

**Nebraska Ethics Advisory Opinion for Lawyers  
No. 09-02**

AN ATTORNEY HOLDING TRUST ACCOUNT FUNDS FOR A MISSING CLIENT IS REQUIRED TO ACT WITH REASONABLE DILIGENCE IN ATTEMPTING TO LOCATE THE CLIENT. IF THE ATTORNEY IS UNABLE TO LOCATE THE CLIENT, THE ATTORNEY SHOULD DISBURSE THE FUNDS IN ACCORDANCE WITH NEBRASKA'S UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.

**Question Presented**

What ethical duties does an attorney have in a situation where the attorney is holding funds in a trust account for a client who cannot be located?

**Facts**

An attorney represented a plaintiff in a personal injury case. The case was settled over four years ago and settlement funds were deposited into the firm's trust account. Monies were disbursed from the settlement funds for fees owed to the firm and to the client after payment of several subrogation liens. With the agreement of the client, the attorney retained in his trust account a sum of approximately \$7,800 for payment of two remaining liens. The liens were to be paid once the exact amount to be paid each lien holder was determined. The client was to contact each of the lien holders and ask that a letter be sent to the attorney stating the balance owed to the lien holder. The attorney never received notification from the lien holders as to the amount owed them. The funds are still held in the firm's trust account. Over the years, the firm has made numerous attempts to contact the client through telephone calls and correspondence. The client has never responded to the telephone calls or correspondence.

**Applicable Rules of Professional Conduct**

RULE § 3-501.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

**COMMENT:**

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . .

RULE § 3-501.15. SAFEKEEPING PROPERTY.

(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 account maintained in the state where the lawyer's office is situated. . . . Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

. . .

(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, 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

#### **COMMENT:**

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

### **Discussion**

#### **I. WHAT EFFORTS MUST AN ATTORNEY MAKE TO LOCATE A MISSING CLIENT WHEN THE ATTORNEY IS HOLDING MONEY FOR THE CLIENT IN HIS TRUST ACCOUNT?**

An attorney's obligation to attempt to locate a missing client was recently addressed by this Committee in Formal Opinion 08-03 in a situation where a statute of limitations was soon to run on the client's claim.

As such, it appears that simply phoning and mailing correspondence to the client may not be enough to comply with the Rules. Instead, it appears that a diligent search must be made to locate the client. As suggested by the Arizona State Bar Opinion, diligence may include phoning the client, sending correspondence to the client's last known address, locating a new address for the client, or even contacting the

client's medical providers or known family members and friends. Should the attorney locate the client, the attorney should give the client an express timeframe in which the attorney needs to hear from the client regarding the client's case.

Id. While it is clear under Rule § 3-501.3 that “reasonable diligence” must be exercised by an attorney in representing a client, it is not clear what constitutes reasonable diligence where an attorney is holding client funds in a trust account but is unable to locate the client. Under Nebraska's former Code of Professional Responsibility, this Committee stated that an attorney should take “appropriate measures” to locate the client, citing to a Michigan opinion as follows:

At a minimum, reasonable steps the lawyer must take to locate the client include checking with the post office to see if the client left a forwarding address and sending a letter to the client's last known address by regular mail and by certified return receipt. Steps reasonably indicated by the facts will vary in the circumstances of each case but, in cases where a great deal of money is involved, the lawyer may have to contact the client's relatives, employers, neighbors, and friends, publish notice in places the client might frequent, use an investigator, or check with the Social Security Administration.

Nebraska Ethics Opinion 93-3.

Other ethics committees have addressed what efforts an attorney should make in locating a missing client where the attorney is holding funds in a trust account for the client. The New Mexico State Bar Ethics Advisory Committee determined that an attorney holding such funds for a missing client “should exercise a high degree of diligence” in attempting to locate the client. New Mexico Ethics Advisory Opinion 1983-3. That committee determined that merely sending letters might not comply with a fiduciary duty owed to the client if the attorney's file showed communication with a relative of the client. Id. More particularly, the committee advised that attorneys should “review the client's file and attempt to communicate with the client through whatever addresses or telephone numbers” might reasonably lead to the client. [The attorney] should also follow whatever leads are developed by those letters or phone calls with other letters or phone calls.” Id. The committee advised that if the attorney was unsuccessful in locating the client after these attempts, the attorney need not take further or more costly measures to locate the client, such as hiring an investigator. Id.

The New Hampshire Ethics Committee, citing a rule substantively similar to Nebraska's Rule § 3-501.15(d), concluded that an attorney's efforts at locating the missing client “must be genuine and diligent under the circumstances of the specific case.” New Hampshire Ethics Committee Formal Opinion #1988-89/16. While leaving it up to attorneys to determine what measures would constitute genuine and diligent efforts, the committee noted that other states

require a lawyer to give notice to the client by publication. Id. citing to Alabama Ethics Opinion 83-146 and ABA/BNA Lawyers Manual on Professional Conduct, 801:4327.

The Kansas Bar Association's Professional Ethics Advisory Committee, also citing to Rule 1.15 (substantively the same or very similar to Nebraska's Rule § 3-501.15), concluded that an attorney must make a "reasonable effort" to locate a missing client whose funds the attorney is holding in a trust account. Kansas Bar Association Legal Ethics Opinion No. 00-4. The committee accepted the attorney's statement that he had made attempts to contact the client and the client's family members without success and concluded this satisfied the duty required by Rule 1.15(b) which is identical in all respects to Nebraska Rule § 3-501.15(d).

