

State Bar of South Dakota

Ethics Opinion 98-11

February 16, 1999

- **Rules: 1.15**
- **Subject: Trust accounts; Unclaimed client funds**
- **Summary: Unclaimed trust funds of deceased client must be maintained by lawyer until valid claim is made; court order is entered or escheat to the state**

FACTS

You are an attorney in private practice and received a \$500 billable retainer to represent a client in a criminal action. The client died prior to completion of the representation and over \$200 remains in the trust account.

You believe your client never married, had no children, and died intestate. While your client's parents are alive, you believe no estate was opened, nor do you believe one will be opened.

You seek the Committee's opinion concerning appropriate disposition of the funds.

OPINION

SDCL 16-18 Appx, Rule 1.15 is titled "Safekeeping Property." Rule 1.15 (a) provides that a lawyer "shall hold property of clients...that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Rule 1.15 does not contain a provision for disposition of funds upon death or disappearance of your client. Your question would be simple if an estate was created and demanded the funds. Rule 1.15(c) provides:

When in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests....

A comment to Rule 1.15 states:

Third parties, such as a client's creditors may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and third party.

While your deceased client is obviously not asserting his interest in the funds, your statement of facts fails to clearly exhaust all possible valid claims to the funds. A discussion of substantive law and speculative possible sources of legitimate claims to the funds is beyond the scope of this Committee's authority. Ethics Committee Guidelines ("THE COMMITTEE CANNOT ... 3. Opine on substantive law.")

The ABA/BNA Lawyers Manual On Professional Conduct reports a decision from Missouri in which a lawyer under somewhat similar circumstances was directed to "continue to make reasonable efforts to find the heirs, if further leads arise and must keep the funds in a trust account until they escheat to the state." ABA/BNA § 45:1201. The Manual also provides that "the lawyer may petition the appropriate court for judicial determination regarding disposition, or the lawyer may follow the procedures contained in the state's disposition of abandoned property laws." ABA/BNA § 45:1201.

In the opinion of the Committee, the above discussion requires a lawyer to maintain abandoned client property until a lawful claim is made to it or it escheats to the state. There may well be many ways to establish a lawful claim to the funds so that they could be transferred. These are matters of substantive law upon which we may not opine. If the lawyer chooses not to wait, and is not reasonably convinced that he/she has a lawful claim to the funds, the funds must be disposed of by petition to, and pursuant to, an order of a court of appropriate jurisdiction.

Lonnie R. Braun

Chair of the Ethics Committee