

LEGAL ETHICS OPINION 1644

UNCLAIMED TRUST ACCOUNT
FUNDS; DISPOSING OF UNCLAIMED
FUNDS; WHAT CONSTITUTES DUE
DILIGENCE TO LOCATE OWNER OF
FUNDS.

You have presented a hypothetical situation in which an attorney performs approximately 700 real estate closings a year. From time to time, funds remain in the attorney's trust account for various reasons. The attorney is uncertain about what to do with unclaimed funds held in trust when the parties to whom such funds are due are missing, cannot be found or have failed to cash their checks drawn on the attorney's trust account. Typically, the attorney or his bookkeeper discover uncashed checks for small amounts of money, often less than \$50.00. In addition, the attorney has a collection practice in which a debtor sometimes overpays or miscalculates the interest when paying off an account. The amount of overpayment is often less than \$2.00. When the attorney issues a refund check from the trust account, the check is never cashed and the funds remain in the attorney's trust account.

You have asked the Committee to opine on the degree of diligence and expense required of the attorney to locate and properly disburse such funds to their owner; the extent to which, if at all, the attorney may deduct reasonable fees or costs incurred in locating the owner of such funds; and, whether the attorney may obtain, in advance, written authorization from such parties to keep such unclaimed funds after exercising reasonable diligence to locate them.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:9-102(B)(4) which requires an attorney to promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive; and, DR:2-105(A) which requires that a lawyer's fee shall be reasonable and adequately explained to the client.

In LE Op. 832, the Committee opined that it was proper for an attorney to dispose of unclaimed trust funds in accordance with Title 55, Chapter 11.1 of the Code of Virginia, 1950, as amended (*Uniform Disposition of Unclaimed Property Act*, § 55-210.1, et. seq.). See also, LE Op. 818. The Code of Professional Responsibility makes no provision for the disposition of funds belonging to a client or another, other than delivery to the person legally entitled to received them as required by DR:9-102(B)(4). The issue of whether there are other acceptable, lawful alternatives to the Uniform Disposition of Unclaimed Property Act are questions of law beyond the purview of the Committee. Once the attorney determines that property is either "unclaimed" or "abandoned" as defined by the Uniform Disposition of Unclaimed Property Act, the attorney must dispose of the funds in accordance with the directives of this statute.

The Committee is of the opinion that an attorney must exercise reasonable diligence in attempting to contact and disburse trust funds to persons entitled to receive them. The

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legal definition of due diligence under § 55-210.2 includes a first class mailing to the last known address of the owner of property or funds, but it is not limited to that. The Committee believes that an attorney owes an ethical duty to use whatever means are reasonable under the circumstances, which will include in almost all instances first class mail to the last known address of the owner. In many instances involving very small payments or refunds, first class mail to the last known address of the owner will be the only reasonable effort required. However, if the attorney knows in which city the person resides, it would be reasonable for the attorney to call information or have a postal records check done to discover a current address or telephone number, if the amount of money involved justified the cost.

The Committee believes that it would not be improper to deduct from the funds held in trust reasonable costs incurred by the attorney in attempting to locate the party to whom trust funds are owed, but this does not include an attorney's fee. However, the Committee is of the opinion that it is improper for an attorney to agree with a client or owner in advance that the attorney can keep the unclaimed funds under any circumstances.

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