

Nebraska Ethics Advisory Opinion for Lawyers
No. 93-3

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.

FACTS

Attorney A is holding in trust money which was paid to him by a client. The money was received by the attorney to pay a debt the client owed a third party. When the attorney attempted to pay the debt he was advised by the third party that they had no record of such debt. The attorney therefore retained the money in a trust account. The client has not been heard from for several years and attempts by the attorney to locate the client and return the money have been unsuccessful.

QUESTION PRESENTED

How should an attorney properly dispose of money being held in trust for a client whose whereabouts are unknown?

DISCUSSION

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. The Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. § 69-1301 to § 69-1329, clearly sets forth the procedure for disposing of unclaimed property. The Advisory Committee may not give legal advice as set forth in Advisory Opinion 68-1, and cannot reach any opinion concerning the applicability of the statutes cited to the situation presented. Therefore, the attorney must evaluate the specific factual circumstances of his or her situation to determine whether the statutes apply in his or her

individual case.

Compliance with DR 9-102 requires that an attorney preserve the identity of funds and property of a client. DR 9-102(B) states:

A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

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

EC 9-5 provides that the separation of the funds of a client from those of his lawyer not only serves to protect the client, but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

An attorney, whose specific circumstances are within the scope of the Uniform Disposition of Unclaimed Property Act, is relieved of the duties set forth in DR 9-102 once the statutorily required time has passed, and unclaimed property is turned over to the state treasurer. Neb. Rev. Stat. § 69-1313 then makes the state treasurer responsible for the safekeeping of the property.

An attorney should make sure that he or she has taken appropriate measures to attempt to locate the missing client. Examples of such measures have been set forth

in advisory opinions from other states. The Michigan State Bar Association, in Formal Opinion RI-38, determined:

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.

The New Hampshire State Bar Association, in Formal Advisory Opinion 1988-9/16, determined that:

The lawyer must make a genuine and diligent attempt to locate the client through addresses and telephone numbers available to him, through leads, through other letters and telephone calls, or by publication.

Formal advisory opinions from other states provide further support for the position that funds held in trust for a client who cannot be located should be distributed according to state law. The Maryland State Bar Association, in Formal Advisory Opinion 87-18, advised that:

A lawyer who has held funds in a trust account for six to seven years for clients who cannot be located may transfer the funds to the State's abandoned property office. Once the funds are transferred to that office, the lawyer is relieved of any further accountability for the funds.

A similar conclusion was reached by the Idaho State Bar Association, in Formal Advisory Opinion 122, where they determined:

A lawyer who makes a reasonable effort to return unclaimed funds in his client trust account to the appropriate client but is unable to locate the client may discharge his fiduciary duty to the client by treating the funds as unclaimed property under the state's unclaimed property statute.

Therefore, an attorney who is holding funds in trust for a client who cannot be located, should distribute those funds according to state law. An attorney must evaluate the specific factual circumstances of his or her case to determine whether the Uniform Disposition of Unclaimed Property Act is applicable to their situation.

CONCLUSION

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.