

January 2003

Lost and found: What to do with missing client's funds

by
Bruce T. Eisenhut

Bar Counsel frequently receives calls from attorneys who have lost contact with their clients. We have previously written about the minimum elements of a diligent search for the client and the attorney's ethical duties with respect to any pending litigation or transactional matters. See, "Missing In Action: What to Do When You Can't Find Your Client," in the Bar Counsel articles section of our website, www.mass.gov/obcbbo/.

The present article will focus on the ethical issues that are implicated when the attorney is holding funds that the missing client is entitled to receive. For example, an attorney may be holding money in an IOLTA account that is subject to a disputed lien, a holdback in a real estate transaction or settlement proceeds, but before resolution or distribution, the client has disappeared. Or, in another not infrequent scenario, the client may have disappeared before a retainer has been fully earned.

After taking all necessary steps to locate the client without success, how should a conscientious lawyer handle this money? The answer to the question lies in the Massachusetts Abandoned Property Act, Chapter 200A of the Massachusetts General Laws, and the regulations of the State Treasurer interpreting that law, 960 C.M.R. § 4:00, et seq..

Generally, abandoned property is that which has not been returned to its rightful owner within three years after the date prescribed for payment or delivery. In accordance with M.G.L.A c. 200A, every person, corporation, or other business association, banking or financial organization, life insurance corporation, utility, court or public authority holding abandoned property is required to report and turn over abandoned funds to the Commonwealth. Nothing in the law excludes lawyers or client trust funds from its requirements. However, after funds escheat, owners may reclaim their abandoned property from the state at any time. There is no statute of limitations on such claims.

In Formal Opinion 95-1, "Funds of Missing Clients...", the Colorado Bar Association took the position that attorneys in that state holding missing client funds were generally subject to the state's Unclaimed Property Act. The opinion concluded that compliance with that law provided a safe harbor for attorneys facing the issue of what to do with unclaimed funds and cited to other disciplinary opinions in other jurisdictions supporting this approach. That opinion cautioned that attorneys should not disclose the identity of the client in circumstances where the identity of the client would constitute a client secret or confidence. However, the circumstances under which this would occur would be rare and any attorney faced with this question should seek further guidance.

The detailed procedures and timelines for reporting and remitting abandoned property in Massachusetts are spelled out in 940 C.M.R. 4:03. These include, among other matters, submitting a form (AP-1), a statement of due diligence including a copy of a specific letter required to be sent to the client, an electronic submission (a tape or a diskette), and a certified check transferring the funds. The Treasurer has tried to simplify these requirements;

for example, the form is available online and a preformatted disk for the electronic submission is available. Attorneys who fail to comply with the Abandoned Property Act may be in violation of the statute and may be subject to penalties and fines as detailed in M.G.L.A. c 200A § 12.

Attorneys should take steps to protect themselves and to reduce the possibility that they will find themselves holding unclaimed funds. As just one example, document all efforts used to search for the client. If an internet search is performed, the results of the search should be printed.

You might also decide to include a provision in a written fee agreement that a reasonable amount of unexpended funds may be withdrawn for fees and expenses involved in locating the missing client. In the not-infrequent situation where the amount left in the IOLTA account is minimal (but by its very existence driving your bookkeeper crazy!), a provision of this type would be useful.

A written fee agreement can also address this issue in other ways. For example, for comparatively small sums of money, the fee agreement might provide that unclaimed funds, or unclaimed funds up to a certain dollar limit, be donated after a specified period of time not to exceed three years to charity (in general or to a specific charity of the client's choice) or to a legal services program to benefit the poor. This type of plan is approved in ABA Informal Op. 1391 (1977). Lawyers who practice in fields of law where this issue repeatedly surfaces, such as real estate or personal injury, might consider such language.

However, such provisions, particularly since they are so unusual, should be specifically discussed with the client and the client should not be compelled to agree to donate unclaimed funds to a charity. In particular, clients should not be asked to forfeit their rights to reclaim significant sums of money. And obviously, the charity should not be one that is selected to provide benefit or advantage to the lawyer.

In a case where you find yourself holding unclaimed trust funds, Mass. R. Prof. C. 1.15(e)(ii) is applicable. This rule requires that trust funds held other than short term must be maintained in an individual interest-bearing account in trust for the client or other beneficiary. Where a client is missing and the attorney has the client's social security number, the unclaimed funds must be transferred to an individual trust account under the client's social security number. The transfer should be made as soon as it becomes obvious that the client is gone and that the funds will remain unclaimed for a period of time. The account should be one without monthly charges, or if that is not possible, with minimal charges so as not to waste principal.

If the property remains unclaimed for three years, the attorney is then subject to the reporting requirements of the Abandoned Property Law. According to the State Treasurer's office, the prudent course is for the lawyer to initiate the report and not assume that the funds will escheat at the end of three years through the normal banking process.

A more difficult issue arises if the attorney does not have the client's social security number. Where client funds are unclaimed, the attorney may keep the money in an IOLTA account until the property is reported and turned over to the State Treasurer. The funds may be held longer term in an IOLTA account in this limited circumstance because there are no other viable options. To avoid this problem, lawyers may wish to obtain the client's social security number at the inception of the attorney client relationship.

In a case where the client has disappeared and the lawyer does not have the client's social security number, there is a procedure to request that the Treasurer accept the funds prior to the expiration of the three-year holding period. Each request is reviewed on a case-by-case basis.

The above problems illustrate the need to minimize the likelihood that clients cannot be

located. In addition to obtaining the client's social security number at the inception of the representation, the lawyer should also obtain the names and addresses of family or persons likely to know where the client can be found, advise the client of the importance of notifying the lawyer of any changes of addresses or phone numbers, and stay in touch with the client on a regular basis.

For additional information regarding the Abandoned Property Act, visit the website of the Abandoned Property Division of the State Treasurer's Office at www.state.ma.us/treasury/Abp.htm.

Please direct all questions to webmaster@massbbo.org.

© 2001. Board of Bar Overseers. Office of Bar Counsel. All rights reserved.