Connecticut's Committee on Professional Ethics determined that while the Rules of Professional Conduct do not provide an answer to the question of what to do with funds belonging to a missing client, "they do establish the context for that answer." An attorney who holds funds belonging to a client or third person "acts as a fiduciary, and is held to the strict responsibilities and duties which that term connotes. Hafter v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974). Rule 1.15 of the rules recognizes and encodes this fiduciary relationship." Informal Ethics Opinion 89-24. The Connecticut committee noted that the disposition of funds in a missing-client situation can be addressed by the attorney and client in a fee agreement. Id. This is consistent with Nebraska Rule § 3-501.15(d) which provides in relevant part: "Except as stated in this rule or otherwise permitted by law *or by agreement with the client*, 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." (Emphasis supplied.)

The Ethics Committee of the Colorado Bar Association, also citing to Rule 1.15, concluded that an attorney may expend a reasonable amount of the client's trust account funds in an effort to locate the client as long as the retainer agreement allows such a use of unexpended funds. Ethics Opinion 95: Funds of Missing Clients, 11/20/93. In addition, the committee concluded that a client could designate another beneficiary in a retainer agreement in the event the client's whereabouts remain unknown. Id.

Pursuant to Rule § 3-501.3, this Committee is of the opinion that an attorney who is holding funds in a trust account for a client who cannot be located must act with "reasonable diligence" in locating the client. We see no reason to deviate from our findings or conclusions in Nebraska Ethics Opinion 93-3. At a minimum, the attorney must check with the post office to see if the client left a forwarding address and send a letter to the client's last known address by regular mail and by certified mail, return receipt. In cases such as this one where a great deal of money is involved, the attorney may have to contact the client's relatives, employers, neighbors, and friends; publish notice to the client; use an investigator; check with the Social Security Administration; or conduct an on-line search for the client. If the fee agreement provides for the expenditure of unused client funds to locate the client, then the attorney may properly expend a reasonable amount of the client's trust account funds to locate the client.

## II. IF AN ATTORNEY'S EFFORTS TO LOCATE A MISSING CLIENT ARE UNSUCCESSFUL, WHAT MUST THE ATTORNEY DO WITH THE FUNDS IN HIS TRUST ACCOUNT?

Consistent with our earlier opinion, *see* Nebraska Ethics Opinion 93-3, we conclude that an attorney, who is holding funds in trust for a client who cannot be located, “should distribute those funds according to state law, after waiting the statutorily prescribed amount of time.” *See Id.* The Uniform Disposition of Unclaimed Property Act, NEB. REV. STAT. § 69-1301 [et seq.], clearly sets forth the procedure for disposing of unclaimed property. This conclusion is supported by ethics opinions issued by other jurisdictions having addressed this issue. *See e.g.*, Virginia Bar Association Ethics Opinion 87-09 (if diligent efforts to locate client are unsuccessful, attorney should comply with state law regarding unclaimed property); New Mexico Advisory Opinion 1983-3 (if after high degree of diligence client cannot be located, appropriate disposition of funds is as set forth in state’s Uniform Disposition of Unclaimed Property Act); New Hampshire Ethics Committee Formal Opinion 1988-89/16 (if diligent efforts to locate client are unsuccessful, attorney must continue to safeguard funds until statutory period set forth in state’s abandoned property statute expires and then dispose of funds pursuant to abandoned property statutes); Kansas Bar Association Legal Ethics Opinion No. 00-4 (if reasonable efforts to locate client are unsuccessful, the attorney must dispose of funds in accordance with Kansas Uniform Unclaimed Property Act); Connecticut’s Committee on Professional Ethics Informal Opinion 89-24 (abandoned property statutes govern disposition of funds); Colorado Ethics Opinion 95: Funds of Missing Clients, 11/20/93 (nominal amounts may be held indefinitely in attorney’s trust account; funds which are not nominal may be disbursed pursuant to state’s Unclaimed Property Act); Alaska Ethics Opinion No. 90-3 (if reasonable efforts to locate client are unsuccessful, the attorney must dispose of funds in accordance with state’s abandoned property statutes).

This Committee notes that Rule § 3-501.3 requires that attorneys act with reasonable diligence and promptness in representing a client. The Comment to this Rule at Paragraph [4] provides “Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.” In this case, the attorney and the client were in agreement that the funds held in the trust account should be used to pay the remaining liens once the amounts of those liens were determined. Under these facts, Rule § 3-501.3 and Rule § 3-501.15 would allow, but not require, the attorney to contact the lien holders for the purpose of determining the amount owed to each and disbursing the funds owed to the lien holders. Absent any actual disbursements to one or both of the lien holders, the Committee is of the opinion that the funds retain their identity as client funds.

### **Conclusion**

The Committee encourages attorneys to anticipate the possibility of a missing-client situation and address the disbursement of unexpended client funds in written fee agreements. In this case, where no such provision is found in the fee agreement, the Committee is of the opinion that reasonable diligence must be used to locate the missing client. If, those efforts are unsuccessful, the attorney must disburse the funds in accordance with state law, and, specifically,

the Nebraska Uniform Disposition of Unclaimed Property Act if it is determined to be applicable.