner of the funds is unknown?

### Introduction

The inquiry raises two possible problems that may arise in the distribution of client funds from an IOLTA or from an individual client trust account, the unknown identity or unknown whereabouts of a client whose funds are held in the trust account. Both problems should be rare occurrences.

The *identity* of a client whose funds are held by a lawyer in a trust account should always be known, unless a lawyer's records are inadequate, misplaced, or destroyed, or unbeknownst to the lawyer the client did not reveal his or her true identity during the representation. A lawyer for a deceased lawyer's estate may face the quandary of unknown identity when the records of a deceased lawyer are inadequate to determine whose funds are held in the deceased lawyer's trust account.

The *whereabouts* of a client whose funds are being held by a lawyer in a trust account should always be known because the lawyer must communicate with the client during the representation. Yet, through no inadvertence of the lawyer the whereabouts of a client may become unknown, if the client unexpectedly or mysteriously moves without informing the lawyer.

Before addressing the proper distribution of funds when a client's identity or whereabouts are unknown, it is pertinent to review a lawyer's duties as to safekeeping funds in a trust account.

### Ethical duty of safekeeping funds and property

Ohio lawyers have an affirmative duty of safekeeping funds and property of a client under Rule 1.15 of the Ohio Rules of Professional Conduct. Rule 1.15(a) specifically requires a lawyer to hold a client's funds separate from the lawyer's funds in an interest-bearing account (an IOLTA or an individual client trust account) and to keep meticulous records.

#### Rule 1.15

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

- (1) maintain a copy of any fee agreement with each client;
- (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
  - i. the name of the client;

- ii. the date, amount, and source of all funds received on behalf of such client;
  - iii. the date, amount, payee, and purpose of each disbursement made on behalf of such client;
  - iv. the current balance for such client;
- (3) maintain a record for each bank account that sets forth all of the following:
- i. the name of such account;
  - ii. the date, amount, and client affected by each credit and debit;
  - iii. the balance of the account;
- (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;
- (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

As part of the safekeeping duty, Ohio lawyers have an affirmative duty under Rule 1.15(d) to promptly pay or deliver to a client the funds the client is entitled to receive.

#### Rule 1.15

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

#### Interest on Lawyer's Trust Account or individual client trust account

Ohio law requires a lawyer to deposit client funds nominal in amount or client funds to be held for a short period of time into an interest-bearing trust account identified as an IOLTA (Interest on Lawyer's Trust Account). The IOLTA is established in the name of the lawyer or law firm, but the interest or dividends are remitted to the treasurer of the state for deposit in the legal aid fund. 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).

Funds that are more than nominal in amount or funds to be held for a long period of time are deposited into an individual client trust account established by a lawyer or law firm on behalf of an individual client. The interest on the individual client trust account is for the benefit of the client and not remitted to the state.

All clients' funds, whether the funds are nominal or more than nominal or to be held for a short period or a long period, are subject to a lawyer's duty of safekeeping under Rule 1.15 of the Ohio Rules of Professional Conduct.

In the normal course of a representation, an attorney, pursuant to Rule 1.15, will release to a client the funds held in a trust account that the client is entitled to receive. But, if a client's identity or whereabouts are unknown, a lawyer will be unable to release the money to the client.

#### Disposition of unclaimed funds

Ohio lawyers are subject to Ohio law regarding the disposition of unclaimed funds. When either the identity or whereabouts of a client who is the owner of funds in an IOLTA or individual client trust account is unknown, the disposition of the funds should follow the statutory procedure for unclaimed funds as set forth in R.C. Chapter 169 which governs the disposition of unclaimed funds.

"Unclaimed funds" are defined in Sections 169.01(B)(1).

#### R.C. 169.01

(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 Supp. 2008).

Pursuant to R.C. Section 169.03(A)(1), a “holder” of unclaimed funds must report to the director of commerce. Ohio Rev. Code Ann. §169.03(A)(1) (West Supp. 2008).

A “holder” is defined in R.C. Section 169.01(D)(1).

#### 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 Supp. 2008).

Pursuant to R.C. 169.02(J) funds held by a “holder” as a fiduciary for the 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. 2008).

An Ohio lawyer who meets the statutory definition of “holder” under R.C. 169.01(D)(1) and who holds funds as a fiduciary for the benefit of another under 169.02(J) falls under the statutory duty to report “unclaimed funds.” If an Ohio lawyer has legal questions regarding a lawyer’s statutory duty to report unclaimed funds those questions should be directed to legal counsel in the Department of Commerce, Unclaimed Funds Division.

#### Duty of confidentiality

If after careful consideration of all records and diligent efforts, the client’s whereabouts are unknown, the lawyer should provide the Division of Unclaimed Funds with the necessary information such as the client’s name along with the amount due to the client. Providing such information will not violate the lawyer’s duties as to confidentiality under Rule 1.6 because the disclosure falls within the authorized by law exception under Rule 1.6(b)(6): “A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes: to comply with other law or a court order.”

If after careful consideration of all records and diligent efforts, a client’s identity is unknown, a lawyer, such as a lawyer for an estate of a deceased attorney, should provide as much information as necessary to the Division of Unclaimed Funds to assist in reuniting the funds with the owner. The information may include the exact dollar amount unable to be matched, the deceased attorney’s

name and address, the date of deposit, or other necessary information known about the unclaimed funds. The reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect confidentiality under Rule 1.6.

#### Conclusion

In conclusion, the Board advises that the proper disposition of client funds in a lawyer's IOLTA or individual client trust account, when either the identity or the whereabouts of the client who is the owner of the funds is unknown, is for a lawyer to follow the statutory procedure for the disposition of unclaimed funds to the state set forth in Chapter 169 of the Ohio Revised Code. A lawyer's reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect a client's confidentiality under Rule 1.6.

**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.**